

Award No. 3869
Docket No. CL-3901

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**
THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

A. C. Retzsch, Clerk, be paid the pro rata rate of his position in accordance with Rule 4-C-1, for January 6, 1945, and all subsequent dates on which he was held off his regular tour of duty. (Docket W-309)

EMPLOYEES' STATEMENT OF FACTS: There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act. This Rules Agreement will be considered as a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant, A. C. Retzsch, is regularly assigned to clerical position, Symbol B-68-G, Undercliff Yard, Cincinnati, Ohio, tour of duty 8:00 A. M. to 5:00 P. M., one hour for lunch, daily except Sundays and Holidays (a six-day position). This position is rated at \$198.96 per month.

After the awarding of this position to Clerk A. C. Retzsch, the Management permitted him to work the position only on Wednesday, Thursday and Friday of each week. On the remaining days of each week he was assigned to the Relief days of Powerman on Monday, second trick, Tuesday, third trick and Saturday, second trick.

The position of Powerman is not a position covered by the Scope of the Rules Agreement, effective May 1, 1942, represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and therefore, not subject to its application.

POSITION OF EMPLOYEES: The question at issue in this case is whether or not the carrier may require an employee holding a position under the Scope of the Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employees, to fill a position coming under the Scope of another Rules Agreement on certain days in lieu of filling his position, and if not, is a claim for the pro rata rate of his own position payable for such days that he was not permitted to fill his position.

The Carrier submits therefore, that neither Rule 4-C-1 nor any other rule of the applicable Agreement supports the claim of the employees herein.

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement Between the Parties and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment, and obligations with deference thereto, not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

The Carrier has shown that, under the applicable Agreement between the parties to this dispute, the Claimant is not entitled to be compensated for the earnings of his regular clerical assignment, in addition to the earnings already paid as Powerman on January 6, 1945, and subsequent dates, on which he performed service as Powerman at Cincinnati, Ohio.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

OPINION OF BOARD: A. C. Retzsch, in whose behalf this claim is made, has a regularly assigned position covered by the Clerks' Agreement at Undercliff Yard, Cincinnati, with hours 8:00 a. m. to 5:00 p. m. His seniority under that agreement dates from September '11, 1942. However Retzsch holds dual seniority not in different districts under the same agreement, but under two different agreements. He also has a position as the senior extra and unassigned Powerman on the same Cincinnati Division with seniority from August 1, 1943 under the American Train Dispatchers Association's Agreement. Both Agreements are with the same Carrier and apparently are of equal rank.

The claim arises from these facts. On Wednesday, Thursday and Friday, Retzsch fills his position as a Clerk. On Monday, Tuesday and Saturday he fills his position as relief Powerman. On the days Retzsch works as a Powerman his Clerk's position is filled by an extra Clerk. The Clerks' Organization contends that Retzsch should be paid his Clerk's salary for each day he did not fill his position as Clerk on the ground Carrier held him "off his regular tour of duty", and required him to fill the position of relief Powerman. Under the Dispatchers' Agreement Carrier was obligated to assign Retzsch to perform the duties under the agreement since he is the senior extra Powerman.

The question for decision is whether Carrier is liable for penalties under the Clerks' Agreement when a Clerk elects to relinquish work under that agreement in order to perform other work he has obligated himself to perform under a later agreement with the same Carrier.

While Carrier was required under the Dispatchers' Agreement to offer Retzsch the Powerman's work, still he could have declined such work thereby losing his seniority under that agreement. But he elected to take the Powerman's work and keep his seniority under that agreement as well as his seniority under the Clerks' Agreement.

We do not believe Carrier should be penalized because Retzsch by his own action elected to relinquish time from his Clerk's position in order to fill the Powerman's position.

The employment relation between an employer and employe is a contractual relationship whether express or implied, verbal or written. To be binding, an employment contract must be mutual. The promise of each party imposes legal obligations. An employe promises he will perform or be ready and willing to perform the services called for by the contract and to devote the required time for their performance. He may not engage in other employment which would be inconsistent with his first contract or detrimental to his employer's interest. If he does he could be held to have abrogated the prior contract.

The rule of contract law is well settled that a contract complete in itself will be conclusively presumed to supersede a prior one between the same parties and concerning the same subject matter where the terms of the two are so inconsistent that they cannot subsist together.

If the parties intended that Retzsch should continue to work under both contracts of employment, as seems to be the case, then the prior one must be deemed to be modified in such respects as are inconsistent with the operation of the later one.

Thus to permit Retzsch to recover penalties attaching to a contract of employment when he has not performed his own obligations under such contract would be to allow him to profit from his own violation of his contract.

In engaging in a second contract of employment it cannot be said that Retzsch has "bartered away any rights established by a collective agreement." See Award 3416. What Retzsch has done in making a second contract of employment is to acquire additional rights under a second collective agreement.

Accordingly the claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes with the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier did not violate the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division.

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of April, 1948.