Award No. 4036
Docket No. CL-4021

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY
(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement:

1. When on November 11, 1946, per Superintendent's Bulletin No. 13 it advertised for bids a clerical position classified as "Time Checker" with assigned duties, per Bulletin No. 13 of

> "Compile back pay, Train and Enginemen under supervision of Chief Timekeeper"

at a rate of $9.29 per day, or .90 per day below the Wage Agreement rate of $10.19 per day applicable to a position of Time Checker;

2. That Clerk Ralph E. Baker or other occupant of the position be compensated in the amount of difference in rate of $9.29 and $10.19 per day commencing November 18, 1946, the first day the position was operative, to continue each day until the claim is satisfied and the dispute disposed of.

Note: Effective September 1, 1947, under the National Wage Settlement, the rate increased from $9.29 to $10.53 per day and the claim on and after September 1, 1947 is for the difference in $10.53 per day and $11.43 per day.

EMPLOYES' STATEMENT OF FACTS: In January and February of 1939, prior to the establishment of the Centralized Timekeeping Bureau and the Machine Bureau (for timekeeping purposes) at St. Louis, Missouri, the Carrier maintained a clerical force at Little Rock, Arkansas and Kansas City, Missouri, in its District Accounting Offices of the General Superintendents, and at Falls City, Nebraska in its Division Superintendent's Office, consisting among others of Chief Timekeeper, Road and Yard Train and Enginemen Timekeepers and other clerical force according to the records available to the Employes as listed in statement submitted for the record and made a part hereof, designated as Exhibit "1", which lists the classification and rate of each position in each of the three offices, subject to the application of the rules of the Agreement of August 1, 1926.

On February 11, 1939, as result of conferences, negotiations and agreement of the parties, Agreement was reached and entered into, to become

various working agreements, such as final terminal delay and the like. This required an up-to-date knowledge of the five working agreements covering enginemen, firemen, conductors, trainmen and yardmen, and the exercise of judgment and responsibility in applying the rules."

Compare the duties and responsibilities required of the claimants in the instant case with those of the Chief Timekeeper at Falls City and the Timecheckers in the Centralized Timekeeping Bureau at St. Louis and you will find in the instant case as in Docket CL-3375 the timekeepers at St. Louis and the Chief Timekeeper at Falls City, Nebraska, have a number of other duties of greater responsibility than that of merely picking off information from time slips. These employes are required to check train, engine and yardmen trip tickets against train sheets and yard reports, compute mileage and other time allowances and allowances earned under arbitrary rules of the various working agreements, such as final terminal delay and the like. They are required to have an up-to-date knowledge of the six working agreements covering engineers, firemen, conductors, trainmen, yardmen and train porters and to exercise judgment and responsibility in applying the rules contained in such agreements, as well as a number of special agreements pertaining to these classes of employes. No such duties or responsibilities were required of the two temporary timecheckers at Falls City who occupied the positions involved in the instant dispute. Their position required only that they look on the time slips for the point where a particular task was performed by the train and engine crews and make a notation on their work sheet of the arbitrary and fixed allowance applicable to the particular instance. There was no exercise of judgment and no requirement of the interpretation of the meaning of any provision in a working agreement. Their responsibility extended only to the requirement that they read and enter the applicable notations on their work sheets accurately. Certainly the requirement that work be performed accurately is a requirement attaching to all clerical employes, regardless of the particular work in which they may be engaged, be it recording the number of packages in a given shipment or recording the items of revenue going to ward the computation of the Carrier's earnings for the purpose of preparing its annual income tax return.

The service record of Claimant Baker (Carrier's Exhibit J) reveals that he, previously, performed some service as timekeeper, however, it is not understood that he ever held a position of Chief Timekeeper in any division office or had occupied any position comparable thereto. It will also be noted (Carrier's Exhibit K) that Mr. H. O. Sutter who occupied the second position of timechecker established at Falls City had no previous timekeeping experience whatsoever, and, of course, did not possess the qualifications required of Chief Timekeeper at Falls City or Timecheckers employed in the Timekeeping Bureau at St. Louis.

When consideration is given to all the facts and circumstances in the case under consideration, it is clearly evident that the contention and claim of the Employes in the instant case is without basis. Therefore, it is the position of the Carrier that the contention of the Employes be dismissed and the accompanying claim accordingly denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The substance of what is deemed to be the controlling facts leading up to this dispute will be stated as briefly as possible.

In September, 1946 on account of matters not here material it became necessary for the Carrier to check and recheck the time slips or earnings, over its Northern Kansas Division, of certain groups of its employes during the years 1936 to 1946 inclusive. Existing clerical forces were not able to perform the service over the ten year period mentioned so Carrier increased its timekeeping force at Falls City, Nebraska, for that purpose, by creating two new temporary positions of Time Checker. One of these was bid in by Claimant Ralph E. Baker, and he was regularly assigned thereto on November 16, 1946, at the rate of $9.29, with duties designated as "Compile back pay, Train and Enginemen under supervision of Chief Timekeeper", the position of Chief Timekeeper being then in existence at Falls City.

Claimant occupied the position, conceded by the parties to be a newly created one, until November 5, 1947, on which date its temporary work having been completed, such position was abolished. He now claims compensation in the amount of difference between $9.29 and $10.19, which last amount he insists was the proper rate required for the position under the Agreement, together with whatever additional amount may have become due on the latter rate under provisions of the National Wage Agreement, effective September 1, 1947.

The applicable portion of the Agreement pertaining to the fixing of rates on new positions is Rule 31 (a), which reads:

> "The rates of pay for new positions will be in conformity with wages for analogous positions of similar kind and class in the seniority district where created; if no existing position in the seniority district, then the rate of pay for the new position will be established with due regard to the rates attaching to comparable positions on other seniority districts."

This is essentially a fact case and must be determined on that basis. None of the parties now question the quoted rule means exactly what it says. Indeed there is no room for misunderstanding. Its directions are plain and unequivocal. Concisely stated the Carrier's position now is there were no analogous positions of similar kind or class in the seniority district, or on other seniority districts.

At the outset of our deliberations we are confronted with three unusual circumstances none of which, due to the established rule the burden is upon petitioner to establish and sustain its claim as made, are decisive of the controversy. They are, however, indicative of the Carrier's attitude throughout the processing of such claim and involve conditions which are entitled to some slight weight and hence may properly be taken into consideration in determining what disposition should be made thereof. In the first place, prior to the creation of the involved position and after it had been bulletined, up to the date of the filing of a monetary claim, the Carrier's position was that the situation at St. Louis, or on other divisions of its railroad, had no bearing on the fixing of the rate of a position at Falls City even though there were no comparable positions in existence there on which the position could be rated. Carrier's position on this point was indefensible. Rule 31 (a) clearly provides to the contrary. As has been indicated, since establishment of the position, Carrier has receded from such position and now makes no such contention. Secondly, it appears Carrier persisted in pursuing its own theories pertaining to the fixing of rates of new positions without regard for, or to say the least proper consideration of, what such rule contemplated. On its own admission in 1946 it established the rate of the position in question upon the rate of a Timekeeper's position which had been in existence at Falls City years before but had been abolished in 1929. This it could not do. See Award 2683. Thirdly, the record discloses, whatever its contention may now be as to what the facts were, the rate was established by the Carrier without regard for or consideration of possibilities of the existence of similar positions on other seniority districts. We attribute Carrier's action in the foregoing respects not to ignorance but to arbitrary disregard for its contract. It follows the facts just related, while they cannot supply defects of proof by the petitioner, are entitled to consideration in determining the weight to be given the Carrier's evidence which now seeks to subsequently justify action taken under the related conditions and circumstances.

Before turning to the factual issue it may be well to briefly review what this Division has said are "analogous positions of similar kind and class" as that phrase is used in Rule 31 (a).

In Award 1861 it is held:

> "Under this rule it is necessary for a new position to receive the rate of an existing position to show that (a) it is in the same seniority district and (b) is of a similar kind or class. It does not have to have equal responsibilities in the sense that duties and

services are identical, nor does it necessarily require supervision of work of equal importance in the sense just mentioned. It may still be of equal importance and responsibility."

To the same effect is Award 3447, which states:

"The nature of the duties and responsibilities of a position are a necessary consideration in determining its kind or class. Even so, the duties of two positions do not have to be identical in detail in order for the positions to be of similar kind or class. The duties need only be of a similar kind or belong to similar classes."

See, also, Award 3485, where it is said:

"However, it is not necessary that the scales exactly balance in weighing the importance of the particular duties and the respective responsibilities attached to the two positions. Neither the duties nor the responsibilities need be identical in order for the positions to be of similar kind or class.

Although the responsibilities of the two positions are different, the positions are not necessarily of such unequal importance that they belong in different classes. The results obtained through the exercise of the respective responsibilities may make the positions of similar importance. See Awards 1861, 3447.

The fact the volume of work attached to one position may be greater in degree than that of the other does not necessarily for that reason alone put the positions in different classes. See Award 2678."

For an illustration of how the rule is applied to a specific factual situation see Award 2678, wherein the following statement appears:

"While it is true that the gross income of the San Rafael station was much less than the others, the kind and class of work appears to be much the same. While gross income is an element to be considered, yet it is not a controlling factor. Large returns often result from few transactions while a smaller income sometimes is the result of a multitude of small ones. It is altogether possible the work of the smaller would require more training and experience than the larger. We cannot say, therefore, from a comparison of station returns alone that cashiers' position in each are or are not of the same kind or class. From an examination of the whole record, we are of the opinion that the claim that the cashiers' position at San Rafael and those at Petaluma and Santa Rosa are of the same kind and class is sufficiently established to warrant an affirmative award."

We turn then to the decisive factual situation. Regarding it, it can be said there is no uniformity of approach, petitioner contending that certain Time Checkers' positions at St. Louis as well as the Chief Time Checker's position at Falls City fell within the rule and governed the rate fixed while Carrier vigorously insists to the contrary.

So far as the St. Louis positions are concerned we are of the view petitioner failed to sustain the burden of showing they were of the kind and character contemplated by the rule. Therefore, they require no further consideration.

As to the position of Chief Timekeeper at Falls City we are not disposed to labor a long and detailed record which, it can be stated, has been examined with considerable care for the simple reason petitioner's evidence is not copious and could be far more convincing. There is, however, one probative fact to be found in the record which stands out like a beacon light in a storm. After putting its own construction on the contract, as heretofore mentioned, when the Carrier finally fixed the rate of the old position it went back to an old abolished Assistant Timekeeper's job at Falls City as a basis. By that action it not only recognized but in effect conceded that positions of Time Checker and Timekeeper, and positions of Assistant Timekeeper, here Time Checker, and Chief Timekeeper as well, at

Falls City had been and were "analogous positions of similar kind and class" as that phrase is used in Rule 31 (a) and construed under our Awards. Having done so we believe Carrier is now precluded and foreclosed from here relying on facts directly contrary to what it then conceded were in existence for the purpose of defeating a claim based upon the premise its former action constituted a violation of the Agreement. This notwithstanding the fact, for present purposes assumed, that the duties of Chief Timekeeper at Falls City involved more responsibility than that of Time Checker as created as well as other and additional duties. Indeed, aside from the conclusion just announced, we would be constrained, if necessary, to say in the light of the rule and our decisions construing its force and effect that under all the conditions and circumstances disclosed by the record in this case the rate of pay for the involved position should have been in conformity with that of the Chief Timekeeper at Falls City.

From what has just been concluded it does not necessarily follow this claim should be allowed in its entirety. Its monetary phase was not lodged with the Carrier until May 2, 1947, although the Organization had knowledge of the alleged violation of the rule, was negotiating with Carrier with respect thereto prior to the bulletining of the position, and was advised as early as November 14, 1946, the Carrier would not voluntarily apply the rate claimed. The Claimant, who had bid in the position, had similar information and knowledge. Notwithstanding Claimant made no money claim until the date heretofore indicated. Under such circumstances we think that there is ample room for application of the equitable doctrine of estoppel and hold that recovery is limited to compensation from May 2, 1947, the day on which Claimant first filed his monetary claim, to November 5, 1947, the date on which such position was abolished. This Award to include, of course, such amounts as would be properly payable on the difference in rate due to increases under the National Wage Settlement.

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 within 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 the Carrier violated the Agreement and the claim should be sustained to the extent indicated in the Opinion.

AWARD

Claim sustained. Monetary compensation awarded at rate stated in the Opinion from May 2, 1947, to November 5, 1947, only, with whatever increases may be due during that period under the National Wage Settlement for difference in rate during such period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of August, 1948.