Award No. 4964
Docket No. CL-5022

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

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

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

(a) Position No. 443, Sweetwater, Texas, known and classified as Car Clerk, rate of pay $6.29 per day (now $11.37), shall be reclassified as position of Yard Clerk at rate of $6.93 per day (now $12.14); and,

(b) Claim that A. T. Sims and/or other employes occupying Position No. 443 shall be paid the difference between the rate of $6.29 per day (now $11.37) and $6.93 per day (now $12.14) from July 1, 1944 to date rate is corrected.

EMPLOYES' STATEMENT OF FACTS: On August 21, 1942, the Superintendent of the Southern Division of the G. C. & S. F. Railway Company established at Sweetwater, Texas, Position No. 443, titled Car Clerk, rate $5.57 per day (now $11.37), hours 4:00 P.M. to 12:00 Midnight. Subsequent investigation developed that this position was not assigned to perform the normal, ordinary and regular duties of a Car Clerk as the title would imply, but rather was assigned to check line-up track, check trains and yards, weigh cars, pull waybills, write up wheel reports, figure tonnage for trains and fills, make government bill of lading reports, make red ball reports and call crews as well as other duties normally attaching to positions titled "Train Checker" or "Yard Clerk" in the same seniority district and rated at $6.21 per day (now $12.14).

Effective July 5, 1944, and July 27, 1944, respectively, Carrier established two additional positions, Nos. 442 and 444, at Sweetwater Yard Office, which positions were likewise improperly rated and titled as Car Clerks, but assigned the duties of Train Checker or Yard Clerk. These latter positions are covered by separate claims.

POSITION OF EMPLOYES: This dispute results from Carrier's refusal to comply with the requirements of the applicable agreement in establishing a new position at the yard office in Sweetwater, Texas. The Employes contend that the following rules in the agreement bearing effective date December 1, 1929, now superseded by agreement bearing effective date October 1, 1942, were violated when Position No. 443, titled Car Clerk, was established at Sweetwater on August 21, 1942, at a rate of $5.57 per day (now $11.37):

became effective on October 1, 1942. There is, as heretofore explained, likewise, no rule in the current Clerks' Agreement which provides a method for re-rating an existing position and particularly one such as Car Clerk Position No. 443, the duties of which have not been changed. The instant dispute is, therefore, one which must be denied on the basis of the conclusions expressed in the above-quoted Opinion of Board in 1943 to the effect that the re-rating of an existing position may, under such circumstaces, only be accomplished by negotiation.

Numerous other Third Division awards have also recognized that the rates of pay of existing positions which were in existence without complaint from either the employes or their representatives at the time a new collective bargaining agreement or a wage agreement was negotiated must be considered as proper and may only be changed by negotiation. See Awards 1645, 1811 and 3002 and others.

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(4) The employes' position in the instant dispute is inconsistent for the reason that they would oppose, and rightfully so, any attempt by the Carrier to reclassify and reduce the rate of pay of an existing position under circumstances similar to those existing in the instant dispute.

The Carrier asserts that its position as heretofore expressed in opposition to the Employes' claim for the reclassification and increase in the rate of pay of Position 443 in the instant dispute **is no different from the position the employes could be expected to take if the Carrier were to attempt to reduce the rate of pay and reclassify a position which had been in existence since prior to the effective date of the current Clerks' Agreement and which the Carrier might consider had been improperly classified and rated under the rules of a former agreement which was in effect at the time the position was established.** The principle involved in two such contrary situations is identical, and the Carrier is quite sure that the Board would not uphold the Carrier in a reclassification and downward adjustment of the rate of pay of a position that had been in existence since prior to the effective date of the current Clerks' Agreement. That being so, the Board should, **for the very same reasons, deny the instant claim of the employes** which seek to obtain a reclassification and upward adjustment in the rate of pay of Position 443, which has been in existence since prior to the effective date of the current Clerks' Agreement. The Carriers request for a denial of the Employes' claim in this dispute is simply a request that it be afforded the same consideration that the Brotherhood would demand of the Board if the situation were reversed.

In conclusion, the Carrier reasserts that the instant claim cannot be supported by the rules of either the current Clerks' Agreement or its predecessor agreement of December 1, 1929, and must be denied for the reasons heretofore expressed.

(Exhibits not reproduced.)

OPINION OF BOARD: The dispute here has to do with Position No. 443 established by the Carrier under the title of Car Clerk in its Yard Office at Sweetwater, Texas, on August 21, 1942, the issue being the correct rate of pay for such position. The rate fixed for the position and the one claimed are set forth in the claim and need not be repeated.

Prior to August 21, 1942, Car Clerk positions had, throughout the years, been established and assigned by the Carrier at such yard office for the purpose of assisting Yark Clerks in the performance of their duties. The record discloses four positions of that character were established between 1925 and 1929, all of which were abolished at some time or other prior to

February 7, 1932. During the periods such positions were in existence they were given and carried the rate then in force and effect for Car Clerk positions assigned at the Sweetwater freight station. No complaint was made at any time by either the employes or their representatives to the classification and rate of pay of such positions during that interim.

From the foregoing it appears that for more than ten years prior to the establishment of the involved position, which we pause to add must, under our decisions (See Awards 4080 and 2808), be regarded as a new position, there had been no existing position of Car Clerk at the Carrier's Yard Office in Sweetwater. It can also be stated that when the new position was established in 1942, the Carrier, in accord with its former practice, gave it the same rate then in effect for the three Car Clerk positions in existence at its freight office at that point.

Proper understanding of the governing factual situation is impossible without some historical reference to the applicable Agreements on which the rights of the parties must ultimately depend.

The governing Agreement in effect between the parties on the date (August 21, 1942) the involved position was established was a Clerks' Agreement, effective December 1, 1929, which had been initially negotiated by representatives of the Carrier and The Association of Clerical Employes—the Atchison, Topeka and Santa Fe Railway System. This Agreement was assumed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes when it acquired the representation of the Carrier's clerical employes in 1935 and continued to be the governing Agreement until October 1, 1942, when the current Clerks' Agreement became effective. The Employes assert, and it is not denied, the instant position was established shortly before and when the parties were in mediation negotiations to make the new Agreement to supersede the old. We note, to be exact, such position was established just forty days prior to the effective date of the new contract. It should also be noted that Article XII, Section 5 of the old contract, provided "The wages for new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district where created.", while Article XI, Section 4 of the new contract contains language of similar import.

Perhaps at this point it should also be stated that it must be conceded the Brotherhood made no complaint or claim with respect to either the classification or rate of pay of the position in question (No. 443) until December 6, 1944, more than two years and three months after it was established and not until the Carrier had established two more positions at the same point under the same general classification, one No. 442 on July 5, 1944, and the other No. 444 on July 27, 1944, at the same rate as No. 443 on the theory that the provisions of the Article and Section of the new Agreement heretofore mentioned authorized it to establish those positions at that rate because No. 443, with similar duties and responsibilities was already properly established at such rate.

Having marshalled the preliminary facts we are now in position to direct our attention to the contentions advanced by the parties in support of the all decisive issue whether the newly created position No. 443 was rated in conformity with requirements of the governing contract or if not whether under existing conditions and circumstances the Carrier should be required to make retroactive reparation for the rate that should have been assigned to it, under the heretofore quoted provision of the contract, at the time it was established.

The Carrier's position is hydra-headed and not entirely consistent. One of its contentions is the rate established for Position 443 is similar to the work and rate of the Car Clerk positions in existence between 1929 and 1932 to which we have heretofore referred and that hence its rate was established in

1942 in conformity with the requirements of Article XII, Section 5, of the then current Agreement. We fail to find anything in the record permitting any conclusion whatsoever as to what were the duties and responsibilities of those early positions. Moreover this Board has held that a rule of the kind here decisive does not contemplate that a newly created position shall be rated on any such basis. In Award No. 2683 involving an almost identical rule, we said:

> "The purpose of Rule 5 was to require as near as possible the same rates of pay for similar positions, newly created, where they had not been classified and rated by agreement. The rule contemplates that the wages of a new position shall be in conformity with the wages being paid employes in positions presently filled. It certainly was not the intent of the rule to conform the wages of a newly created position with those of a position no longer in existence."

Another contention is that Position 443 was rated and classified in conformity with such rule because the three Car Clerk positions in existence at Sweetwater at that time were positions of similar kind and class. We admit the parties are not in agreement as to what were the duties of the position when established and that we have had some difficulty in ascertaining the facts from a record that is far from satisfactory so far as this particular point is concerned. No useful purpose would be served by laboring what is to be found there. It suffices to say that after a careful and painstaking rewiew of the facts we have concluded, although there was some similarity in the duties of the two positions, there were several other duties assigned to the Yard Clerks position which would not warrant us in holding it was a position of similar kinds and class, as that term is used in the Agreement, to the three then existing Car Clerk positions in the freight depot. We confess that in the face of the unsatisfactory record, to which we have referred, and an apparent disposition on the part of the parties to refuse to agree as to facts about which there should be no dispute, we have been compelled to give consideration to the following facts: that when the instant position was established it was bulletined "to assist yard clerks and any other duties that **may be assigned by the yardmaster**" (emphasis added); that when such position became vacant in 1946 the bulletin noticing the vacancy and asking for bids to fill it described its duties as, "Checks Yards and rip track, makes lists, calls crews, weighs cars, assists with red ball reports, keeps wheel reports, writes and files scale tickets, and such other duties as may be assigned by the Yardmaster."; and that when on December 9, 1948, an ex parte check was made by the Employes they found, and the record contains his detailed statement to that effect, that the duties of the incumbent of such position on that date were those of a Yard Clerk rather than a Car Clerk. Perhaps by reason of time and other matters so obvious they need not be mentioned any one of the matters just detailed might not be entitled to great weight when standing alone. However, when considered together they do become highly significant, particularly in the face of the Carrier's denial of the Employes' assertion the assigned duties of the position when created, and on all dates in question, included the making of red ball reports and the writing up of wheel reports, followed by the Carrier's affirmative assertion that those duties were a part of the duties of the Yard Clerks assigned at the Sweetwater Yard Office and were or had been no part of the duties of Car Clerk Position No. 443. Under such conditions and circumstances we are not only compelled to conclude the bulletin, which it must be conceded was binding as of the date it was issued, was indicative of what the former duties of the position had been but constrained to hold the facts claimed by the Employes with respect thereto were entitled to credence.

The result, in the absence of anything barring compliance with the contract because of conduct of the parties to be presently discussed, is that Position No. 443 when established should have been rated in conformity with positions of similar kind or class in the seniority district where created. The record, as we read it, discloses there were such, Yard Clerk Positions, rated at rate for which compensation is sought in the instant claim.

We are not impressed with the Carrier's position, strenuously urged, that the fact there was no complaint by the Employes until the date of the instant claim is conclusive evidence the Carrier's application of the new position rule (Article XII, Section 5) was in conformity with the understanding of the parties who originally negotiated such rule and incorporated it in the 1929 Agreement. In the first place, as we have heretofore indicated, the record is devoid of proof as to the status of the duties of the positions established and abolished between the years 1929 and 1932. For all we know the Employes may have had no cause to complain. Neither can we agree the facts as heretofore related are of such character as to warrant us in holding they create an exception to the general principle that repeated violations of a rule do not change or abrogate it or preclude its enforcement.

Nor do we believe in view of the facts and circumstances of this case as they have been described the fact the instant claim was not presented for slightly more than two years and three months after the position was established warrant application of the equitable doctrines of laches or of estoppel. This is not a case where the Carrier has been lulled to sleep and induced to take action resulting to its disadvantage because of the conduct of the Brotherhood but one where it established a new position at an erroneous rate and is obligated to pay the difference between the rate it has been paying and the rate it would have paid had the Agreement been complied with.

From what has been heretofore stated it follows the claim must be sustained and compensation allowed on the basis of the rate therein set forth. However, the circumstances are such we do not think reparation should be allowed from July 1, 1944, as claimed, but from December 6, 1944, the date on which the claim was presented to the Carrier, to continue until such time as the position is properly classified and rated.

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.

AWARD

Claim sustained as per the Opinion and the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 31st day of July, 1950.