

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee.

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

KANSAS CITY TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated and continues to violate the Agreement between the parties when effective August 16, 1949, it changed the title of position of Chief Clerk, Ticket Office, to that of Assistant Ticket Agent, without notice, conference and agreement with the purpose, intent and effect of removing the position and the work attaching to it from the scope and stipulated coverage of the said Agreement, and;

(b) Carrier establish and apply the proper rate, namely, \$326.03 per month (\$15.40 per day) to position of Chief Clerk, Ticket Office, effective September 1, 1949, and compensate the employees occupying this position for services performed in accordance with the provisions of the applicable rules of our current working conditions Agreement, retroactive to September 1, 1949.

EMPLOYEES' STATEMENT OF FACTS: There is an Agreement in effect between the parties bearing effective date of October 1, 1942, with subsequent amendments, governing the hours of service and working conditions of employees of the Carrier represented by the Brotherhood, copies of which have been furnished the Board. The Employees request that the entire text of such Agreements be considered in evidence in this dispute and treated as having been cited by the Employees.

The Rules or part of Rules of the said Agreement of October 1, 1942, having particular bearing and pertinence in this case are as follows:

"RULE 1

EMPLOYEES AFFECTED

These rules shall govern the hours of service and working conditions of the following class of employees:

* * * *

on the position than had previously been carried. The duties listed as items 1 to 17 are purely dicta. The position of Chief Clerk was given only limited coverage under the Agreement, therefore, not limited as to duties, hours or responsibilities. The Carrier refused to divulge the salary connected with the newly created position so the General Chairman attempted to elicit the information from the Assistant Ticket Agent to which he replied as follows:

"November 11, 1949

Mr. C. A. Schutty, Chairman
Brotherhood of Railway Clerks
B. M. A. Building
Kansas City, Missouri

Dear Sir:

We are in receipt of your letter of November 5, 1949 relative to a claim filed for me for Saturdays and Sundays.

As was stated in Mr. Voorhees letter to you dated October 14th, the terms of my position are satisfactory to me and it is my wish that no claim be filed in my behalf.

Yours truly,

(Signed) E. M. SNELLING

EMS/cd"

The matter was discussed in conference along with 20 other cases submitted. The Carrier made the following reply:

"Case 14, refers to claim filed for E. M. Snelling, who was promoted from Chief Clerk to Assistant Ticket Agent. Mr. Snelling's letter of November 11, 1949, indicates that he does not desire to protest or file claim. The added duties and commensurate increase in rate of pay are satisfactory to him. The Company is entirely satisfied with the manner in which he has taken hold of his new duties. Claim denied."

The Carrier did not establish a position doing relatively the same work; they did not reduce the rate of pay, nor attempt to evade the application of the agreement. Neither position comes under bulletin or overtime rules. The Carrier established a position that would best suit their needs and successfully carry on the work of the Department. The Carrier does not have a position of Chief Clerk, Ticket Office, which the Employees ask your Honorable Board establish for them under (b) of their Statement of Claim and do not have need for such a position to be re-established.

The Carrier abolished the position of Chief Clerk, established a position of Assistant Ticket Agent with added duties and responsibilities with a rate of pay commensurate with similar positions. The responsibility of a Carrier is to establish such positions as are necessary for proper handling of the business of the department and we request your Honorable Board to so hold.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood claims the Carrier violated its Agreement with them when, effective August 16, 1949, it changed the title of the position of Chief Clerk, Ticket Office, to that of Assistant Ticket Agent, without notice conference and agreement, with the intent and purpose of removing it, and the work attached thereto, from the scope of the parties' Agreement. It asks that the occupants of the position since September 1, 1949, be compensated in accordance with the rate of pay applicable to Chief Clerk, Ticket Office, under the rules of all Agreements of the parties relating thereto.

The position of Assistant Ticket Agent created by the Carrier as of August 16, 1949, is not within the Clerks' Agreement. However, all the work formerly performed by the occupant of the position of Chief Clerk, Ticket Office, a position within the Clerks' Agreement, has, since August 16, 1949, been assigned to and performed by the occupant of the position of Assistant Ticket Agent. The effect of what Carrier did was to merely change the title of the position.

Rule 48 of the parties' Agreement effective October 1, 1942, provides:

"Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

Carrier undoubtedly had the right to establish a position of Assistant to the Ticket Agent to perform some of the duties of that position as they became too burdensome for the Ticket Agent to perform. But, because of Rule 48, it did not have the right to establish a position with the title of Assistant Ticket Agent and assign to it substantially all the duties of the Chief Clerk, Ticket Office, and then abolish the latter position, even though it assigned to and had such Assistant Ticket Agent perform some duties which had formerly been performed by the Ticket Agent. What Carrier did was in violation of Rule 48 of the parties' Agreement. For similar holdings under comparable rules see Awards 139 and 3396 of this Division.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier has violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of January, 1951.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 5197
DOCKET CL-5169**

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

NAME OF CARRIER: Kansas City Terminal Railway Company.

Section 3, First (m) of the Railway Labor Act provides: "In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

The Award determined Carrier had changed the title of the position of Chief Clerk, Ticket Office, to that of Assistant Ticket Agent in violation of Rule 48 of the parties' effective Agreement and, effective as of September 1, 1949, directed it to compensate the employes occupying this position for all services performed in accordance with the rate of pay applicable to the position of Chief Clerk under the rules of the parties' Agreement relating thereto.

On January 25, 1951, Carrier was ordered to make this Award effective, and, on or before March 16, 1951, to pay to the employe or employes the sum to which he or they may be entitled to by reason thereof.

E. M. Snelling occupied the position and was the employe to whom the claim was paid. From September 1, 1949 to April 1, 1951, he worked seven days each week, except when on vacation or off sick. After April 1, 1951, he was assigned two rest days, they being Sunday and Monday.

After the Award was rendered the reparations or penalty part of the claim was held in abeyance by mutual agreement pending the settlement of a dispute between the parties then pending before the 40 Hour Week Committee on the question of whether or not Rule 1, paragraph (B) positions were subject to the provisions of Article II of the 40 Hour Week Agreement of March 19, 1949. The dispute was resolved by an agreement of the parties dated March 17, 1953, effective September 1, 1949, and thereupon withdrawn from consideration of the 40 Hour Week Committee. The effect of the Agreement of March 17, 1953, was to place the position of Chief Clerk, Ticket Office, and all other Rule 1 (B) positions, under the Rules of the Agreement providing for a 40 hour week, including rules for overtime for work performed on rest days.

Carrier used the Agreement of March 17, 1953, which provided that overtime rules applied to Rule 1 (B) positions, as the basis for disposing of Award 5197, using Sundays and Mondays as rest days for the position in so doing. It at first declined to inform the Organization's Committee as to the amount it had paid Snelling and the basis it used in computing whatever amount it had paid, saying it had paid him in line with the Award. Consequently, on November 24, 1953, the Organization submitted the following question to the Division: "Shall the Carrier be required to make available

to the System Committee of the Brotherhood such of its records as may be necessary to give (1) evidence that payment of the claim was made; (2) evidence of the amount of payment made, and (3) the basis and details of computation thereof."

Thereafter, on December 15, 1953, the Organization, having been furnished with the information desired, requested that the submission of November 24, 1953, be disregarded.

The information disclosed that from September 1, 1949, to March 31, 1951, Snelling, who occupied the position, worked seven days a week; that effective April 1, 1951, he was assigned rest days of Sunday and Monday; and that for the period from September 1, 1949 to March 31, 1951, Carrier, treating Sundays and Mondays as rest days, paid Snelling under the Award as follows: Mondays, except when off on vacation or off because of sickness, eight hours at time and one-half and for all Sundays, except when off on vacation or off because of sickness, two hours at time and one-half. Snelling actually worked only two hours or less on Sundays.

The Organization, upon being so informed, filed a request for an Interpretation of Award 5197 with this Division on December 28, 1953, posing the following question: "Shall the Carrier pay the claimant, E. M. Snelling, the additional amount of 6 hours at the overtime rate of the position for 82 Sunday rest days involved in the claim?"

In the original submission the Organization referred to Rules 1, 48 and 60 as particularly applicable. The rules now said to be controlling, that is Rule 37 (e) and 38, had no application then for "Rules 28 to 43, both inclusive", were not applicable to Rule 1 (B) positions, which included the "Chief Clerk" at "Union Station Ticket Office."

However, by the Agreement of March 17, 1953, which was made retroactive to September 1, 1949, Rules 37 (e) and 38 became applicable to the position as it provided: "All the rules of this Agreement, excepting specifically 5 to 12, both inclusive, Rules 14, 15, 29 and 36, shall apply to the following positions and the occupants thereof," which reference includes the Chief Clerk at Union Station Ticket Office.

On behalf of the Carrier it was contended that while the Organization may have a new claim under these facts, a question not properly here, they are not properly here for the purpose of our interpretation of Award 5197, citing our Interpretations to Awards 4967 and 5195 as authority therefore. It is true that the Award must necessarily be based on the facts shown by the record at the time it is made and not in view of new or additional facts brought forward after the record has been closed. An interpretation of an award is not a rehearing or new trial of the cause on its merits. Its purpose is to explain or clarify the award as made, not to make a new one.

This Award was allowed on the basis that compensation be paid in accordance with the rate of pay applicable to the Chief Clerk's position under all the rules of the parties' Agreement relating thereto. Reparation or penalty thereunder was held in abeyance by mutual agreement of the parties pending the settlement of certain disagreements as to certain rules being applicable thereto. This was settled and the parties agreed and settlement of the Award was made accordingly by Carrier. Whether this settlement was properly made relates directly to the Award, and not any new claim. We think the question poses an interpretation of the Award to ascertain if the Carrier has properly made it effective.

Rules 37 (e) and 38, as of September 1, 1949, became applicable to the position herein involved and, insofar as material, provide as follows:

"Rule 37 (e). Service rendered by employees on assigned rest days shall be paid for under the call rule * * *. Where Sunday is

one of the rest days, service on Sunday will be paid for as provided in Rule 38, (Sunday Call)."

"Rule 38. Except as provided in Rule 39, employees notified or called to perform work not continuous with, before or after the regular work period, shall be allowed a minimum of three (3) hours for two (2) hours of work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

"Employees notified or called to perform work on rest days and holidays shall be paid a minimum of eight (8) hours at time and one half."

The work Snelling performed on Sundays did not fall within the following language of the first paragraph of Rule 38; to wit, "work not continuous with, before or after the regular work period" but within the following language of the second paragraph thereof "work on rest days".

In view of the foregoing our answer to the Organization's question must be "Yes".

Referee Adolph E. Wenke, who sat with the Division as a member when Award 5197 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 21st day of July, 1954.

**DISSENT TO INTERPRETATION NO. 1 TO AWARD 5197,
DOCKET CL-5169**

Here, in the guise of an Interpretation the majority have in effect treated the proceedings as a rehearing of the merits, and, compounding error upon error, have reached a determination based not upon the facts appearing in the record at the time the docket was closed but based upon new facts and evidence that arose subsequent to the time the docket was closed.

This same Referee who sat with the Board in making this Interpretation stated correctly in his Interpretation No. 1 to Award No. 5195:

"In doing so it should be understood that an interpretation of an award is not a rehearing or a new trial of the case on its merits. Its purpose is to explain or clarify the award as made, not to make a new one. Consequently questions raised and disposed of will not be considered again. Neither will we consider questions raised for the first time."

In Interpretation No. 1 to Award 4967 — Referee Carter assisting — the Board there held:

"The Carrier asserts that the record before us when the award was made does not reflect all the facts and in view of additional facts presented in the application for an interpretation the award arrives at an incorrect conclusion. Granting for the sake of argument that this is so, it cannot benefit the Carrier. The award is necessarily based on the facts shown by the record. After the record is closed,

new or additional evidence cannot properly be received. If this was not so, the awards of the Division would have no finality. An interpretation of an award may not properly be treated as a rehearing or a new trial of the merits of the case. Its purpose is to explain and clarify the award, not to make a new one. We are obliged to say that the only evidence properly before us for consideration is that appearing in the record at the time the docket was closed, that the evidence appearing in the application for an interpretation is outside the record and, consequently, the position of the Organization is correct."

The determination herein, having been made upon facts and evidence not in the record at the time the docket was closed, is clearly erroneous.

We dissent.

/s/ J. E. Kemp

/s/ E. T. Horsley

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan