Award No. 5920
Docket No. CL-6021

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

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes:

(1) That the Carrier violated the Agreement between the parties, effective May 14, 1948, when by notice dated January 25, 1949, it required James E. Feeney, Relief Yard Clerk, Terminal Division, Boston, Mass., rate of pay $9.88 per day, to suspend work on his regular relief position on Fridays of relieving Thomas E. Cruise, Yard Clerk, Mystic Wharf, assigned bulletin hours 11 P. M. to 7 A. M., rate of pay $9.88 per day, and effective January 28, 1949, required him to relieve G. L. Maynard, Messenger, Mystic Junction, and for which assignment he was compensated at the lower rate of pay ($8.80 per day of the Messenger's position; and

(2) That the Carrier shall be required to compensate James E. Feeney at the rate of $1.08 per day, representing the difference between the rate of pay of his regular bulletin relief position ($9.88 per day) and the rate of pay of the position of Messenger $8.80 per day) for Fridays, retroactive to and including Friday, January 28, 1949, and continuing for each Friday thereafter so long as the alleged violation continues (plus any subsequent general wage increases applicable to said position).

EMPLOYES' STATEMENT OF FACTS: James E. Feeney appears upon the Seniority Roster of Yard Clerks, Terminal Division, with a seniority date of February 3, 1944, and holds a regular bulletined position of Relief Yard Clerk, rate of pay $9.88 per day, which position regularly relieves six (6) other Yard Clerks on their assigned days of rest.

Prior to January 25, 1949, Mr. Feeney had, as a part of his regular six-day assignment, the relief of third trick Yard Clerk Thomas E. Cruise at Mystic Wharf, assigned bulletin hours 11 P. M. to 7 A. M., rate of pay $9.88 per day, on Fridays.

On January 25, 1949, notice was served upon Mr. Feeney by Mr. W. E. Barrett, Superintendent, Terminal Division, reading as follows:

involved was changed to a six-day position. Claimant's relief assignment was changed to include five days of relief on yard clerk positions and one day of relief on a messenger's position. Yard clerk and messenger positions are within the same seniority district and yard clerks and messengers appear on the same seniority roster.

This was a permanent change in claimant's regular relief assignment. Rule 16 has no application.

3. PAST PRACTICE AND RULES SUPPORT CARRIER

In setting up relief assignments it has always been the practice to pay the assignee the daily rate each day of the position he relieves on that day. This is true not only of yard clerk relief assignments but also of baggagemen relief assignments, etc.

That this is as it should be is supported not only by common sense but also by the agreement, itself. Rule 12 of the Agreement reads:

> "Rating Positions: Positions (not employes) shall be rated and the transfer of rates from one (1) position to another shall not be permitted."

Thus, it is the position that carries the rate and not the employe. The employe occupying a position receives the rate that goes with the position. A relief employe having a regular assignment to relieve on six positions each week would receive six different daily rates each week if the positions relieved carried different rates. Neither the relief employe nor any other employe has a rate himself for Rule 12 forbids.

Therefore, when it became necessary to permanently change the relief assignment of claimant whereby relief on a messenger's position was substituted on one day each week, for relief on a yard clerk's position, claimant automatically assumed the messenger's position rate on each day he relieved thereafter on the messenger's position. To assert that claimant could carry "his rate" over to the messenger's position when he, as an employe, has no "rate" would violate Rule 12.

Petitioner has no claim here. This is an attempt to "rate" an employe in contravention of Petitioner's own rules agreement.

Here a bona fide change was made in claimant's relief assignment. It was a permanent change. Claimant was given an opportunity to displace but refused to do so. Claimant was paid the rate of the position he relieved. Petitioner has shown no rule violation.

All factual data and argument herein has been brought to the attention of Petitioner.

OPINION OF BOARD: An independent review of the record discloses that prior to January 25, 1949 pursuant to bulletin, bid, and award posted on June 18, 1946, James E. Feeney became the holder and occupant of a regular Relief Yard Clerk position, established to relieve six (6) Yard Clerks who each held seven (7) day positions, with a rate of $9.88 per day for each of the positions so relieved; that on January 25, 1949 the Carrier notified Feeney that effective at once he would relieve a Messenger on Fridays, rate $8.80 per day, instead of the Yard Clerk he had been relieving on that day at a rate of $9.88 as a part of the duties of the bulletined position theretofore awarded him; that thereafter, although given opportunity to displace if he desired to do so, which was not accepted, Feeney's claim for the difference between what he would have received while relieving a Yard Clerk in conformity with the requirements of his bulletined position and what he did receive while relieving the Messenger's position at the direction of the Carrier was denied. Hence this controversy based upon the premise the Carrier's action violated the rules of the current Agreement.

The first defense made by the Carrier is that the claim is barred by laches. It is true the claim was filed and denied on the property during the early months of 1949 and was not brought to this Division until January 10, 1952. However, it is clear that during the interim the Carrier was fully aware it was still pending and undisposed of. In fact, as late as October 6, 1950, Carrier advised the Organization that if it was not withdrawn and the parties could not agree upon a joint submission it would submit the matter ex parte. Conceding, as Carrier insists, this Division does not favor delays in the progressing of cases, it also frowns upon their dismissal on strictly technical grounds, particularly where—as here—the parties have suffered no prejudice as a result of the delay. Under the existing facts and circumstances we do not believe this is a case where the doctrine of laches should be applied and so hold.

Next it is argued the claim should be denied because it finds no support in the rules. Let us see.

Rule 11 of the Agreement states rates of pay in effect on the date of the execution thereof should be made a part of the contract and remain in effect until changed by negotiation. Rule 14 (a) provides that when there is a material increase or decrease in the duties and responsibilities of a position, the rate of pay thereof, upon request, will be the subject matter of adjustment between the parties, while subdivision (b) of the same rule authorizes employes to exercise seniority as if the starting time was changed if the character of the work of a position is changed 33% or more for a period of twelve (12) working days or more. Rule 12 is to the effect positions (not employes) shall be rated and the transfer of rates from one position to another shall not be permitted. Rule 15 is authority for the proposition the changing of the rate of a specified position for a specified reason, unless the result of negotiation, shall constitute a new position. Rule 16 provides that employes temporarily assigned to lower rated positions or work shall not have their rate reduced. It is to be noted these rules contain no execeptions and apply to all positions. In our opinion they definitely indicate the parties to the Agreement intended rates of pay, once established, should not be changed without negotiation.

It must be remembered that in the instant case Claimant's position was established to relieve six Yard Clerks, that the bulletin advertising his position so specified and in addition stated the days on which those positions were to be relieved and that the rate of pay for relief of each such position was to be $9.88 per day. Likewise it should be kept in mind that Claimant bid in and was awarded the position on the precise terms on which it was bulletined. Thereupon, as we understand the rules of the Agreement, he became the assigned occupant of a regularly established position with a fixed rate of pay, i.e., $9.88 per day, which, so long as it continued in existence, could not be changed except by adjustment through negotiation in accord with their terms. Having reached this conclusion we have little difficulty in concluding the Carrier's unilateral action in assigning Claimant to work the lower rated position of Messenger, one day a week, resulted in a reduction, hence a change, in the rate of pay of his regularly established position and was in violation of the rules of the Agreement. It follows the claim should be sustained for the period of time the violation continued under the existing rules.

We think support for the foregoing conclusion is to be found in the Carrier's admission that each position, except regular relief positions, under the scope of the current Clerks' Agreement is allocated a specific rate and changes in rates thereof are subject to negotiations. If the rules require that action with respect to such positions they must require it as to all regularly established positions, in the absence of exceptions which, as we have heretofore pointed out, are not to be found in the contract. Further support for such conclusion is to be found in the fact that after its action the Carrier afforded Claimant an opportunity to displace if he so desired. This of itself suggests the inquiry: Would this offer, clearly not required by contractual obligation, have been made, if as the Carrier

insists, its action had been in conformity with the rules of the Agreements and established practice?

Finally the Carrier relies upon past practice. In support of this position it presents bulletin showing combinations of positions and different rates on established relief positions. Nothing that has been heretofore stated is intended to imply action of that nature was not permissible under existing rules of the Agreement. The weakness of this position from Carrier's standpoint stems from the fact the position in controversy, when established, was not of that character. Therefore the fact such positions have been established and are in existence on the property does not establish a practice respecting the one here involved. Nor do we find anything else in the record which has that effect.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties to this dispute waived oral hearing thereon;

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 indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of August, 1952.