

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

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

THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY

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

(1) Carrier violated the rules of the current Agreement by arbitrarily removing Mrs. Dora M. Thomas from her regular assigned Position No. 492, rated \$12.17 per day, in the Accounting Department—Accounting Machine Bureau,—Denver, Colorado, and requiring her to perform the work normally attached to Position No. 481, rated \$12.59 per day, in said Bureau.

(2) Carrier shall compensate Mrs. Thomas for an additional day's pay at rate of \$12.59 per day attached to Position No. 481 for each and every day she was withheld from her regular position and required to perform the work normally assigned to Position No. 481 from November 10, 1952 to April 6, 1953.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, Mrs. Dora M. Thomas, holds seniority dating from June 6, 1949, in the Office of Consolidated Machine Bureau including the Key Punch Operators in Accounting Machine Bureau and Microfilm Operators in the Records Bureau.

On January 11, 1952, Mrs. Thomas (then Dora M. White) was assigned to Job 492, Key Punch Operator in the Accounting Machine Bureau at base rate of \$12.17 per day following posting of Bulletin January 8, 1952. (Employees' Exhibits Nos. 1 and 2).

On Friday, November 7, 1952, Mrs. Thomas was told by her Supervisor that effective Monday, November 10, 1952, she would be required to perform the work on Position No. 481, Key Punch Operator, base rate \$12.59 per day, and that the occupant of Position No. 481 would in turn perform the work on Mrs. Thomas' Position No. 492. Mrs. Thomas' assigned duties on Position No. 492 consisted of punching cards for payroll deductions, name cards, social security cards, time drafts and other cards used in connection with payrolls as well as making corrections from other jobs in the key punch room. The duties assigned to Position No. 481 covered only "cutting" cards from wheel reports. The Brotherhood protested this transfer on November

Key Punch Operators—in most every case—taking their work with them when going from one job to another in the same group or when going from one group to another at a higher rate of pay—Groups (a), (b), (c) and (d) in Memorandum of Agreement effective January 3, 1950, which has hereinbefore been quoted—has been done with the full knowledge and consent of the Brotherhood and without any objection.

The claimant—who has been on a maternity leave of absence since March 1, 1954 and which leave expires August 30, 1954 unless given an additional leave—was required on November 10, 1952 to perform the key punching work on Job 481 which was punching cards from Conductors' wheel reports. This was done for the sole purpose of helping the claimant improve both her accuracy and speed. Her basic rate of pay, \$12.17 per day, was not reduced.

The Carrier's action in requiring the claimant to perform the Key Punch work on Job 481, resulted in an improvement in her accuracy and speed with the result that she was assigned as the successful applicant—on April 6, 1953—to Job 499, punching cards from Interchange Reports, at a basic rate of \$12.61 per day. Four other Key Punch Operators punch cards from Interchange Reports. One is paid a basic daily rate of \$12.49; two are paid a basic daily rate of \$12.61 and one is compensated at \$12.91 per day.

The Brotherhood, during conference in connection with this case, did not advance any reason why the claimant should have received \$12.29 per day while performing the work which had been attached to Job 481. They could not do so in view of the record, for the reason, as previously stated, the occupants of Jobs 484 and 488 were, prior to, during and subsequent to the dates involved in claim, performing the same work as claimant at a basic daily rate of \$11.99.

The Memorandum of Agreement—hereinbefore quoted—governing the grouping and rates of pay of Key Punch Operators, was effective January 3, 1950. No protest was made until receipt of the instant claim—November 25, 1952—with respect to the manner in which the rates of pay of Key Punch Operators was applied. Neither was any protest ever made with respect to the manner in which vacancies or new positions in the Key Punch Department were bulletined. Having knowledge of and having acquiesced in the manner in which the Key Punch Operators have been handled, the Carrier asserts the position of the Brotherhood in the instant case is not justified either by any Agreement rule or settlement.

During the period involved in claim, the claimant was regularly employed. She lost no time. This claim is frankly one for a penalty. Penalties are not awarded under a contract unless it clearly so provides. The Clerks' Contract does not expressly so provide.

All data in support of Carrier's position has been submitted to the Brotherhood and made a part of this particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim presents the question whether the work of Key Punch Operators in a Consolidated Machine Bureau can be interchanged at will by the Carrier among the various groups of established positions within the Key Punch Operator Class.

In 1939 the Carrier established a Consolidated Machine Bureau for the purpose of pooling stenographic, typist, comptometer and key punch operator service as a separate seniority district within the General Accounting Department at Denver, Colorado. Prior to the formation of the Bureau each department head and subdepartment head had under his jurisdiction a number of stenographers, typists and machine operators, all of whom were taken away from their old positions and transferred to the new Bureau with agreed upon seniority within the Bureau.

The consolidation was effected pursuant to a special Memorandum Agreement effective March 1, 1939 which established the new seniority roster, fixed several rates of pay for each of the various classes of work transferred to the Bureau and provided:

"4 (a) The management will be permitted to assign stenographic, typing, computing and key punch work, regardless of character, to any employee in the district assigned to and capable of performing such classes of work.

"(b) It is recognized that rearrangement and transfer of work will necessarily result in order that the highest rated positions will be assigned to work justified by the rate of pay."

Award 2893 held that these quoted paragraphs 4 (a) and (b) spoke as of the time of the organization of the Bureau and were designed to permit the assignment of any character of work to any employee in the new district who was assigned to and capable of performing such work, regardless of what the character of her work may have been before. Award 2893 also held that, once work was assigned to a new position, the Carrier could not thereafter interchange work at will among the various positions.

This conclusion was said to follow from: (1) the fact that the Memorandum Agreement established varying rates of pay within each class of work and (2) the fact that, although the bulletin described the work generally by class only, it carried the notation "Vice Helen R. Broderick" which was said to mean that, when an employee bid in the position of "stenographer", the position with the same duties performed by Helen Broderick was the position bid in.

This 1939 Agreement has been renewed and carried forward to date without change except for wage revisions.

By another special Memorandum Agreement effective January 3, 1950 there were established within the Bureau four groups of Key Punch Operator Positions to be known collectively as "Step Rate Positions" each with a different rate of pay. Of 17 positions in all, six were allocated to employees to be transferred to the Bureau from the Office of Car Accounts; and the remainder were to be allocated "to other employees then assigned to key punch positions, each on the basis of individual seniority rights."

Claimant bid in a Key Punch Operator position "vacated by Lucille E. Rivero", rate of pay \$12.17 per day, the principal duties of which according to the bulletin were to "operate all numeric and alphabetical key punch machines." The assignment, however, consisted of "punching cards for payroll deductions, name cards, social security cards, time drafts and other cards used in connection with payrolls as well as making corrections from other jobs in the key punch room."

Claimant was required to interchange her position with the occupant of another Key Punch Operator in another group, rate of pay \$12.29 per day, likewise bulletined to "operate all numerical and alphabetical key punch machines" but assigned to "cutting cards from wheel reports."

The rest days of the two positions were the same and neither occupant underwent any change in rate of pay as a result of the interchange of assignments.

The Carrier asserts, however, and it is not contradicted, that at least ever since the adoption of the 1950 Special Memorandum Agreement there never has in practice been any relationship between the rates paid and the work performed by Key Punch Operators and that "in most every case" they have in fact taken their work with them, both when going from one position to another within the same group and also when going from a position in a lower paid group to a position in another higher paid group. The Carrier also asserts without contraction that prior to, during and subsequent to the

dates under claim two other positions were performing the same work of cutting cards from wheel reports at a lower basic daily rate of \$11.99.

First. The factual situation presented by this claim is identical with that presented in Award 2893. And, right or wrong, Award 2893 fixed the meaning of the 1939 Special Memorandum Agreement and determined that a claim such as this should be sustained.

We are foreclosed from determining whether Award 2893 was correctly decided or not, because the parties have since repeatedly readopted in the 1939 Special Memorandum Agreement without change in language. The parties must be taken therefore, to have assented to the interpretation put upon the 1939 Special Memorandum Agreement unless the Special 1950 Memorandum Agreement demonstrates some amendment of their essential understandings about the effect of the creation of the Bureau as reflected in the 1939 Special Memorandum Agreement as interpreted by Award 2893 and so since readopted by the parties in subsequent Agreements.

Second. The 1950 Special Memorandum Agreement did not in terms purport to amend or supersede the general effect of the 1939 Special Memorandum Agreement; it dealt merely with the work of one class within the Bureau within the scope of the general purposes which lay beneath the initial understandings about the Bureau. It did no more by way of amendment than to give specialized treatment to the rate differentials of this one class, which Award 2893 considered to be significant.

Moreover, the Carrier has continued the method of earmarking bulletined positions by earmarking them as they were earmarked in Award 2893, which Award 2893 also considered to be significant.

In view of the foregoing considerations we are unable to conclude that the parties have effected any change in their basic understandings with respect to interchange of work since those understandings were interpreted and determined by Award 2893.

Third. In this view we find no ambiguity or uncertainty in the two Special Memorandum Agreements when read together as they should be. Prior to the presentation of this claim, the Organization put the Carrier on notice of its position. Such being the case, the evidence of practice is no defense to this claim, although it may bar past violations.

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 the Agreements were violated and claim will be sustained for the correct rate of \$12.29 per day.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 19th day of March, 1956.