

Award No. 8416
Docket No. CL-8164

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Horace C. Vokoun, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY COMPANY
John W. Martin, Trustee

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

Because of the violation of Clerks' Agreement, as hereinafter stipulated, Carrier shall pay to the incumbents of Utility Clerk Position No. 27, Utility Clerk Position No. 49, Clerk-Stenographer Position No. 50 and Utility Clerk Position No. 52, at West Palm Beach Agency, the difference between their rates of pay, \$14.5718 per day, and the rate of the Assistant Cashier, Position No. 5, \$15.2776 per day, for as long as they are required to perform higher rated work of expensing and waybilling, beginning sixty days prior to February 17, 1955.

EMPLOYEES' STATEMENT OF FACTS: The current agreement between the Carrier and the Brotherhood became effective January 1, 1938. Prior to the effective date of the agreement, the Agent at West Palm Beach issued Bulletin No. 1 on May 21, 1937, reading as follows:

"Bids will be received until 5 PM May 26th for position of Asst. Cashier, West Palm Beach Agency, rate of pay \$5.6580 per day, vacated by Mrs. L. M. Ridenour.

"Hours of service 8 AM to 5 PM, 1 hour lunch

"Qualifications for this position are: Typist-Steno, and well versed in duties of Cashier's Department, including billing and expensing of waybills, etc., preparation in maintenance of OS&D reports, handling and adjustment of claims. In lieu of stenographic ability applicant must be well equipped to handle correspondence without necessity of dictation."

lished for Position No. 2519. The rate of Position No. 3 is now about 45c per day higher than that of Position No. 2519 (27), due to increase negotiated in the rate of that particular position (Item No. 3, Carrier's Statement of Facts), but that is immaterial, as it is rates as they existed when Position No. 2519 was re-established on December 8, 1951 that provide the yardstick for determining its rate.

4. Position No. 2519 (now No. 27) was properly rated in conformity with the rules of the applicable agreement and practices thereunder when re-established on December 8, 1941, and Positions Nos. 49, 50 and 52, being positions of a similar kind or class to Position No. 2519 (now No. 27), have been properly rated at the rate of that position. Any changes in those rates are, as the Employees recognized in 1945 and 1946, matters for negotiation. (Third Division Awards 2202, 2682, 2983, 3194, 3484, 4123, 4292, 5093, 5131, 5911, 6413 and 6881.)

The claim is without merit and should be denied.

The Florida East Coast Railway Company reserves the right to answer any further or other matters advanced by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, in connection with all issues in this case, whether oral or written, if and when it is furnished with the petition filed ex parte by the Brotherhood in this case, which it has not seen. All of the matters cited and relied upon by the Railway have been discussed with the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim presents a question as to the rate of pay applicable to positions of Utility Clerk No. 27, Utility Clerk No. 49, Clerk-Stenographer No. 50 and Utility Clerk No. 52, four of many positions maintained by the Carrier at its Station, West Palm Beach, Florida.

It is the Employees' contention that the Carrier violated Rule 56 of the applicable Agreement, identified above, when it established the involved positions. Rule 56 reads:

"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."

The rate of pay sought by the Employees is that paid to the position of Assistant Cashier No. 5 at this location. The record shows that the duties of this position as listed in vacancy Bulletin No. 1, dated May 21, 1937, to be:

"Qualifications for this position are: Typist-Stenographer and well versed in duties of Cashier's Department, including billing and expensing of waybills, etc., preparation and maintenance of OS&D reports, handling and adjustment of claims. In lieu of stenographic ability applicant must be well equipped to handle correspondence without necessity of dictation."

This Assistant Cashier No. 5 position was again bulletined on November 25, 1942, the described duties being:

"Duties of this position consist of serving as Asst. Cashier, Freight Agency, expensing, waybilling, handling OS&D reports, making inspections, and other duties assigned by Agent."

The record shows that the position of Cashier was also performing work of expensing and waybilling.

On April 30, 1937, prior to the effective date of the applicable and first Agreement between the parties, the Carrier established Utility Clerk Position No. 2519. Work of expensing and waybilling was assigned thereto. This position was abolished on April 20, 1938, less than four months after the effective date of the involved Agreement. Almost four years later, on December 8, 1941, Position No. 2519 was again established, as temporary, being then bulletined for the first time under the Clerks' Agreement with duties shown as:

"The duties of this position will consist of waybilling, expensing, and abstracting by use of billing machine, handling correspondence by use of typewriter, delivering and receiving freight, handling OS&D matters, and such other duties as may be assigned by Agent."

This position No. 2519 was rebulletined for another temporary period on May 1, 1942 and as a permanent position on May 26, 1943 at which time the title was changed to Utility Clerk No. 27 but with the same duties as described in the earlier bulletin.

The positions of utility clerk, designated as Position Nos. 49 and 52 were established on January 17, 1946, and March 7, 1947 respectively, each carried the same rate that was then applicable to utility clerk Position No. 27. The position of clerk-stenographer, designated as Position No. 50 was established on October 30, 1946, also with the same basic rate that was applicable to Position No. 27.

The carrier has pleaded three lines of defense to the claim of the organization and they, of course, must be taken into consideration. The first defense is jurisdictional as to whether or not this division has jurisdiction of the dispute. The second maintains that this claim is barred by the Doctrine of Laches and the third, whether or not the carrier violated Rule 56 of the parties' current agreement effective January 1, 1938, when it established and maintained positions of utility clerk and clerk-stenographer, all of which included the duties of "expensing and waybilling", at a rate lower than applicable to the position of assistant cashier which also included those duties.

The question has been raised as to whether or not this is a "major dispute" or a "minor dispute". In *Elgin, Joliet and Eastern Railway Company versus Burley et al.*, 325 U.S. 711, 65 S. CP. 1282, the United States Supreme Court took cognizance of the traditional difference between the types of disputes in railway labor affairs. The Court had this to say:

"The first (Major Disputes) relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

"The second class (Minor Disputes) however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.

"The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have left for settlement entirely to the processes of non-compulsory adjustment.

"The so called minor disputes, on the other hand, involving grievances, affect the small differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally to the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so. Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act set them apart from the major disputes and provides for very different treatment."

The Act treats the two types of disputes alike in requiring negotiation as the first step toward settlement and in contemplating voluntary action for both at this stage in the sense that agreement is sought and cannot be compelled. Beyond the initial stages of negotiating and conference, however, the procedures diverge. Major Disputes go first to mediation under the auspices of the National Mediation Board. The adjustment board was created and given power to decide the grievances of a minor nature. It has been noted that disputes concerning changes in rates of pay, rules, or working conditions may not be referred to the National Adjustment Board but are to be handled when unadjusted through the processes of mediation.

In this case the question involved is not a change as provided in rates of pay but the establishment of a rate under the agreement's procedure for jobs of a similar nature and an alleged violation of Rule No. 56. The board, therefore, is of the opinion that this adjustment board has jurisdiction to hear and decide the question and issue.

The claim itself seems to be based upon the fact that the claimants have as a part of the work to be performed in their job the work of "expensing and waybilling" which is part of the work of the assistant cashier position and the claimants should receive the same rate of pay as that of the assistant cashier because of the requirement that they perform this higher rated work.

From the testimony as presented apparently the work of expensing and waybilling is work performed not only by the assistant cashier and the claimants but also the cashier. We are therefore faced with the problem in this claim as to whether or not one element of a job will set the basic rate of pay for that job and provide that the basic rate of pay must be common because of the fact that one element of a job is common to others. The record indicates that positions requiring Expensing and Waybilling have been in existence with the company immediately prior to the first agreement between the organization and the carrier in 1938 and have continued in existence since that date in various classifications. The record indicates that between 1938 and 1945 several positions which provided that part of the work be expensing and waybilling were established and that during the year 1945 the carrier and the organization discussed a proposed change in the rates for these classifications with no settlement. Since the negotiations of 1945 other positions have been established which have the duties of expensing and waybilling among the various activities of the work.

There is no doubt that if this claim must be treated as a claim for a change of rate in an entire classification this board has no jurisdiction. The claim, however, will be discussed by the board in accordance to the language as couched in the statement of claim itself, namely, that the company, by instituting the certain jobs with these specific duties violated the contract of the parties and more particularly, Rule 56.

The board approves its position in Award No. 4036 which together with the awards 1861, 3485, and 3447 assert:

"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."

It is the opinion of this board that one certain assignment of work does not create a class for the job. In a study of the bulletin set forth above, we find that in some of them the work of "expensing and waybilling" is the top skilled work in the job itself and in others it is either an intermediate type of work or in the lower echelon of the services required for the position. The Assistant Cashier has many higher rated duties which do not appear in the bulletin of the complaining classifications.

A review of the bulletins shows a dissimilarity between the work assigned to the complaining classified employees and that of the Assistant Cashier who has assigned to him work "in duties of Cashier's Department, including billing and expensing" and "serving as Assistant Cashiers" which do not appear in the other bulletin. This must be considered as work of a higher rate than the work of expensing and waybilling by itself.

The Board, however, feels that the case at hand is governed by the ruling of the Board in Award No. 5093 in which the Board held:

"Fortunately for the Board it is not charged with the duty and responsibility of fixing rates of pay. Its responsibility is only to interpret and apply the rules of agreement. The only authority conferred upon the Board by the subject rule is to review the action of the Carrier for gross error, a lack of sound judgment, or misapplication of the rule. Failing to find any the Board may not substitute its judgment for that inherent in management, properly exercised, but must leave to the parties, for negotiation and bargaining, any differ-

ences existing over the worth of value of the services performed or to be performed."

It is the opinion of the Board that a violation of Rule 56 has not been shown.

The Board feels that it is not necessary to discuss or take into consideration the matter of the time of filing for this claim.

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 this 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 Carrier did not violate the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July, 1958.