Award No. 10701
Docket No. CL-10227

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

CHICAGO UNION STATION COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier properly apply rules of the parties' Agreement effective November 1, 1940, in compensating employes who relieve regular assignees on their weekly rest days in the Ticket Office, Union Station, Chicago, Illinois, retroactive to March 1, 1957.

NOTE: Reparation due employes to be determined by joint check of Carrier's payrolls and such other records that may be deemed necessary to establish proper claimants.

EMPLOYES' STATEMENT OF FACTS: The Brotherhood's initial Agreement with the Carrier governing the hours of service and working conditions of its employes represented by the Brotherhood became effective November 1, 1940. Included in the rules of this Agreement are provisions for rating positions and preservation of the rates established for positions within the scope of the Agreement. The two Rules particularly involved in this dispute are here quoted for ready reference.

Rule 49 — Rating Positions: Positions (not employees) shall be rated, and the transfer of rates from one position to another shall not be permitted.

Rule 50 — Preservation of Rates: Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions. Employees temporarily assigned to lower rated positions shall not have their rates reduced.

NOTE: — A "temporary assignment" contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee

All data herein and herewith submitted has been previously submitted to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: It is the claim of the Petitioner that the Carrier has not properly applied the rules of the parties' Agreement, effective November 1, 1940, in compensating Employes who relieve regular assignees on their weekly rest days in the Ticket Office, Union Station, Chicago, Illinois; and ask that the application of such rules be made retroactive to March 1, 1957. It is the claim of the Brotherhood that the Carrier has paid the Relief Ticket Sellers a flat rate, rather than the rate of pay of the position which they relieved, in violation of the Agreement.

Rules 49 and 50 of the Agreement, effective November 1, 1940, read, as follows:

"Rule 49 — Rating Positions

"Positions (not employees) shall be rated, and the transfer of rates from one position to another shall not be permitted."

"Rule 50 — Preservation of Rates

"Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions. Employees temporarily assigned to lower rated positions shall not have their rates reduced."

The Carrier contends that prior to and after the date of the Agreement the Carrier had paid a flat rate of pay to relief ticket sellers, that in 1941 a controversy arose between the Brotherhood and the Carrier and in 1941 it was agreed between the Carrier and the General Chairman of the Brotherhood that the Carrier should continue to pay the relief ticket sellers at a flat rate; that this had been the practice up to the year 1956 without any protest as to the method of payment on the part of the Petitioner. It is the contention of the Carrier that, presently, and prior to 1956, these relief assignments were and are regularly rated positions, individually numbered and that relief ticket sellers do not transfer from one position to another in the performance of their relief duties.

In answer to this Petitioner urges that the assignment of Relief Ticket Seller is not a rated position, that any alleged understanding or Agreement with the General Chairman was not in writing; that Rules 49 and 50 of the Agreement are clear and unambiguous; that you cannot change such a rule by custom and practice and, that, if there was an Agreement, as claimed by the Carrier, that such an Agreement was not in writing, and could not vary the terms of a written Agreement, that, at most, it was a "Gentlemen's Agreement" which could be terminated at the will of either party to the Agreement.

Rule 37 of the Agreement is the "Forty-Hour-Work Week" made effective September 1, 1949. Because of the two rest days provided for in Rule 37 it did increase the necessity for additional work for relief ticket sellers. It is significant that we note the following language:

"Rule 37 — Forty-Hour Work Week

* * * * *

"(e) . . . **All possible regular relief assignments** with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under this agreement. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week. **Assignments for regular relief positions may on different days include different starting times, duties and work locations for employees of the same class in the same seniority district, provided they take the starting time, duties and work locations of the employee or employees whom they are relieving.**" (Emphasis ours.)

* * * * *

"(g) . . . The typical work week is to be one with two consecutive days off, and it is the carrier's obligation to grant this. Therefore, when an operating problem is met which may affect the consecutiveness of the rest days **of positions of assignments** covered by paragraphs (c), (d) and (e), the following procedure shall be used:

"(1) **All possible regular relief positions shall be established pursuant to paragraph (e).**" (Emphasis ours.)

Arbitration Award No. 215 considered a request of the Brotherhood for the establishment of pay for all Employes performing duties of ticket sellers — $420.77 for those selling Railroad and/or Pullman tickets, $379.87 for those selling coach and/or Suburban tickets. Pursuant to this hearing this Arbitration Board established monthly rates for all Employes including relief ticket sellers.

Subsequently, the Carrier asked that the Board be reconvened for the submission of the following question: "Should the incumbents of the eleven **relief ticket seller positions** be paid the monthly rates specified in the Arbitration Award dated July 26, 1956 (plus subsequent increases) or should they be paid the rates of the positions they relieve." (Emphasis ours.)

In Arbitration Award 215 Board Reconvened submitted February 27, 1958, we note, in part, the following:

"It appears from the record that the prior Award of this Board has been applied to all the **positions** involved without controversy as to its interpretation or its intended application to the **relief positions.**

"No controversy has arisen or question been raised as to the interpretation of the award or that the Carrier has not **applied the rates awarded to the relief positions** and all positions, in accordance with the plain intent of the award."

* * * * *

"The rules referred to were not involved in the Arbitration Award, therefore, this Board does not have jurisdiction to make a determination concerning the application of such rules."

If, prior to 1949, there had been any question of the propriety of regarding the assignment of Relief Ticket Seller, as a regular rated position, the inclusion of Rule 37 (Forty-Hour Work Week) in the Agreement, has pretty well established that it is a rated position and that a Relief Ticket Seller does not transfer from one position to another in the performance of his relief duties and consequently there is no violation of Rule 50 of the Agreement. (Though the precise question involved herein is not there presented, in Award 7176 (Carter) and Award 6503 (Leiserson) it is recognized that a relief ticket seller holds a regular rated position.)

Couple this with the fact of the long acquiescence by the Brotherhood in the method used of paying relief ticket sellers and the further evidence of an oral Agreement entered into in 1941 after the Agreement effective November 1, 1940, and not prior thereto nor simultaneous with, and we are bound to the inevitable conclusion that there has been no violation of the Agreement.

Inequities, may have occurred in applying flat rates of pay to the assignment or position of Relief Ticket Sellers; if so the rule could be changed or rates of pay increased. That would be the subject of negotiation between the Brotherhood and the Carrier as this Board has no authority to change the Agreement nor the rates of pay.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of July 1962.

LABOR MEMBER'S DISSENT TO AWARD 10701 (DOCKET NO. CL-10227)

The Referee has grossly erred in his Opinion in Award 10701.

Particular attention is directed to page 3 of the Award reading as follows:

"In arbitration Award 215 Board Reconvened submitted February 27, 1958, we note, in part, the following:

> 'It appears from the record that the prior Award of this Board has been applied to all the **positions** involved without controversy as to its interpretation or its intended application to the **relief positions.**

'No controversy has arisen or question been raised as to the interpretation of the award or that the Carrier has not **applied the rates awarded to the relief positions** and all positions, in accordance with the plain intent of the award.

The rules referred to were not involved in the Arbitration Award, therefore, this Board does not have jurisdiction to make a determination concerning the application of such rules.' "

When the Referee quoted the above from the Award of Arbitration Board No. 215, he failed to include several very important paragraphs which deal specifically with this dispute. The Decision of the Arbitration Board which the Referee quotes and the paragraphs he has omitted are quoted below:

* "FOURTH. The National Mediation Board, on application of Carrier has decided that it is necessary to reconvene said board for the purpose of obtaining a ruling of the Board on the specific question submitted by the Carrier for interpretation of its award. Such Question is:

* Should the incumbents of the eleven (11) relief ticket seller positions be paid the monthly rates specified in the Arbitration Award dated July 26, 1956, (plus subsequent increases) or should they be paid the rates of the positions they relieve.

* The reason here asserted by the Carrier for seeking such interpretation is that claim has been filed in behalf of the employes here represented in the Third Division of the National Railroad Adjustment Board reading as follows:

* STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier properly apply rules of the parties' Agreement effective November 1, 1940, in compensating employes who relieve regular assignees on their weekly rest days in the Ticket Office, Union Station, Chicago, Illinois, retroactive to March 1, 1957.

* The ground asserted for requiring such interpretation is that such claim before the Third Division involves the application of the Award of this Board.

It appears from the record that the prior Award of this Board has been applied to all the positions involved without controversy as to its interpretation or its intended application to the relief positions.

No controversy has arisen or question been raised as to the interpretation of the Award or that the Carrier has not applied the rates awarded so the relief positions and all positions, in accordance to the plain intent of the Award.

* The claim filed in the Third Division of the National Railroad Adjustment Board makes no reference to the Award or to this Board but asks that 'Carrier properly apply the rules of the parties' agreement effective November 1, 1940' in compensating the relief positions here involved.

The rules referred to were not involved in the Arbitration Award, therefore, this Board does not have jurisdiction to make a determination concerning the application of such rules.

* To answer the question now submitted to us on reconvening would not be a determination of the meaning or application of that Award but a determination of whether it should be changed. This is beyond our jurisdiction."

* Note: Omitted and completely ignored by the Referee.

What actually happened, and the file is replete with supporting evidence, is that when this dispute was handled on the property without a satisfactory settlement being obtained, the Brotherhood submitted this dispute to the Third Division, National Railroad Adjustment Board; and then the **Carrier,** not the Brotherhood, asked for the reconvention of Arbitration Board No. 215 in a further effort to thwart disposition of this dispute.

The decision of reconvened Arbitration Board No. 215 was a complete denial of the Carrier's contention; the Referee quoted certain portions of the Award out of context, apparently for the express purpose of confusing the true issues of this dispute.

On page 4 of the Award, the Referee states:

"If, prior to 1949, there had been any question of the propriety of regarding the assignment of Relief Ticket Seller, as a regular rated position, the inclusion of Rule 37 (Forty-Hour Work Week) in the Agreement, has pretty well established that it is a rated position and that a Relief Ticket Seller does not transfer from one position to another in the performance of his relief duties and consequently there is no violation of Rule 50 of the Agreement. (Though the precise question involved herein is not there presented, in Award 7176 (Carter) and Award 6503 (Leiserson) it is recognized that a relief ticket seller holds a regular rated position.)"

We have never questioned the fact that these relief assignments should be rated; conversely, we heartily concur and prove our concurrence by submitting to the Referee understandable graphs and figures to show that such relief employes should be paid a monthly rate of pay comprehended on a composite basis determined by the number of days per week he performed relief service **on each such regular position**; however, it is apparent that the Referee completely ignored this factual material.

The Referee then states in parenthesis "Though the precise question involved herein is not there presented, in Award 7176 (Carter) and Award

6503 (Leiserson) it is recognized that a relief ticket seller holds a regular rated position.)". Awards 7176 and 6503 are completely foreign to this dispute, and the only possible reason for the Referee having included those awards in his decision is because the Carrier Member made mention of them in his brief by merely stating without any connotation: "See Awards 7176 (Carter) Citing 6503 (Leiserson).

The Referee then follows with:

> "Couple this with the fact of the long acquiescence by the Brotherhood in the method used of paying relief ticket sellers and the further evidence of an oral Agreement entered into in 1941 after the Agreement effective November 1, 1940, and not prior thereto nor simultaneous with, and we are bound to the inevitable conclusion that there has been no violation of the Agreement."

The Referee's "inevitable conclusion" was based (1) on "the further evidence of an oral agreement" which "further evidence" at best was "hearsay" put into the record by the Carrier without one iota of proof to sustain it; and (2) the so-called "long acquiescence" of the Employes in the manner in which the relief assignments were being rated. On these two points, among many others on which the Referee bases his fallacious determination in this Award, there is nothing — absolutely nothing — of record to support his "inevitable conclusion." Likewise, he receives no support in the long line of prior Awards. Additionally, the United States Court of Appeals, District of Columbia Circuit, held on February 8, 1962 (Vincent B. Welsh Appellant vs. Robert W. Sherwin, et al. Appellees No. 16312) that:

> "(W)here parties enter into a written contract, their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of any contemporaneous oral agreement on the same subject matter, contradicting, varying, modifying, or adding to the terms of the written agreement is inadmissible. * * * The written contract merges all previous negotiations and is presumed, in law, to express the final understanding of the parties.
>
> * * * * *
>
> It follows that the instant contract must be enforced as written."

In further support of our position we furnished the Referee copy of Third Division Awards 2839, 3289, 5057, 5059, 5978, 7914, 9040, 9245 and Award No. 16 of Special Board of Adjustment No. 194; it is equally apparent that no consideration was given these awards.

The Referee then completes his Opinion by stating:

> "Inequities, may have occurred in applying flat rates of pay to the assignment or position of Relief Ticket Sellers; if so the rule could be changed or rates of pay increased. That would be the subject of negotiation between the Brotherhood and the Carrier as this Board has no authority to change the Agreement nor the rates of pay."

The Referee was not asked either to change any rule or rules or to increase any rates of pay; his duty was to read and interpret the agreement

as written based on the facts in the file. He failed dismally in that duty, permitting the continuance of a travesty of justice. His statement that "this Board has no authority to change the Agreement" is a tragedy in view of his failure to adhere to **that** well-established principle.

A final appeal was made to the Referee to refrain from voting and permit the due process to prevail by allowing this dispute to be assigned to another Referee; this he refused to do.

Neither the rules of the Agreement nor the facts of record support the Referee's findings. Rather, the "Opinion", "Findings" and "Award" are based on imagination coupled with unsupportable Awards furnished by the Carrier Member. The Award here makes a farce of collective bargaining.

For the above reasons, among others, I dissent.

/s/ **C. E. Kief**
C. E. Kief, Labor Member

August 21, 1962

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 10701 (CL-10227)

Among other statements loosely made without foundation in the Dissent, is the assertion in the final paragraph reading: "The Award here makes a farce of collective bargaining." Had the Dissenter taken as much time to examine the Award as writing the Dissent, he could have saved himself the trouble.

A casual reading of the Dissent establishes that the Dissenter ignored the issue presented in the case. The Award specifically covers the issue presented. Moreover, the Dissent does not purport to show in what manner the Referee failed to properly interpret the rules involved. In fact, taking the Dissent literally, the rules relied upon by the Organization and the arguments presented by it were not germane to the issue which the Dissenter infers was involved.

The rules relied upon by the Organization were Rules 49 and 50, and are set forth on the first page of the Award. These rules were interpreted and applied by the Referee primarily because they were the rules cited by the Organization. Rule 49 provided that positions, not employes, should be rated. The question was whether Relief positions were positions within the meaning of Rule 49 and could properly be given a stated monthly rate. The Organization argued in the negative and this was the argument presented to the Referee. The Carrier contended that Relief assignments were positions within the meaning of the contract, and Rule 37 was cited to support this assertion. Furthermore, the Carrier relied upon the decision in reconvened Board of Arbitration No. 215 to show that such Relief assignments were positions and were so treated by the parties and the Board when the increased rates were allowed. The Referee properly took cognizance of these facts and made his decision accordingly.

Now the Dissenter comes forth with a startling new theory of the case which inferentially repudiates the Organization's position by asserting on page 3 of the Dissent:

"We have never questioned the fact that these relief assignments should be rated; conversely, we heartily concur and proved our concurrence by submitting to the Referee understandable graphs and figures to show that such relief employes should be paid a monthly rate of pay comprehended on a composite basis determined by the number of days per week he performed relief service **on each such regular position**; * * *" (Emphasis theirs)

Compare this if you will, with his argument presented to the Referee, to wit:

"The relief ticket seller **does not own a position**, he has an **assignment** to work two (2), three (3), four (4) or possibly five (5) positions (see page 11 of the record) depending on the number of relief assignments required by the Carrier in accordance with Rule 37 . . .

"The fact that the Carrier bulletins these relief assignments as 'Position No.' giving it a number) does not make such assignments 'positions' as contemplated by Rules 49 and 50; conversely, they are each made up of several **positions to which rates of pay are attached.**' " (Emphasis theirs)

The Referee considered this argument and properly rejected it for the reasons stated in the Award. The awards cited by the Carrier Member were pertinent to the particular issue framed for decision, i.e., whether Relief assignments are positions within the meaning of Rule 49, and consequently they were properly referred to by the Referee.

In the quoted statement taken from the Dissent above, you will note that reference is made to graphs and figures which were presented to the Referee. That is true. They are not found in the record but were presented merely to the Referee on the basis of a formula which was also first presented to the Referee. This formula was designed to arrange a so-called "composite" rate and was outlined for the Referee by the Labor Member as follows:

"We will explain the method we used in determining the proper monthly payments to the incumbents of the relief ticket seller assignments: Multiply by 12 the monthly rate of the position relieved; divide that answer by 254; that outcome is the daily rate of the **position.** Then, we add the daily rate of the five (5) positions together to get the composite weekly rate; divide the weekly rate by 40 hours to determine the hourly rate of pay; multiply the hourly rate by 169-1/3 hours per month, and we determine the monthly rate of pay of the relief assignment." (Emphasis theirs)

The idea of a composite rate was discussed early in the record by the Petitioner but, as the reader can best judge for himself, it had nothing to do with the awkward formula so recently advanced by the Labor Member. In the record, the Petitioner averred:

"When these relief positions were established [1940] an attempt was made to have one relief position assigned to relieve some higher and some lower rated positions so that the average of the several positions he was to relieve would be somewhere nearly equal to his own rate. **That is the reason for the reference that was made to composite rate.**" (Emphasis supplied)

It is thus apparent that the Award, contrary to the assertions of the Dissenter, was correct when it held that the subject of increasing the flat rates payable to Relief Positions was a subject for negotiation and could not be granted by this Board under the guise of an interpretation on the theory of allowing a composite rate. If the Organization desires a composite rate for the Relief positions they have a proper forum to progress their demands and it is not before this Board. The Award was entirely correct when it held that we have "no authority to change the Agreement nor the rates of pay".

Much more could be said concerning the Dissenter's refusal to accept the obvious that facts had been introduced by the Carrier in the form of affidavits and exhibits supporting the long practice of paying monthly rates to Relief positions and the only possible conclusion which could be drawn from these facts.

There is no need to comment at length on the application of the Parol Evidence rule to this case nor the Court decision cited by the Dissenter. The oral understanding was reached with the General Chairman not "prior or contemporaneous with the written agreement", but over a year **after** the written agreement was adopted. The Referee, a learned Judge, was aware of this distinction. Moreover, the oral understanding did not change or alter the terms of a written agreement, it merely implemented it.

If there was any "travesty of justice" in this case, it was only that travesty which forced the Carrier to spend time, expense and energy in defending itself against such an obviously ridiculous claim.

For the reasons hereinabove recited, there has been no error committed.

/s/ **W. F. Euker**

/s/ **R. E. Black**

/s/ **R. A. DeRossett**

/s/ **G. L. Naylor**

/s/ **O. B. Sayers**