

Award No. 15223
Docket No. CL-15339

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**

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5671) that:

(1) Carrier violated the Clerks' current Agreement when it established IBM Line Desk Clerk No. 4 position, Miller Yard, working Tuesday through Friday, 7:59 A. M., to 3:59 P. M., rate of pay \$20.90 per eight hour day, and Saturday as Chief Yard Clerk No. 2, 7:59 A. M., to 4:59 P. M., rate of pay \$22.16 per eight hour day, rest days Sunday and Monday. IBM Line Desk No. 4 is worked on Monday and is relieved by Relief Clerk No. 1 and does not work on Saturday and Sunday.

(2) That Mr. J. J. Jarvis, with Group 1 seniority dating from March 8, 1927, and other employees who may later work this position, be compensated at the time and one-half rate of \$22.16 for nine hours, Saturday, September 14, 1963, and each subsequent Saturday until violation is corrected. This is in addition to what they have already been paid.

EMPLOYEES' STATEMENT OF FACTS: There existed a Group 1 position in Miller Yard, Dallas, Texas, IBM Line Desk Clerk Position No. 4 working 7:59 A. M., to 3:59 P. M., Tuesday, Wednesday, Thursday and Friday, rate \$20.90, and on Saturday relieving Chief Yard Clerk No. 2 position working 7:59 A. M., to 4:59 P. M., rate \$22.16. This was not a relief position, but a regular assignment of Claimant J. J. Jarvis.

This position was advertised on July 9, 1962, Page 2, Advertisement No. S-24-Clerks, reading as follows, in part:

"8. IBM Line Desk Clerk No. 4, 7:59 A. M. to 3:59 P. M., Tuesday, Wednesday, Thursday and Friday rate \$20.90 Chief Yard Clerk No. 2 Saturday rate \$22.16 per 8 hour day, Miller Yard, Dallas."

On October 28, 1963, Division Chairman, Mr. J. A. Cooney, filed claim as stated in Statement of Claim with General Yardmaster, Mr. R. E. Cherry.

(Rule 14), which he did, displacing Cave off of position of Line Desk Clerk No. 4, effective August 7, 1963.

October 28, 1963, more than 15 months after assignment of July 19, 1962, claim was filed by Division Chairman Cooney with General Yardmaster Cherry (Exhibit 7) in which it was alleged that the assignment of Line Desk Clerk No. 4 Jarvis, Tuesday through Saturday was improper, and that it should be Monday through Friday.

General Yardmaster Cherry overlooked the claim and made no reply until January 28, 1964, after Division Chairman Cooney called attention January 27, 1964, to reply not being received. Exhibit 6 shows Yardmaster Cherry's reply January 28, 1964, denying the claim.

March 10, 1963, General Chairman appealed to Assistant Manager-Personnel Cowan (Exhibit 8). Claim was denied. Further appeal was made and case was discussed in conference and again denied.

Exhibits 1 to 12, inclusive, are attached hereto and made a part hereof.

The applicable schedule agreement is that effective April 1, 1946, as amended by Supplemental Agreement dated July 22, 1949, and Memorandum of Agreement dated August 5, 1950, relating to the Forty Hour Week, copies of which are on file with the Board.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 28, 1963, the Division Chairman filed a claim as was set forth in the Statement of Claim with the General Yardmaster. No reply was received from him nor did he deny the claim in any manner. On April 22, 1964, the First Assistant Manager-Personnel denied the claim in writing.

The instant claim was filed pursuant to Article V, Section 3 of the National Agreement dated August 21, 1954:

There can be no question that the claim is for "an alleged continuing violation" and as such should have been disallowed, if that was Carrier's intent, within 60 days. It will be noted Carrier does not deny it failed to disallow the claim within 60 days. At the point Carrier notifies the Claimant in writing that it is denying the claim it terminates its procedural defect. A violation of the August 21, 1954 Agreement having been established, our allowance is limited to the period prior to April 22, 1964, the date Carrier denied the claim in writing. There has been no attempt here to determine this claim on the merits.

In 2nd Division Award 4853 we note the following:

"In Third Division — Interpretation No. 1, Award No. 9578, Referee Johnson assisting, we note the following statements which are applicable to this present situation: 'and as of the amount then due, the Claimants received under the cut-off rule what was essentially a default judgment * * *. The question is not here presented to what, if anything, the Board might have found the claimant entitled to as damages if they had established the substantive claim on the merits * * *.'"

* * * * *

"Third Division Award 13780 concerns a dispute which is similar to the one here involved. It was referred to the National Disputes Committee which was established by Memorandum Agreement dated May 31, 1963. On March 17, 1965, that Committee rendered the following:

'Findings and Decision:

The National Disputes Committee rules that the receipt of Carrier's denial letter dated December 29, 1959, stopped the Carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement.'"

The Carrier should make payment to the Claimant of the amount which he became entitled to from September 14, 1963 to April 22, 1964, as indicated in these findings.

See Awards 8318 (Daugherty), 10401 (Mitchell), 10644 (Bailer), 11211 (Miller), 11326 (Dolnick) and 2nd Division Award 4853 (Hall).

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

That the parties waived oral hearing;

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 Agreement has been violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1967.