

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23176  
Docket Number CL-23075

John J. Mikrut, Jr. Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,  
                              { Freight Handlers, Express and Station Employees  
                              { Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-8840) that:

1) Carrier violated the Clerks' Rules Agreement at Milwaukee, Wisconsin on September 2, 1977 when it abolished Chief Clerk Position No. 23600 and arbitrarily and unilaterally assigned the duties of such position to Clerk Position No. 23640.

2) Carrier shall now be required to compensate employee C. M. Twardowski the difference in rates between Chief Diesel Clerk Position No. 23600 and Clerk Position No. 23640 commencing September 7, 1977 and continuing each workday thereafter.

OPINION OF BOARD: On July 7, 1977, Claimant, then the occupant of Clerk Position No. 23640 in Seniority District No. 55, requested and was granted temporary assignment to fill a vacancy which existed in the Position of Chief Clerk No. 23600. The principal duties of each of these respective positions are as follows:

Chief Clerk Position No. 23600: Supervision and maintaining all records for diesel locomotives, mileage and similar statistics. Develop necessary information for units going to shop for all type of repairs, typing and other general clerical duties as assigned.

Clerk Position No. 23640: Loco. Equipment Report CS-56 OSF Report; Fuel Oil Reports; Distribution of Mail; Also Typing and Other Related Reports and Clerical Duties.

Claimant was assigned Chief Clerk Position No. 23600 from July 8, 1977 to and including September 5, 1977. During this period of time, as

per parties' Rule 17 - Preservation of Rates, Claimant received the higher rate of Chief Clerk. On August 29, 1977 Carrier issued Bulletin No. 6 abolishing said Chief Clerk Position No. 23600 effective September 2, 1977 and showing said position as "vacant" at that time. Thereafter, Carrier transferred the remaining duties of the abolished position to Clerk Position No. 23640. Carrier maintains, however, that the "supervisory duties" of the Chief Clerk Position were not transferred, but were eliminated.

On September 7, 1977, Claimant filed a formal claim protesting Carrier's action and requesting payment of the protected, higher rate of Chief Clerk Position No. 23600.

Organization contends that Carrier's action in this matter was in violation of Rule 17 which provides "...for the payment of the higher rate for the performance of higher rated work except where such higher rated work is performed in assisting a higher rated employee due to a temporary increase in the volume of work or for the performance of work of an employee absent account of sickness and such employee's position is blanked." According to Organization, neither of the above stated Rule 17 exceptions were operable at the time of this incident; and furthermore, though Carrier abolished Chief Clerk Position No. 23600 on September 2, 1977, Claimant, allegedly upon the direction of supervision, continued to perform all of the duties of that position, but at the lower rate which had been established for Clerk Position No. 23640.

In its rebuttal arguments, Organization charges that despite Carrier's contention that "supervisory duties" of Position No. 23600 were eliminated, Claimant continued "...the supervision of the inanimate instruments such as files, records and statistics, not the animate beings as they (Carrier) imply," and, Organization continues, this type of supervision is the same as that which was performed by the previous employees who were assigned to Position No. 23600. Without negating the import of the preceding argument, Organization further maintains that even if the supervisory duties of Position No. 23600 has been eliminated and all of the other remaining duties transferred to Position No. 23640 as Carrier acknowledges, then Claimant still should be granted the higher rate because, according to Organization, previous Board decisions have established that "...it is not necessary for an employee to take over and perform all of the duties and responsibilities of a higher rated position in order to be entitled to pay at the higher rate" ( see Award 3706 and see Awards 4540, 6870, 7367 and 17698). In summary of this latter argument, Organization contends that "the duties of former Chief Diesel Clerk Position No. 23600 are predominantly performed by Claimant...throughout a major portion of her workday," and she should, therefore, receive the higher rate for her efforts.

Carrier's basic position in this dispute is that the claim which has been submitted represents a request for a reclassification and increase in the rate of pay of Clerk Position No. 23640, and that the Board is without jurisdiction and lacks authority to authorize such a request (see Awards 9307, 9784, 12327, 13876, 14095, 14966, 15225, 15604, 17106 and 20339). In this regard, Carrier contends that Organization is attempting to secure through Board action a benefit which they do not now have under existing rules, and which can only be achieved through direct negotiations between the parties.

In addition to the foregoing and without jeopardy thereto, Carrier further maintains that, with the exception of the supervisory duties of Chief Clerk Position No. 23600, the duties of the two disputed positions were similar in nature. Therefore, Carrier argues that when Position No. 23600 was abolished and the supervisory duties eliminated, the remaining duties which were transferred to Clerk Position No. 23640 caused no real change in that position and Claimant "remains the regularly assigned occupant...and is performing essentially the same duties as she has always performed."

In rebuttal to Organization's argument that Claimant continues to perform the supervisory duties of Position No. 23600, Carrier maintains that: (1) supervising "inanimate instruments such as files, records and statistics" is not the same as supervision of subordinate employee which is the type of supervision contemplated in the Chief Clerk Position No. 23600 List of Principal Duties; and (2) "title of Chief Clerk was established many years ago when the position supervised other clerks..." and "the higher rate...was predicated upon that duty of 'supervision'."

The Board has carefully read and studied the complete record in this instant dispute and is impressed that there is much therein which supports the position of each of the respective parties. There are, however, some significant factors which are distinguishable and which weigh heavily upon the resolution of this matter.

From the outset, while Carrier is correct in arguing that it has the right to add or to subtract from the duties of a particular position, such right, as Organization properly asserts, must be exercised in accordance with existing rules. Additionally, though Carrier is further correct in arguing that the Board is without authority to reclassify positions and/or order a change in the rate of pay for such positions, the specific claim which is before the Board is not one which seeks such a remedy, but, as Organization has accurately proposed, is one which seeks "...to maintain and/or preserve" an existing rate as provided in Rule 17 of the parties' rules.

Disputes involving Carrier's right to transfer duties from one position to another as well as disputes involving the rate which will be paid when such duties are transferred, have been the basis of numerous rulings by various Boards on this and other Divisions. The citation of each of these cases would have only limited value and is unnecessary since most of these rulings are familiar to the parties. Suffice it to say, however, that as a result of these decisions, two (2) principles have been developed which have been utilized to assess the appropriateness of Carrier's actions in situations similar to this instant dispute. These principles are as follows:

1. it is not essential for an employe to perform all of the duties and responsibilities of a higher rated position to qualify for compensation at the higher rate; neither must the employe assume all the work involved (see Awards 4545, 4669, 6870, 6965, 11981, 12088, 14681, 16461, 22760 and 22831);
2. there must be a substantial fulfillment of the position or work in order to receive a higher rate of pay (see Awards 15629, 16536, 16828, 20478, 22760 and 22831).

In an effort to apply the above stated principles to the facts of this instant case, this Board finds that much of the data which is needed to resolve the dispute is unavailable in the record. Indeed, it appears that there is almost as much that is unknown about Positions No. 23600 and 23640 than that which is known! We know that Position No. 23600 was abolished; that certain of its duties were transferred to Position No. 23640; that a dispute exists as to whether the supervisory duties of Position No. 23600 were eliminated or continue to be performed by Claimant in Position No. 23640; and that Claimant is not receiving the higher rate. On the other hand, however, we do not know which of the specific duties of Position No. 23640 were transferred and which were not; whether these duties were/are substantial; whether any of these duties were common to both positions; and what amount of time is now spent performing the transferred duties in comparison to the amount of time spent performing the original duties of Position No. 23640. Each of these "unknowns" are critical to the resolution of this dispute; and without their availability, such a resolution is impossible. Because of this determination, therefore, and because the burden of proof in these proceedings lies with Claimant (see Awards 22760 and 22831), we must conclude that Claimant has failed to sustain this burden, and as such, we will deny the claim.

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 was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1981.

LABOR MEMBER'S DISSENT  
TO  
AWARD NO. 23176, DOCKET NO. CL-23075  
(Referee Mikrut)

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After recitation of most of the facts and claiming to be impressed by the fact that "there is much therein which supports the position of each of the respective parties," the majority opted to ignore the facts supporting claimant.

Claimant, as clearly shown, worked Position No. 23600 from July 8 through September 5, 1977 at the proper rate i.e., \$59.1816 per day. On September 6, 1977, claimant was instructed to continue performing the duties of Position No. 23600, but at the lower rate of \$55.40 per day.

After agreeing that the Organization was correct in that the claim sought "to maintain and/or preserve" an existing rate as provided in Rule 17 as opposed, for example, to a request for reclassification, the majority then proceeded to ignore the facts of record, set out two (2) principles and, contrary to another supposedly well-known principle, proceeded to attempt to determine whether or not claimant's present position warranted the higher rate. Having come that far, the majority then concluded that it didn't know enough about the position to resolve the dispute and therefore they conveniently denied the claim on an alleged failure of proof!

Besides ignoring the un rebutted facts of record and the rules of the agreement, a third (3rd) principle which would readily have resolved the dispute, with a neutral involved, is that:

"Unchallenged statements of fact are accepted as true."

Claimant, in her initial presentation of her claim, wrote, under Item 3:

"On September 6, 1977, I was verbally told by Chief Clerk C. J. Morgano that I was to continue doing the duties of Position No. 23600 in their entirety (which is an 8 hour a day job)."

Nowhere is that straight forward statement denied. Not in the handling on the property nor in the record before this Board. Rather the Carrier, as did the majority, ignored it for their own reasons.

The award is totally in error and I most vigorously dissent. For the majority and particularly the Referee, I simply wish to quote, in hopes that it might be understood, that said, in part, in early Award No. 13834 of this Division:

"We do not think that the Board should support every decision of management merely because it was an exercise of managerial judgement."

Even given the "fact" that Carrier erred many years ago in establishing the higher rate, this Board should not have now allowed Carrier to "correct" its earlier error in violation of the present rules agreement.

The award is in error and I dissent thereto.

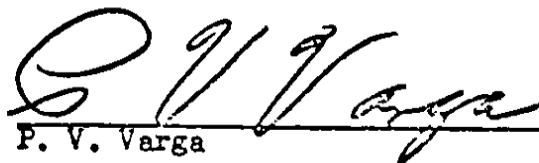


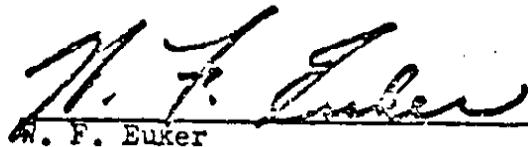
J. C. Fletcher, Labor Member

CARRIER MEMBERS' REPLY TO EMPLOYEES' DISSENT  
TO  
AWARD 23176, DOCKET CL-23075  
(Referee Mikrut)


The fact of record in this case substantiated that the two positions involved were identical with one exception. Position 23600, when it was established, included supervisory duties and therefore was paid a higher rate. Over the years these supervisory duties became non-existent. At the time of this dispute, the record substantiated that both positions were similar. What was assigned to Claimant on September 6, 1977, was nothing more than what she was already assigned. This fact was not rebutted by evidence.

To deny compensation for work neither assigned nor performed is not erroneous. Award 23176 is a proper disposition of the case that was submitted to this Board.

  
P. V. Varga

  
W. F. Euker

  
P. E. LaCasse

  
J. E. Mason

  
J. R. O'Connell