

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

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

LITCHFIELD & MADISON RAILWAY COMPANY

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

(1) Carrier has violated and continues to violate the rules of our agreement by denying to employees on Excepted Positions conditions which should be accorded them under existing rules agreement.

(2) That Carrier be directed by appropriate order, to comply with the provisions of agreement, as to Rates of Pay, Hours of Service, and Working conditions. That the Excepted Position employees be paid on daily rate, instead of a monthly rate, overtime rate for services performed before or after regular assignments, and basic eight (8) hours at overtime rate for Sunday and Holiday service, when such service is consonant with established week day assignments.

EMPLOYES' STATEMENT OF FACTS: During negotiations on July 15, 1942, with management, on other matters concerning employees covered by our agreement, our System Committee was advised by the General Manager that Excepted Position Employees were not covered by our agreement, and accordingly were not being accorded the benefits of agreement, bearing date of October 1, 1938.

The Management's position as then stated being that, excepted positions as listed in agreement, following the General Exceptions, on which these rules will not apply, are integrated with General Exceptions, making the veribage as recorded on page four and five of agreement, one distinct rule without reservations or qualifications.

The Management has been paying all excepted position employees on a monthly basis, instead of daily basis, they have worked excepted position employees more than eight (8) hours, also have worked excepted position employees on Sunday and Holiday without regards to basic eight hour guarantee, and without payment of overtime rate for services performed.

The question of excepted position employees as being covered, or, not covered, within the confines of our present agreement, has been discussed informally during conferences on other matters, with management, during past months, our system committee hoping that the matter could be adjusted on the property, without recourse to this Honorable Board. Our hopes and efforts have been in vain, management recently having refused to consider the employees holding positions listed under caption, "Excepted Positions" as being covered within the scope of our agreement. (See our exhibits A, B, C, and D.)

Employees now filling or promoted to excepted or official positions shall retain all their rights, and continue to accumulate seniority in the district from which promoted.

When excepted or official positions are filled by other than employees covered by these rules, no seniority rights shall be established by such employment."

6. Had the parties intended to exclude the "Excepted Positions" from the rule on seniority only, they would have listed such positions under Rule X, and so stated that they were excluded from that rule. This was not, however, the intention of the parties, as they purposely listed the excepted positions under the general exceptions of Rule 1 stating:

"The following are the General Exceptions on which these rules will not apply."

After clearly exempting these positions from the rules, it will not be implied that they are exempted only from Rule X by the Negative provision following the list of excepted positions. Implications cannot be indulged in contrary to the plain language of the agreement. There would be no purpose in inserting the list of "Excepted Positions" if the parties intended the rules to cover the "Excepted Positions."

7. The exempted positions are of a type commonly designated or classified as executive or managerial, and ordinarily not designated as clerical employees, office workers or laborers, as defined in Rule 1.

8. The interpretation of this agreement now contended for by the CARRIER was placed upon the Agreement by both parties at the time of the execution of the Agreement, October 1, 1938, and has been so acted upon by them until the making of this complaint. The BROTHERHOOD made no contention that the employees holding the exempted positions were within their jurisdiction, or governed by the rules of this Agreement until April, 1942.

9. An interpretation mutually placed upon an Agreement by the parties thereto in the past is the best indication of what was the intention of the parties when they executed the Agreement. The intention of the parties at the time of the execution of the Agreement is the controlling factor.

WHEREFORE, the CARRIER respectfully prays this Board to enter an order interpreting said Agreement to the effect that the employees whose employment is within the "Excepted Positions" under Rule 1 are, while in said positions, not subject to the rules of the Agreement, except as specifically provided in Rule X.

OPINION OF BOARD: The positions here involved are included among the "Excepted Positions" enumerated in Article II, Rule I of the Agreement. The question at issue is whether these positions are excepted from all provisions of the Agreement or only from the seniority provisions. Claimant relies on the last paragraph of Article II which is as follows:

"The seniority provisions of this Agreement will not apply in filling the above positions, and employees occupying such positions shall not be displaced by senior employees whose positions are abolished."

It is contended that by this paragraph, excepting these positions from the seniority provisions, it is implied that the positions are subject to all other provisions of the Agreement. But this contention overlooks the opening sentence of the "Exceptions" under which the excepted positions are listed. This sentence is as follows:

"The following are the general exceptions on which these rules will not apply."

We believe these two provisions, one apparently excepting the positions from the entire agreement and the other providing that seniority provisions of the agreement will not apply to the positions, create an ambiguity in the agreement which requires that consideration be given to extrinsic evidence in order that the intention of the parties might be determined. The record discloses that at the time the parties were negotiating the agreement the question arose as to whether the excepted positions would be subject to the seniority provisions of the Agreement.

The Employees submitted a contract providing that, "The seniority provisions of this Agreement will apply" to the excepted positions. The Carrier refuted this proposal and as a result the word "not" was written into the provision submitted by the Employees. It was in this manner that the present paragraph containing the word "not" found its way into the Agreement.

We think it clear from this evidence that the parties intended, as expressed in the opening sentence of the "Exceptions" part of the Agreement, that the rules would not apply to the excepted positions, and that it was only because of the Employees' attempt to make the positions subject to the seniority provisions of the Agreement that the paragraph upon which they rely found its way into the Agreement.

In view of this evidence we would not be justified in concluding, because this paragraph expressly states the excepted positions are not subject to the seniority provisions of the Agreement, that by implication the positions are subject to all other provisions of the Agreement.

The Agreement involved in Award 2009 was unambiguous, and it was not there sought to bring positions within the terms of the Agreement by implication when those positions had theretofore been specifically excepted from the Agreement.

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 positions are excepted from the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 15th day of November, 1943.