Award No. 5501
Docket No. CLX-5451

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dudley E. Whiting, Referee.

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

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

(a) The Agreement governing hours of service and working conditions between the Railway Express Agency and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes effective October 1, 1940 was violated at the Framingham, Massachusetts Agency in making a runaround on call of F. F. Fitzpatrick, R. F. Delage, W. G. Faulkner and L. C. Trudeau in violation of their seniority rights;

(b) These employes were available for call or overtime service subject to the prior rights of furloughed and/or extra employes;

(c) They shall now be compensated for wage loss sustained February 14, 1944 and subsequent dates under the same or similar circumstances up to the date when the violation of the agreement complained of was corrected; and

(d) Each of the claimants shall be allowed interest at the rate of one-half of one percent per month for all monies due but withheld from them arbitrarily retroactive to and including February 14, 1944.

EMPLOYES' STATEMENT OF FACTS: F. F. Fitzpatrick with a seniority date of February 15, 1928 is the regular occupant of a 6-day position titled Platformman-Driver, Group 15 Position No. 1, hours of assignment 5:00 A. M. to 1:00 P. M. Salary $39.69 basic per week—Sunday day of rest.

R. F. Delage with a seniority date of November 30, 1943 and W. G. Faulkner with a seniority date of December 22, 1941, are the regular occupants of 6-day positions titled Platformman-Driver, Group 15, Positions Nos. 5 and 6 respectively, hours of assignment 7:30 A. M. to 3:20 P. M. Salary $39.69 basic per week—Sunday day of rest.

L. C. Trudeau with a seniority date of September 25, 1937 is the regular occupant of a 6-day position titled Driver-Clerk, Group No. 17, Position No. 1, hours of assignment 7:30 A. M. to 3:20 P. M. Salary $41.45 basic per week—Sunday day of rest.

based upon the assumption that these employes had no seniority rights because they worked for other employers. This, of course, was contrary to the facts, for the extra list employes, as indicated above, derived their seniority rights from Addendum A of the Rules Agreement and there was nothing contained in either document which would vitiate extra list seniority rights because such employes held other employment. The claims as originally filed, therefore, are without merit, and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier contends that the claim filed herein is so altered from the original claims filed on the property that this Board is without jurisdiction to determine it. On August 14, 1944 separate claims for each of the four individuals named in this claim were filed. They are substantially alike and read as follows:

> "Claim of the District Committee of the Brotherhood, agreement rules were violated when:
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> Regular employe F. F. Fitzpatrick, Framingham, Mass., was not notified or called to perform work coming under the scope of the Agreement when he was available and possessed sufficient fitness and ability to perform same and in notifying or calling an individual who is regularly employed by the Warren Telechron Co., Ashland, Mass., and possesses no seniority to perform such work.
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> Claim that F. F. Fitzpatrick shall be notified or called and allowed to perform the extra work in question and he shall now be paid for the extra work performed by an outside person beginning, retroactive 180 days on and from March 14, 1944."

It will be noted that one hundred and eighty days prior to August 14 would be February 14. Such error was corrected in the claim thereon progressed to the Express Board of Adjustment No. 1 in Docket 4602. In fact, the statement of claim in that docket is practically identical to the statement of parts (a), (b) and (c) of the claim in this case, and it does not appear that the Carrier raised this objection to that claim. Moreover, it appears to us that parts (a), (b) and (c) of the claim here are substantially identical to the original claims filed on the property. The recitation of additional facts and contentions to support a claim does not alter the claim. Such contention of the Carrier is without merit.

Part (d) of the claim was added thereto for the first time when the claim was filed with this Board. Not having been handled on the property part (d) of the claim must be denied.

This claim is in essence identical to the claims involved in Express Board of Adjustment No. 1, Decisions E-1481, E-1482 and E-1483, rendered in disputes between the same parties. The Carrier alleges that the utilization of the services of persons holding other employment was here a practice of long standing. Admittedly such was the case prior to the adoption of Addendum A in the 1931 Agreement between the parties. The Organization denies that such was the practice thereafter, until the Carrier started utilizing the services of such persons in December, 1943. The first employment dates of such persons disclosed by the evidence presented by the parties in this case, confirms the claim of the Organization. The party who relies upon past practice must adduce evidence to substantiate its allegations before we may properly find in its favor thereon, particularly when the existence of such practice is challenged. Accordingly, we find that the foregoing decisions of the Express Board of Adjustment No. 1 govern the decision here.

The record shows some difference between the parties in the calculation of the time for which payment should be made. In accordance with the claim herein and the decisions referred to above, Claimants should be compensated on the call or overtime basis for the time involved, during which

Claimants were available for work. Computation thereof is referred to the parties.

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 Carrier violated the Agreement.

AWARD

Parts (a), (b) and (c) of the claim are sustained and part (d) of the claim is denied, in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 3rd day of October, 1951.