

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas C. Begley, 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 Employees, effective October 1, 1940 was violated at Jacksonville, Florida when an excepted employee was required and/or permitted to perform routine Agency work on certain days in December, 1948; and

(b) Employee R. H. Fussell, regularly assigned to the work in question and available for overtime, shall now be compensated for monetary losses sustained as a result of not being used to perform this work on December 2, 1948, between 2:30 P.M. and 9:40 P.M. and subsequent dates, instead of the excepted employee.

EMPLOYEES' STATEMENT OF FACTS: R. H. Fussell, with seniority dating from July 20, 1920, was regularly assigned to position of Foreman, basic rate \$301.30 per month, at Jacksonville, Florida. His position was in a 7-day operation with Monday as day of rest, hours 6:30 A.M. to 2:20 P.M. During his tour of duty he was assigned to supervise and route outbound cars.

On December 2, 1948, and subsequent dates, an excepted employee, Z. E. Ryan, Acting Route Agent, was required and/or permitted to perform the same kind of routine work, 2:30 P.M. to 9:40 P.M. as performed by Foreman Fussell 6:30 A.M. to 2:20 P.M. Prior to the appointment of Ryan to the position of Acting Route Agent, a position excluded from the scope of the Agreement by Rule 1(c), he was the regular assignee of a Messenger position, N.C. & St.L. Trains, Atlanta, Georgia—Nashville, Tennessee Route, Georgia Division, and held no seniority in the Jacksonville, Florida Agency Seniority District.

On January 29, 1949, Foreman R. H. Fussell filed claim with Mr. H. A. McDougal, Terminal Agent, as follows:

"Please accept this my claim at time and one-half for continuous service from 2:20 P.M. to 9:40 P.M. on the following dates:

In the instant case there is no evidence on which to sustain a claim for contract violation, hence no basis for a finding of any penalty whatever. Carrier submits that it has amply demonstrated that there is no merit for the claim on the facts or the rules of the applicable Agreement and that it should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: There are Agreements of record as of August 1, 1937, October 1, 1940 and September 1, 1949.

This claim states that an expected employee was required and/or permitted to perform routine agency work on certain days in December 1948, and that Claimant Fussell who was regularly assigned to work in question and available for overtime, shall be compensated for monetary losses sustained.

The Employees state that effective December 2, 1948 and sixteen subsequent days in December 1948, the Carrier permitted Acting Route Agent Ryan to perform work of supervising the loading of cars at Jacksonville, Florida during the hours 2:30 to 9:40 P.M. That Ryan was holding an expected position and held no seniority in the Jacksonville Florida Agency Seniority District.

The Carrier states that a foreman was used on the 2:30 P.M. to 9:40 P.M. shift performing the same work that the Claimant performed on his 6:30 A.M. to 2:20 P.M. shift. That it has been a long continuing practice for this Carrier each December to select and appoint experienced messengers from Georgia, Alabama and Kentucky Divisions as "Acting Route Agents", the purpose to expedite citrus fruit shipments, because of their intimate knowledge of the routings of the peak citrus fruit traffic to reach northern and western destinations. That there is no evidence presented by the Employees that this practice has been changed or superseded in the several new Agreements negotiated between the parties. That it is its responsibility to decide the amount of supervision needed. Awards 4992 and 5225.

From a careful reading of the docket and the rules of the effective Agreement, it appears that this practice of assigning messengers from other points to perform Acting Route Agency positions at Jacksonville, Florida, has been in existence for a number of years and has not been objected to by the Employees; that no rules of the effective Agreement have been violated by the Carrier.

"The conduct of the parties to a contract is often just as expressive of intention as the written word" was stated in Award 2436. In Award 5747 we stated—"when a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself." Therefore, this claim must be denied.

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

The Carrier did not violate the terms of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 6th day of February, 1953.