

Award No. 6456  
Docket No. CL-6516

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Dudley E. Whiting, Referee

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**PARTIES TO DISPUTE:**

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

**SOUTHERN PACIFIC COMPANY (Pacific Lines)**

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

(a) The Carrier violated the Rules of the Clerks' Agreement when on July 9, 1951, it bulletined Position No. 130-B, Chief Clerk, District Freight Office, San Pedro, as excepted from Rules 27 and 28, Promotion, Assignments and Displacements.

(b) That Carrier shall now be required to rebulletin Position No. 130-B, Chief Clerk, without Rules 27 and 28 exceptions.

**EMPLOYES' STATEMENT OF FACTS:** 1. There is in evidence an Agreement between the Southern Pacific Company (Pacific Lines), (hereinafter referred to as the Carrier) and its Employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, bearing effective date of October 1, 1940, which Agreement (hereinafter referred to as the Agreement) was in effect on the date involved in the instant claim. A copy of the Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

2. Supplement No. 1 to Agreement appears between pages 65 and 78 thereof and provides that certain specific positions are excepted from Promotion, Assignments and Displacements, Rules 27 and 28. At Page 70 of Supplement No. 1 to Agreement, the various District Freight Agencies on the property are listed and the specific positions excepted from Rules 27 and 28 therein agreed to by the parties are as follows:

San Francisco	—	Secretary Chief Rate Clerk Diversion Clerk
Oakland	—	Secretary Chief Rate Clerk
Sacramento	—	Secretary
Los Angeles	—	Secretary
San Pedro	—	Secretary

gation requested under the provisions of Rule 50 of our current agreement with the Carrier, in connection with filling position of Stationmaster at Tucson, Arizona.

(b) Employes W. H. Kline, R. K. Kerr, Sr., and S. L. Freeman be granted investigation under the provisions of Rule 50, in the order of their seniority.

"(c) If investigation held in seniority order under the provisions of Rule 50, develop that any one of the three employes involved, Kline, Kerr, or Freeman, possess sufficient fitness and ability to fill the position of Stationmaster at Tucson, he shall be assigned to the position and reimbursed for any wage loss sustained because of prior non-assignment, retroactive to August 1, 1943."

In this connection, the petitioner has cited no provisions of the current agreement or settlement to support its contention. The carrier asserts that there are no provisions in the current agreement which will support the petitioner's contentions in this dispute. A distinction must necessarily be drawn between the petitioner's aspirations and its contractual rights which flow from the current agreement.

In conclusion, the carrier asserts that its action in establishing the position of Chief Clerk in the District Freight Office at San Pedro was induced by the requirements of the service and was in keeping with the spirit of the current agreement. Carrier has shown that there is no basis for the instant claim and that said claim is not supported by any provision of the current agreement.

Carrier, therefore, requests that this Division deny the claim in this docket in its entirety.

#### CONCLUSION

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced).

**OPINION OF BOARD:** Here there is an agreement between the parties which provides that "these rules shall govern the hours of service and working conditions" of clerical workers. There is attached Addendum No. 1 to the Agreement which excepts certain departments, offices and positions from the scope of the Agreement. The positions so excepted are listed by title, department and location. There is also attached Supplement No. 1 to the Agreement which excepts certain positions "from Promotion, Assignments and Displacements Rules Nos. 27 and 28". The positions excepted are listed by title, department and location.

It appears that the addendum and the supplement listed positions then existing and that similar positions created subsequently at other locations were similarly excepted by letter agreements. Thus the parties have clearly shown that it was not their intention to restrict the exceptions specified by the addendum and the supplement to the positions specified therein, but that they did intend such exceptions to be applicable to other similar positions at other locations which might become necessary to meet the needs of the service.

The agreement, the addendum and the supplement certainly limit the right of the Carrier to act unilaterally in the establishment of excepted positions. Similarly the clearly expressed intention thereof limits the right of the Organization to decline to concur in excepting bona fide similar positions arbitrarily or capriciously. Thus we find that the Carrier is primarily

obligated to seek agreement but if such is not obtained and it can show (1) that the requirements of the service necessitate such a position, (2) that it has exhausted every reasonable possibility of agreement and (3) that the failure to agree is due to arbitrary or capricious action by the Organization, it may establish such an excepted position unilaterally.

In this case the only attempt to obtain agreement was a letter from the Carrier to the General Chairman proposing the partially excepted position involved. When the General Chairman declined to concur by his answering letter, the Carrier established the partially excepted position unilaterally. There was no genuine effort to obtain agreement nor is there any showing that the Organization's declination was arbitrary or capricious and contrary to the clear intention of Supplement No. 1. Consequently part (a) of the claim must be sustained.

To sustain part (b) of the claim would in effect be granting affirmative relief beyond that granted by the awards of this Division. We have generally held that, we will not direct the establishment or reestablishment of positions but will leave the Carrier free to negotiate thereon with the Organization or to adopt its own method of conforming to the agreement.

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

That both parties to this dispute waived oral hearing thereon;

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 violated.

#### AWARD

Part (a) of the claim sustained.

Part (b) of the claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1954.