

Award No. 11776

Docket No. CLX-11570

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, 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 Railway Express Agency, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective September 1, 1949, was violated at the Jacksonville, Florida, Agency through the establishment and maintenance of eight (8) so-called excepted positions and assignment to or permitting the occupants thereof to perform regularly routine agency (classified) work:

(b) The positions shall now be reclassified, bulletined and assigned in conformity with Agreement rules and furloughed Employees W. W. Johnson, G. W. Davenport, F. L. Griffin, Ralph Hicks, Alice Hilley, H. A. Logsdon, T. B. Moore, H. B. Edenfield, J. L. Dixon and L. A. Yeomans in seniority order and number required shall be compensated for salary and wage losses sustained retroactive to and including August 1, 1956; and

(c) Carrier shall be required to make a joint check of the daily payrolls covering the Jacksonville, Florida, Terminal operations during the period in question in order to determine the salary and wage losses sustained by employees named in part (b) of claim.

EMPLOYEES' STATEMENT OF FACTS: There are approximately 300 full opportunity positions established and maintained at the Jacksonville, Florida Agency operations, 17 of which are classified as totally excepted from Agreement coverage. The title of 15 of these positions and names of the occupants thereof are set out in Local Chairman Marvin Allen's letter of protest and claim instituted with General Agent Henry Massey dated July 17, 1956, which is to be identified as Employees' Exhibit A. And the

accordance with the criterion established by the Rule for determining whether the position is excepted from the agreement.

The fact that some evidence indicates that these General Foremen have at time performed work of a character and in a manner which might constitute a violation of Note 1 to Rule 1 does not justify the relief requested in view of the foregoing."

Thus, even though the Board found that the excepted employees were performing routine agency work, it declared that the positions were properly excepted and that a violation of Note 1 to Rule 1 did not justify the claim that the positions be made subject to the Agreement. In the instant dispute, petitioner is again asking the Board to order that excepted positions be classified and again supports its claim by alleging that the excepted employees sometimes performed classified work. In Award 6498, the Board held that such allegations, even if true, did not justify the relief requested. Carrier submits that the Board must hold the same in this dispute.

The evidence in this case is overwhelming that the excepted positions in question, most of which had been in existence for many, many years prior to this claim, were properly excepted from the Agreement because the incumbents exercised supervision through subordinate supervisory employees for a period of not less than six hours a day. The only evidence offered by petitioner to the contrary was that the excepted employees on occasion performed what petitioner's witnesses considered to be classified work. Most of this work was clerical work incidental to the supervisory positions, instruction, inspection and direct supervision which is not exclusively classified work under any circumstances. More important, in no case did petitioner rebut the positive testimony of Carrier's witnesses that they supervised through subordinates for not less than six hours of their tour. Under these circumstances, petitioner has failed to sustain its burden of proof and the claim should therefore be denied.

All evidence and data set forth have been considered by the parties in correspondence and in conference. Carrier reserves the right to supplement this presentation in the form of an answer to petitioner's Ex Parte Submission when it has been furnished with a copy thereof.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier, Railway Express Agency, Inc. carries on an extensive operation at its Jacksonville, Florida Agency where the instant dispute arose. This claim arose when Carrier created eight (8) additional excepted positions under the Clerks' Agreement. The dispute arises from the charge of the Petitioner that Carrier has violated the Agreement between the parties by establishing and maintaining eight (8) so called excepted positions and permitting the occupants thereof to perform regular classified routine agency work which under the Scope Rule of the Agreement is reserved to employees holding seniority rights thereto. Carrier denied the claim on the grounds that the positions established were excepted positions, supervisory work, and that whatever work of a clerical nature that was done was merely incidental and not prohibited under the Scope Rule.

Petitioner contends, further, that repeated requests were made to the Carrier for a joint check for the purpose of substantiating exactly what work the occupants of the disputed positions were performing and that Carrier

refused all requests for joint checks. Carrier in response to such demand contended that it was not required to acquiesce in a joint check under the provisions of the Agreement. Petitioner also demanded a formal hearing under the Agreement for the purpose of developing the facts and determining whether any provision of the Agreement was violated. Petitioner's request was granted, a hearing was subsequently held and after the conclusion of the hearing the Carrier again denied the claim of Petitioner that the Agreement had been violated.

Agreements generally provide who or what positions will be excepted. In the Agreement with which we are here involved Article 1, (c) reads in part:

"Depot Agents, General Foremen and their equals or superiors in official rank who exercise supervision through subordinate supervisory employes for a period of not less than six (6) hours of their normal and customary tour of duty.

"and also see Note 1 to the same rule reading:

"Employees excepted in this Section (c) will neither be required nor permitted to perform regularly routine agency work, except at offices where not to exceed five (5) full-time employees are regularly employed to care for local operations, not including those required to handle transfer at such offices."

Petitioner, though a hearing was held as requested, contends that it was conducted in an unfair and prejudicial manner. The transcript of the hearing covers 121 pages of the Record but from a perusal of it, we cannot say that the manner of conducting it was improper. The occupants of the eight (8) supervisory positions in question were called on to testify as to what their duties were and the Local Chairman was given an opportunity to cross-examine them. Petitioner in turn was permitted to introduce statements of witnesses he wished to call and they were cross-examined by Carrier's representative. During the process of the hearing, the Local Chairman complained frequently that there could not be a satisfactory determination of the matters involved in the dispute unless the Carrier would agree to a joint check.

There is no rule in the Agreement which requires the Carrier to search its records to develop a claim for the employees. In Award 9343 (Begley) we find the following demand in the Statement of Claim: "Carrier shall be required to permit joint check of records to determine violations, if any." In response to this we find in the award the following declaration: "There is no rule in the Agreement that would require Carrier to search its records in order to make a claim or claims for this Organization." The foregoing award has been followed in Award 10435 (Miller) and Award 11156 (McMahon).

Carrier has the privilege of conducting its business in a manner prescribed by good business practices unless it has limited itself by Agreement or otherwise. If Carrier decided that it required the services of additional Supervisory personnel in order to properly conduct its business it had the right to establish additional supervisory positions.

The burden was on the Petitioner to establish that through the creation and maintenance of eight (8) so called excepted positions and assigning to or

permitting the occupants thereof to perform regular routine agency (classified) work the Carrier had violated the Agreement. It was the further obligation of the Petitioner to prove that the exempted Supervisors exercised supervision through supervisory employees for less than six of their customary eight hour duty or that they failed to exercise any Supervision through any of the Supervisory employees as permitted under Rule 1, (c) of the Agreement. From a review of the Record, including the transcript, we cannot hold that the Petitioner has sustained the burden of establishing that these eight (8) excepted Supervisors failed to exercise Supervision through Supervisory employees for less than six hours in violation of the Agreement.

Excepted employees could perform routine classified work provided they did not do so regularly. It cannot be said that these excepted Supervisors did any work that belonged exclusively to the Clerks under the Scope Rule.

For the foregoing reasons, the Claim must be denied.

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 Employee 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1963.