

Award No. 948

Docket No. CL-958

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

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

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that the position of Chief Clerk, created in the office of the General Agent, Freight Department, St. Paul, Minnesota, on June 21, 1937, comes within the scope and operation of the Clerks' Agreement and that same shall be classified, rated, bulletined and assigned in accordance with the rules of the Agreement."

EMPLOYEES' STATEMENT OF FACTS: "On June 21, 1937, the Carrier created a position in the office of the General Agent, Freight Department, St. Paul, Minnesota, with a nominal title of Chief Clerk and filled same by appointment in disregard and violation of the rules of the Clerks' Agreement."

"The Carrier has failed and refused to apply the rules of the Clerks' Agreement to the position in question."

"The duties of the newly created position are entirely clerical and are as follows:

"Taking dictation from the General Agent and two solicitors and transcribing same. Filing correspondence and keeping card index on freight shipments. Answering telephone, tracing cars and other routine office duties."

CARRIER'S STATEMENT OF FACTS: "A position of Chief Clerk to General Agent, Freight Department, St. Paul, was established on June 21, 1937. The position was not bulletined but was filled by selection. The man selected for this position has a seniority date of September 8, 1931, in the St. Paul General Office, Traffic Department. The office of General Agent, Freight Department, St. Paul is considered as a Line office. If the position of Chief Clerk in that office is bulletined under schedule rules it will be open to bid to clerical employees of the Operating Division."

POSITION OF EMPLOYEES: "The position of Chief Clerk to General Agent, Freight Department, is one which properly comes under the scope rule of the agreement between the Northern Pacific Railway and its clerical employees. This rule reads, in part, as follows:

'Rule 1. These rules shall govern the hours of service and working conditions of the following employees, subject to the exceptions noted below:

- (1) Clerks—
 - (a) Clerical workers;
 - (b) Machine operators.

raised this issue the Carrier for the information of the Board offers the following statement of the duties and responsibilities of the chief clerk to the General Agent, Freight Department, St. Paul:

"In the General Agent's office there are two city Freight Agents and the chief clerk. The chief clerk has charge of the office and in the absence of the General Agent, who is out of the office a large portion of the time, conducts the affairs of the office. He has direct contact with shippers in connection with routing, rate matters, service matters, bills of lading, etc. In other words, he is the representative of the Railway who deals with shippers in the absence of the General Agent. In addition to this, he of course performs routine office work. The duties of chief clerks to General Agents may vary, dependent upon the location of the General Agency offices and size of such offices. However, the rule, as before stated, does not distinguish between such positions on the basis of their duties and responsibilities."

There is in evidence an agreement between the parties bearing effective date of August 15, 1922, and the hereinbefore quoted rules are a part thereof.

OPINION OF BOARD: A position of chief clerk to General Agent, Freight Department, St. Paul, Minn. was created June 21, 1937, and was filled by appointment. The claim is that the position comes under the Clerks' agreement and should be classified, rated, bulletined and assigned in accordance with the rules of said agreement.

The dispute turns upon the meaning of Article 1, Rule 1, and one of the exceptions thereto reading:

"Rule 1. These rules shall govern the hours of service and working conditions of the following employees, subject to the exceptions noted below:

(1) Clerks—* * *

These rules shall not apply to * * * the positions indicated under excepted positions.

Excepted Positions

* * *

Line Employees

Chief Clerk and Stenographer to Assistant General Freight and Passenger Agents, District or General Freight and Passenger Agents; and Traveling Freight and Passenger Agent at Yakima."

The record shows that this exception was first agreed to by the parties in February, 1920, and later incorporated into the present agreement, effective Aug. 15, 1922. The record further shows that there were five General Agent offices in existence at the time the rule was negotiated into the agreement and since said date positions of chief clerk and stenographer in these offices have been regarded by carrier as excepted positions and filled by appointment. However, the fact that the positions have been so regarded as excepted and filled by appointment is unimportant if the positions are in fact covered by the Clerks' agreement. Past violations do not change an agreement. See Awards 422 and 456.

When the current agreement was being negotiated carrier included in its request of changes a restatement of the excepted offices mentioned above as follows:

Assistant General Freight Agents
Assistant General Passenger Agents
District Freight and Passenger Agents
General Agents

The proposed change was not agreed to and the parties retained the language of the then existing agreement. Petitioner now contends that the proposal to incorporate the office of "General Agent" in the agreement which was not agreed to is conclusive proof that the office is not among the excepted list. This overlooks the plain language of the agreement. It will be noted the proposal was to list the four offices separately instead of altogether in one sentence. The Board finds no difference in the meaning or effect of the language proposed and that used in the agreement. It merely represents different ways of saying the same thing.

Carrier contends that if there is ambiguity in the language used, the interpretation placed on the rule by the parties since it was first agreed to in 1920 should be resorted to to determine its meaning. The record shows that the parties have always, with one exception (and that case was not progressed to a final conclusion), construed the rule as excepting the positions of chief clerk and stenographer in offices of General Agents from the agreement. This long concurrent interpretation of the agreement by both parties thereto is sufficient to establish the intention of the parties if there was ambiguity in the language used. But a careful analysis of the language proposed and that used leaves little, if any, doubt about the matter. The language used and proposed must both be considered in the light of existing offices at the time, and, when this is done, it becomes clear that chief clerks and stenographers in the offices of General Agents, whether freight or passenger, are excepted from the agreement. The claim will 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

That no violation of the Agreement has been shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of September, 1939.