Award No. 2423
Docket No. CL-2405

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier (Terminal Railroad Association of St. Louis) violated and continues to violate the Agreement existing between the respective parties when

(1) on March 15, 1943, it created the position of Assistant General Foreman in the Baggage and Mail Department and assigned Mr. Frank Hopkins to the position, and

(2) that the said Carrier shall now be required to advertise this position for bid in accordance with the Rules of the existing agreement, and

(3) that the successful applicant be compensated for all wage losses suffered account of the carrier's action in failing to comply with the existing agreement, and

(4) that all employes affected be compensated for wage losses suffered account of the carrier's action.

EMPLOYES' STATEMENT OF FACTS: On the morning of March 15, 1943, the following notice was posted on the bulletin boards in the Baggage and Mail Department:

29-321
March 15, 1943

B-U-L-L-E-T-I-N

All Concerned:

Effective March 16, 1943 Frank Hopkins is appointed Assistant General Foreman with hours of duty from 7:30 A. M. to 6:30 P. M. In that position he will exercise General Supervision during his tour of duty.

C. J. Wehmeyer
General Baggage Agent

* * *

On the afternoon of March 15, 1943, Local Chairman H. A. Ferguson filed written protest with the General Baggage Agent. In his letter of protest the Local Chairman pointed out the rules of the Agreement which were being violated by such appointment as well as the Memorandum of Agreement of March 25, 1938 which Memorandum sets out the agreed upon personal office

The Organization has agreed—it did so twenty years ago—that the position of Asst. General Foreman properly belongs in the "excepted" class. The classification—the character of the work performed—was the controlling factor in arriving at that decision. To say that one man of that classification should be excepted and that another should not is devoid of reason or practical application. The principle is the same. The number of men involved is of no moment. It is the classification that counts.

The Memorandum Agreement of March 25, 1938 was never intended to limit the number of legitimate "excepted" positions, although it contained only the number in existence at the time of execution in accordance with our past practice of listing "excepted" positions. For instance, it will be noted that the position of Chief Clerk is not included under the sub-heading "Chief Engineer" and that the position of Secretary is not included under the sub-heading "Purchasing Agent." Neither the Organization nor anyone else could legitimately argue that such positions, by reason of their very nature, should not be included in the "excepted" class. As it happened, no such positions were in existence at the time the list was agreed to. There had been such positions in the past and when they were in existence they were included on the "excepted" list.

OPINION OF BOARD: The Organization contends that the excepted position of Assistant General Foreman in the Baggage and Mail Department is limited to one employe because (1) the word "foreman" is used in the singular in the supplemental agreement, and (2) that interpretation has been adopted by the Carrier, (a) in applying to the Organization for permission to establish a second such assistant foreman, and in accepting conditions imposed by the Organization in that instance, and (b) in applying to the Organization for permission to establish a third such assistant foreman, and in offering to accept the same conditions as in the prior instance.

Under its first contention the Organization's argument is that the plural would have been used if more than one assistant had been intended. On the other hand the Carrier contends that what the parties were primarily considering was the kind of position or work to be excepted rather than the number of employes, and that if the latter had been intended also, the word "one" would have been used.

Where the meaning of the language of a rule is doubtful obviously the construction should be adopted which best accords with the purpose of the rule.

There can be no doubt that the primary purpose was to agree upon the positions properly to be excepted from the Agreement because of the nature of the position or of the work involved. While for obvious reasons the Organization naturally desires to keep down the number of employes to be excepted from the Agreement, the question whether or not any employe or group of employes should be excepted, depends upon the nature of their work or position rather than upon their number. Certainly it is not to be presumed that the Organization would or should agree to the exception of any position, even if only one employe is involved, unless the nature of the work or position makes the exclusion reasonable, or that in the latter case it would refuse to agree to the exception. This accords not only with justice which is based upon reasonable distinction, but with the spirit of the Agreement, as shown by the provision of Rule 56 that "positions (**not employes**) will be rated." Having manifestly been agreed to upon that basis, it would seem that if the further intent had been to depart from that basis so as to limit the number of employes in that position regardless of changing needs, and especially for assistants' jobs which obviously are often required in the plural, the limit would have been stated definitely by the use of words so showing. Under the circumstances, the use of the singular noun cannot logically be construed to change or extend the limitation to the number of employes excepted, thus changing the fundamental basis upon which the exception was logically founded. The agreement determining that the position itself should for some reason be excepted from the agreement, without any indicated limitation of the Carrier's normal and necessary discretion to de-

termine the number of individuals needed for that particular function from time to time under changing conditions, the Carrier must normally be considered free to exercise that discretion.

The discretion must, of course, be exercised honestly and not as a subterfuge to take employes out of the agreement by improperly giving them an excepted classification. The Organization contends that in spite of the admittedly great increase of traffic and of the number of employes in the mail and baggage department the new assistant should, in its opinion, be employed at other hours than those named for him by the Carrier, and that in any event the Carrier could have had the work performed by a foreman. But no suggestion is made that the occupant of this position is not in fact as well as in name an assistant general foreman, or that he is merely doing the work of a foreman, which is not an excepted position.

The record shows that all foremen and assistant foremen work under the general supervision of the general foreman and his assistants, and the latter position would presumably not have been excepted at all if the same work was properly to be done by a foreman or was interchangeable with his.

We thus come to the question whether a contrary interpretation has been established by the Carrier's act in applying to the Organization before employing the second assistant general foreman and also before employing the third, whose employment is here in question. The Carrier states that the reason for its request to the Organization upon the first occasion was that in that instance it "agreed to some restrictions on our rights because of the fact that we were anticipating a schedule negotiation at the time which contemplated the inclusion of all 'excepted' positions in the Scope Rule of the Agreement"; that it followed the same course in the present case "because we are still in negotiations involving the inclusion of all 'excepted' positions in the agreement"; and that upon the Organization's refusal to agree to employment of the third assistant under the same terms as the second, namely, subject to all but the seniority rule, the superintendent was instructed to employ the third assistant because it was not "intended to surrender any of the company's rights" under the contracts, and the additional assistant was necessary.

The explanation seems logically to indicate that the purpose of the requests was to reach an agreement if possible, and thus to exclude the view that they must necessarily have constituted interpretations or admissions of the meaning of the exclusion agreement. But without reference to that point, no argument has been made, and no awards have been cited or found, to the effect that a generally accepted practice or interpretation binding either upon the Organization or the Carrier is established by one or two instances of the kind.

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 did not violate the terms of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1943.