

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Ernest M. Tipton, 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 Employees, that the Carrier violated the Agreement:

1. When on November 1, 1945, it appointed Mr. L. W. Dodge and Mr. W. F. Barclay to the positions of "Traveling Agents" as "Excepted" positions in the office of the General Agent and Car Accountant, formerly the Superintendent of Car Service and declined the applications of Mr. W. F. Ashcraft, Seniority date July 6, 1910 and Mr. G. W. Hughes, Seniority date September 14, 1923, for these positions. The seniority dates shown are those acquired in the office of the General Agent and Car Accountant, formerly the Superintendent of Car Service. The men who were appointed held no seniority in the department where they were assigned.

2. That Mr. W. F. Ashcraft and Mr. G. W. Hughes be assigned to the positions of Traveling Agents and compensated for all monetary losses suffered since the position were established on November 1, 1945.

EMPLOYEES' STATEMENT OF FACTS: The title of Superintendent of Car Service was abolished November 1, 1945. On that date Mr. P. E. Reineke, who held the title of Superintendent of Car Service was appointed General Agent and Car Accountant and his new duties included the supervision of yard clerks in conjunction with the Superintendent, and we submit as employees' exhibit "A" copy of the bulletin issued by the Carrier announcing this change. On the date of this appointment Mr. L. W. Dodge and Mr. W. F. Barclay were transferred from other departments of the Carrier and were appointed to the newly created positions as "Traveling Agents" in an excepted capacity. The claimants, Mr. Ashcraft and Mr. Hughes, not having had an opportunity to bid for the positions, made formal application to the General Agent and Car Accountant and were advised by the General Agent and Car Accountant that these positions were the subject of negotiations between the General Chairman of the Clerks' organization and the Director of Personnel of the Carrier. Copy of these applications and replies are submitted as Employees' Exhibits "B. C. D. E." We herewith present as Exhibit "F" a letter written by the Director of Personnel to the former General Chairman, Mr. P. A. Dwyer, following a conference held October 17th, setting out the duties of the positions and requesting the consent of the organization in line with Paragraph "E" of the Exceptions under Rule 1 of the agreement, to establish the two positions as "Excepted Positions".

As Employees Exhibit "G" we present letter of October 30, 1945, written by former General Chairman, Mr. P. A. Dwyer, to the Director of Personnel, requesting that specified changes be held in abeyance and in response to that

eral duties of the positions are comparable with those of other excepted positions already agreed to (see Rule 1); and there is no similarity whatever between the duties of the clerks holding seniority in the General Agent and Car Accountant's office and the duties of yard clerks scattered over the entire property, the claim of the organization that they should be open for the exercise of seniority on the part of the employees in the General Agent and Car Accountant's office is without foundation. It is true as the organization outlines in their Statement of Facts, that "the men who were appointed hold no seniority in the department where they were assigned," but conversely, the man in the General Agent and Car Accountant's office making claim for the positions likewise hold no seniority in the seven separate and distinct yard clerks' seniority districts where the new appointees must perform most of their duties.

The supervisory positions in question require men of certain caliber and experience not possessed by all employees, responsible directly to the General Agent and Car Accountant, and there should be no limitation on his right to appoint them. However, it will be noted that we followed the principle enumerated in Rule 1 in making the appointments, in that the incumbents of the positions were chosen from the ranks of employees represented by the Clerks' organization and holding seniority under the Clerks' contract. This is as far as we should be expected to go. It will also be noted from the carrier's Statement of Facts that both men have been in our employ for many years—one since July 17, 1914 and the other since December 8, 1923.

OPINION OF BOARD: On October 17, 1945, a conference was held between the Petitioner and the Carrier in reference to the establishing of two positions known as "Traveling Agents" in the "excepted" class under Rule 1 of the Agreement effective April 1, 1945. The Petitioner asked the Carrier to furnish a detailed description of the duties to be performed on these positions. On October 23, 1945, the Carrier complied with this request and stated:

"Their duties will consist of general supervision of all yard clerks' work pertaining to manifesting of cars; proper application of demurrage charges necessary to the protection of revenue due our Company; daily supervision of manifest errors that will be reported to General Agent's office by Freight Auditor.

At the present time there are numerous cars that are switched and carded in error to various lines and it will be the duty of the Traveling Agents to check with roads and I feel sure that a very large percentage of these errors can be eliminated. This will also afford proper investigation with all lines of cars moving without bills or interchange."

On October 30, 1945, the Petitioner replied by letter that similar positions on trunk lines were not "excepted" positions and declined Carrier's request, and in this letter the Petitioner made the following request:

"We, therefore, request that the contemplated changes as specified in your letter be held in abeyance."

On the same day the Carrier wrote the General Chairman in part as follows:

"The positions that we have in mind are to be established here, not on some trunk line, and whether or not they are of the type that should be 'excepted' should be determined by comparing them with positions at present 'excepted' on this property, all as outlined in Rule 1 of the Agreement of April 1, 1945. They are of the type covered by our present exceptions: as a matter of fact, they will be similar to the positions of Traveling Auditors under the jurisdiction of the Agent and Freight Auditor except as to details."

The Carrier then gave its construction of Rule 1 with reference to "excepted" positions. This letter also stated:

"I trust that the Organization will give the matter further consideration and agree to their inclusion in the 'excepted' list. However, we will add the positions in that category November 1."

The assignment of the present occupants was not made until November 12, 1945.

To sustain its action, the Carrier relies upon our Award Nos. 2423 and 2693. In those disputes the Organization contended that the Carrier had no right under the Agreement then in existence to make additional positions to the "excepted" list. That is to say, the Organization contended by the Agreement then in force that the "excepted" list was limited to those that appeared on the "excepted" list at the time the Agreement was made and new positions could not be properly added thereto.

Awards Nos. 2423 and 2693 did involve the same parties as are in the present dispute, but those awards are of little value in determining this dispute for the reason they were decided under an agreement effective February 1, 1922, while this dispute must be decided under the current agreement which was effective April 1, 1945, and contains a new rule. That is Rule 1 (e), which was added, and it reads in part:

"This agreed upon list of excepted positions or positions excluded from the provisions of certain rules is understood to be flexible and is subject to change at any time by mutual agreement between the parties signatory hereto."

This rule plainly provided that new positions may be added to the "excepted" list and likewise "excepted" positions now on the list may be removed upon one condition, and that is by mutual agreement. There is no procedure provided for creating new "excepted" positions, however badly they may be needed to operate the railroad, if they are not agreed upon.

Under this rule, it appears to us that both parties are required to use utmost good faith to determine if a proposed new "excepted" position should be established or if there is no longer any need for keeping an existing "excepted" position as such. If both parties act in good faith in considering whether a new position to be created should be an "excepted" position and are still unable to agree, then it cannot be established as such; or if both parties act in good faith as to whether there is no longer any need for a position to be classified as an "excepted" position and are unable to agree, then the position cannot be removed from the "excepted" list. To act in good faith both parties must be guided solely by the merits of the position under consideration and look at the question from the duties assigned to the position to determine if it is an "excepted" position. Award 2491.

From the facts stated in this opinion it follows that the Carrier established these "excepted" positions while negotiations were in progress. Petitioner's letter of October 30 asked that the contemplated changes be held in abeyance, yet on the same day the Carrier created them as "excepted" positions, effective November 1st. However, no assignment was made until November 12, showing that there was no immediate necessity for action on the Carrier's part. We conclude that the Carrier under these circumstances did not act in utmost good faith in conducting these negotiations, and, therefore, has no right to contend that they are "excepted" positions. If proper negotiations had been conducted it may be that they should have been so classified. We will not determine that question. But we do hold that under this record the Carrier had no right to establish these positions as "excepted" positions.

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 the carrier violated the Agreement as contended by the Petitioner.

AWARD

Claim (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of January, 1947.