# Award No. 12353
# Docket No. CL-12169

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Louis Yagoda, Referee

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## PARTIES TO DISPUTE:

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

## FLORIDA EAST COAST RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4879) that

1. The Carrier violated Rules 1, 3 and 70, among others, of the January 1, 1938 Agreement in requiring Watchmen-Bus Drivers, with police authority and who are not covered by the Clerks' Agreement, to perform work of Group 2 employes in handling mail, telegrams and waybills between South Jacksonville, Jacksonville Terminal Company and the Jacksonville Freight Agency beginning January 30, 1960, thereby depriving Group 2 employes of work regularly assigned to and performed by them prior to January 30, 1960, and that

2. The Carrier be required to pay a day's pay at the rate of Messenger position, Jacksonville Freight Agency, to the senior furloughed Group 2 employe who had not waived right to work at Jacksonville and who otherwise did not perform compensated service for the Railway beginning January 30, 1960 and continuing each day thereafter during the period the work in question was performed by Watchmen-Bus Drivers.

EMPLOYES' STATEMENT OF FACTS: On January 27, 1960, Carrier's Superintendent issued the following instructions to the Agent at Jacksonville and to the General Yardmaster at Bowden:

"Please be referred to conversation held with you by Assistant Superintendent Parker on January 26 in connection with the captioned subjects.

You were advised that the Revising Clerk now employed in the Bay Street building would be discontinued after completion of work January 31, and all LCL freight bills would be revised at the Revision Bureau located in the General Yardmaster's office at Bowden.

We have instructed all connecting lines to have waybills to accompany carloads of merchandise through to Bowden Yard instead of mailing them by railroad mail. Off line points which are mailing LCL waybills by U. S. mail will in future address these bills to the Bowden Revising Bureau, P. O. Box 5461, Jacksonville, 7.

**OPINION OF BOARD:** On August 28, 1958, the Carrier furloughed one of its two Group (2) messengers stationed at its Bay Street Agency facility (also known as the Jacksonville Freight Agency) in Jacksonville, Florida. Among other duties, the assigned tasks of these employes had been the picking up and carrying of messages, mail and waybills to and from the Bay Street location and other points in the environs.

The claim is made that commencing January 30, 1960, the Carrier acted in violation of the Agreement by having its bus drivers pick up and deliver mail, messages and waybills to various points, in substitution of Group (2) messengers. There is demanded as remedy, the payment of a day's pay to the senior furloughed Group (2) messenger for each day during which said work was performed by bus drivers.

The parties are in disagreement concerning the work which had been done by messengers at various stages of the history of this controversy. There is no disagreement, however, that prior to August 28, 1958, when the two messengers were employed they conveyed messages, mail and waybills to and from various locations, but at the same time a Carrier-owned bus was used to transport the same kind of material between the Bay Street location and Bowden Yard, about 6½ miles away.

From August 28, 1958 to January 30, 1960, the Carrier substituted the use of passenger trains for its busses.

At the same time, one of the two messengers was furloughed. The new procedure continued to utilize the company busses for pick-up and transmission between some points and also the single messenger for other trips.

The record does not clearly show in all respects the extent to which work formerly done by messengers was turned over either to handling by train or by bus. But two pertinent facts are derived by us from the record: (1) some work formerly done by messengers was turned over to other means and (2) there is no record that the employes or their Organization presented any grievance or claim concerning this transfer of work over the 18 months period during which it lasted or protested during this period against the furloughing of one of the two messengers.

Beginning January 30, 1960, the use of railroad cars was discontinued for the conveying of the messages and other written material.

The new method for handling mail, messages and waybills between and among the various points now again primarily utilized the Carrier's busses.

The Petitioner claims that as of January 30, 1960, under these arrangements, work was extracted from the regular assigned duties of the Group (2) messengers and assigned to bus drivers in violation of the Agreement. The claim covers also additional changes in routing and conveying which resulted from the fact that on March 11, 1960, the Carrier discontinued the dispatch and receipt of telegrams by a telegrapher at the Bay Street Agency who was dropped from the staff on that date.

On July 16, 1960, while this claim was being processed, the Carrier discontinued the operation of the Company-owned bus and contracted with a private bus company to make pick-ups and deliveries of written material between certain points previously served by their own busses. Concurrently, the Bay Street messenger was assigned to trips between South Jacksonville and the Bay Street Agency.

The Carrier's position is that (1) the single messenger "performed practically the same work" on and after January 30, 1960 as during the period August 28, 1958 to January 30, 1960 when mail and messages had been dispatched by train, (2) even if work allegedly done before January 30, 1960, had been restored to the messenger classification, the single messenger on duty could have handled it during the compass of his regular eight hour day; therefore, no loss in time and earnings resulted.

It is noted that in the subject Agreement, the Scope Rule is a "general" one. It does no more than list the Group (2) messenger classification as one of the positions included in the Agreement coverage. Nevertheless, the Seniority Rules under Article 4 of the Agreement assure preference to covered employes within their respective jobs to the work available within said jobs. (Note particularly Rule 3(e): "Seniority rights of employes . . . to perform work covered by this agreement will be governed by these rules.")

Our reading of the applicable Agreement Rules and of Board Awards on this subject shows that the determination of whether a particular set of duties has been improperly denied is dependent on a showing that practice and attitude towards said work has been that it has been customarily, continuously and exclusively relegated to the job title for which it is claimed.

In the instant matter, there is no doubt (as indicated by Carrier Bulletins and on-the-job practices) that the general work of transporting messages, mail and waybills has been within the general comprehension of work which Group (2) messengers do. But there is considerable doubt as to whether the particular trips which are here claimed to have been improperly extracted from the messengers enjoyed such commitment in the expectations and practices of the parties as to confer it unalterably on them.

The burden is on the Claimant to show that there was a severing from customary, continuing and well-established duties in the actions occurring here. We do not find that the burden has been convincingly met.

Although the parties are in conflict concerning the facts, we find the record to show two instances which indicate possible changes from messenger use to conveyance of Carrier's papers by other means. One of these is in the making of trips between South Jacksonville and the Bay Street Agency. By the Carrier's own admission, these were assigned to the messenger on July 16, 1960; the question is thereby immediately raised as to whether it had been improperly extracted from his duties during the period of claim. The other is revealed by the instructions issued by Carrier's Superintendent in one of two letters dated January 27, 1960, putting into effect the use of busses. The statement appears therein: "It will no longer be necessary for the messenger at Bay Street to make two calls on Sunday, one of which was for the purpose of handling waybills to be dispatched on Train 75."

In regard to the first of these trips — between South Jacksonville and the Bay Street Agency, the Carrier contends that this had already been extracted as early as August 29, 1958, when the use of trains was instituted. The record does not show the Petitioner to have established otherwise. To have met its burden of proof in support of this aspect of the claim, the Petitioner would have to show the time and performance dimensions of an earlier practice which was customary, continuous and exclusive, or at least evidence of objection to a change from it when it first arose. Taking the record as it stands, we find no such case to have been established.

In regard to the second of these possible changes, we note that the instruction on which the Petitioner relies makes reference to a connection which the messenger is to make with a train. It is improper for us to speculate at this final level of investigation as to whether these surface indications show that the trip or trips referred to arose only from or were dependent on the Carrier's use of trains during the 18 month period of August 29, 1958 to January 30, 1960. We must, however, put upon the Petitioner the necessity for establishing whether or not there was a substantial history of exclusive use of the messenger for such Sunday trips so as to conform the events to the criteria of conventional, customary and exclusive practice. How long, how continuously and how exclusively did the earlier claimed practice take place?

Bearing in mind that the violation charged and the remedies sought are derived rather than specified rights, we need explicit and full answers to the foregoing questions before it can be established that the right existed here, that it was denied and that a remedy is called for. The Petitioner has not supplied the answers and has, therefore, failed to make its case.

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 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 there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1964.