

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Rules of the Clerks' Agreement:

(a) When on September 16, 1948, it denied Mr. William I. O'Leary the right to exercise seniority and displace Position No. 5, Land Agent, in the Office of Lease Agent, San Francisco, California.

(b) That Mr. William I. O'Leary shall be placed on Position No. 5, Land Agent, and reimbursed the difference between the rate of Position No. 5 and the rate of other positions occupied retroactive to September 18, 1948, the date the displacement was made effective.

EMPLOYES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its Employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees bearing effective date of October 1, 1940, which Agreement (hereinafter referred to as the Agreement) was in effect on the dates involved in the instant claim. A copy of the Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

2. On September 13, 1948, Mr. William I. O'Leary (hereinafter referred to as claimant), seniority date September 7, 1929, was occupying regular Assignment No. 10, Lease Clerk, in the Office of Lease Agent, San Francisco, California, with rate of pay \$12.32* per day. On said date the claimant was notified that he was being displaced from his assigned position by senior employee Catherine B. Heintz.

3. On September 15, 1948, the claimant addressed a letter to the Manager, Real Estate Department, under whose supervision the Office of Lease Agent was placed, and advised that he would exercise his prerogative and displace Mr. Richard T. Rundle, Position No. 5, Land Agent, effective September 18, 1948, rate of pay \$380.00 per month.

The Manager would not accept the claimant's displacement on Position No. 5, Land Agent, which displacement was in accordance with Rule 41 (a) of the Agreement, and on September 16, 1948, advised claimant of his action, contending that the position of Land Agent was not within the scope of the Clerks' Agreement.

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CONCLUSION

We respectfully submit that the facts hereinbefore placed in evidence establish beyond doubt that the functions and positions of Land Agent are not now and never have been covered by the current agreement and that the claim in this docket is an obvious attempt on the part of the petitioner to enlarge the Scope Rule of the current agreement and bring within the scope of said agreement positions which the present Scope Rule clearly precludes. We therefore respectfully direct the attention of Division members to the many awards, too numerous to warrant citation, indicating that it is not the function of this Division to change agreements but only to interpret them on the basis of establishing rules of contract law.

The following findings of the court in *Shipley v. Pittsburgh and L. E. R. Co.*, 83 F. Supp. 722, are significant in this connection:

"Assuming that it is a principle of the Board that where a contract is silent on the matter and the claimant does not ask less, the claimant is entitled to an extra day's pay for working outside his craft, no more can an administrative agency such as the National Railroad Adjustment Board rewrite a contract by administrative fiat than a court can by judicial construction."

"Terminal R. Ass'n. of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6, 63 S. Ct. 420, 87 L. Ed. 571, 577." (Underlining added).

Other court decisions holding awards void because their effect would have been to change rules are, *Southern Pacific Co. v. Joint Council Dining Car Emp.*, (1947) 165 F. 2d 26, certiorari denied 333 U.S. 838, 68 S. Ct. 608; *Hunter v. A.T.&S.F. Ry Co.*, 171 F 24 594, certiorari denied (1949) 337 U.S. 916, 69 S. Ct.

We respectfully ask that the claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employee and are made a part of the particular question in dispute.

(Exhibits not reproduced).

OPINION OF BOARD: On September 7, 1948, Claimant O'Leary, seniority date September 7, 1929, occupant of regular Assignment No. 10, Lease Clerk, in the Office of Lease Agent, San Francisco, was displaced by a senior employee. On September 15, Claimant sought to displace the occupant of Position No. 5, Land Agent, but was advised by the Carrier on the following day that it did not consider the position of Land Agent within the scope of the Clerks' Agreement. Under protest, Claimant then displaced the occupant of Position No. 20, Payroll and Billing Clerk, a lower rated position. On September 21, 1948, the Organization demanded that O'Leary be assigned to the position of Land Agent as of September 18 and that he be compensated accordingly. Two days later the Carrier declined the Claim. No further action of record was taken by the Organization until July 11, 1951, when its Division Chairman repeated the demand that O'Leary be assigned as Land Agent and compensated accordingly from September 18, 1948. This demand was again denied on the alleged ground that the position of Land Clerk was not within the scope of the Clerks' Agreement, and for the further reason that the Claim was then barred because it had laid dormant for nearly three years. We shall consider the Carrier's contentions in reverse order.

There is in the record a letter from the Claimant to his Division Chairman under date of May 27, 1952, in which the Claimant details the efforts that were made to obtain a satisfactory adjustment of his demands, between September 18, 1948, and July 11, 1951, when the Division Chairman renewed the Claim. Said letter also discloses that in the interim the Division Chairman who had been handling the Claim had died. Inasmuch as the facts recited in Claimant's letter have not been denied by the Carrier they must be accepted as true. It is apparent that the Carrier was never justified in concluding that the Organization had abandoned the Claim. There is no statute of limitations applicable to the progressing of a claim to this Board and, in our judgment, the facts disclosed by the record are sufficient to absolve the Claimant of the charge of having abandoned the Claim by reason of laches.

Much of the voluminous record before us is devoted to the history of the position presently designated as Land Agent and with respect to which the Claimant sought to exercise his seniority. We do not find it necessary to review this history in detail.

The scope rule of the effective Agreement brings three general classes of employees under the contract and excepts certain other groups. To the Agreement there is also an addendum that removes from its scope certain specifically enumerated positions. At the Office of the Lease Agent at San Francisco only the Chief Clerk and the Secretary are so excepted. The enumeration of these two named exceptions from the operation of the scope rule of the Agreements creates an inference that there are no others.

Carrier says, however, that the position of Land Agent is not a clerical position within the definition found in Rule 2(a) of the Agreement and, for that reason, there was no occasion to exempt it as was done with respect to the positions of Chief Clerk and Secretary.

During 1926-1927 the Organization and the Carrier were parties to an arbitration proceeding that resulted in an award dated April 16, 1927. The award made effective as of January 1, 1927 certain increases in rates of pay. Among the increases so ordered was one (1) cent per hour to be used for the adjustment of inequalities and the balance, if any, to be applied as a horizontal raise. This last mentioned provision required implementation, and to effectuate this phase of the arbitration award the Carrier promulgated a document designated as "Form C-21 (Final)." This document listed Position 5, Office Engineer (Clk) in the Office of Lease Agent at San Francisco with a rate of \$10.22, effective as of January 1, 1927. The title of Position No. 5, Office Engineer (Clk) was changed to that of Land Clerk in 1932 and to Land Agent in 1941, although we do not regard the title ascribed to the position as of controlling importance further than to identify it. See Award No. 3742.

We find from an examination of Award No. 1519, involving the same parties and Agreement, that this Carrier there contended that the position there under consideration had not previously been recognized as coming within the scope of the Clerks' Agreement because it was not included among the positions listed under said Form C-21 (Final). If the absence of that position from Form C-21 (Final) was evidence that the case covered by Award No. 1519 was not under the Agreement, the presence of the position here involved on said Form must be regarded as some evidence that this position is under the Agreement. The Carrier cannot consistently urge that Form C-21 (Final) does not here have probative value.

The Carrier says in its submission: "Claimant is not capable of performing the functions of Land Agent and he could not qualify for that position in any event: had he been qualified Carrier would have given him the position when it became vacant on April 4, 1948 because it is Carrier's policy to advance competent employees within the department."

The Carrier's right to demand qualified employees is fully protected by Rule 27 of the Agreement, and this Award is not to be construed as expressing any opinion whatever as to whether the Claimant is or is not qualified to discharge the duties of Land Agent. It should be noted, however, that if Claimant is in fact so qualified there is no substantial basis for this dispute—the Claimant asserting that he is entitled to the position by reason of his seniority, and the Carrier saying that it is its policy to promote competent employees within the department and that had Claimant been qualified he would have been advanced to Land Agent at the inception of this dispute. The Carrier's admitted policy seems, therefore, to be in complete harmony with the Organization's understanding of the Agreement.

While the evidence supports the Claim we cannot absolve the Organization from all responsibility for its delayed prosecution. It would be unfair to the Carrier to require it to reimburse the Claimant for the difference between wages earned and what would have been earned retroactive to September 18, 1948. Such reimbursement to July 11, 1951, when the Organization formally renewed its demand, would appear to be in order.

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 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 Carrier violated the Agreement.

AWARD

Claim sustained, retroactive to July 11, 1951, in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 15th day of May, 1953.