# Award No. 6671
# Docket No. CL-6760

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Francis J. Robertson, Referee**

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## PARTIES TO DISPUTE:

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

## ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that,

1. The Carrier violated the terms of the currently effective Agreement between the parties, governing the hours of service, rates of pay and working conditions of clerical employes when, on December 4, 1951, it picked up three outsiders, who hold no seniority or other rights under the Clerks' Agreement and who were not otherwise employes of the Carrier in any capacity, off the street and used them for two hours thirty minutes each, at a rate of $1.00 per hour, to reload a part carload of cotton, at Chaffee, Mo., at a time when regularly assigned Group 3 station employes were available and willing to work.

2. Stowmen A. C. Grojean and R. H. Moore and Trucker R. G. Dow now be compensated for two hours thirty minutes each at one and one-half times their regularly established rates account being deprived of overtime work to which their seniority entitled them.

**EMPLOYES' STATEMENT OF FACTS:** Included in the Agent's station force at Chaffee, Mo., at time of this claim, were two positions of Stowman, rate $1.552 per hour, occupied by A. C. Grojean and R. H. Moore and one position of Trucker, rate $1.504 per hour, occupied by R. G. Dow, their regular assignments being 12:01 A. M. to 8:01 A. M. each day, Monday through Friday (except holidays) with Saturday and Sunday as designated rest days.

On Thursday, November 22nd, 1951, Thanksgiving Day, between 1:00 A. M. and 2:00 A. M. a car of cotton, PRR 60428, was discovered on fire and claimants were called on their holiday to unload the burning bales of cotton upon the ground and were properly paid for such work.

On Tuesday, December 4, 1951, one of the regular work days of claimants, it was determined that no fire still existed in the bales of cotton, and carrier instructed that they be reloaded into car PRR 60428. The Agent contracted with a local garage for a garage derrick and driver at rate of $2.25 per hour, and picked up three outsiders, who held no seniority or other rights under the Clerks' Agreement nor any other employe status with the carrier, at rate of $1.00 per hour, to reload the cotton which had been dumped upon the ground on November 22, 1951. The work of reloading was

Following the enactment of the Fair Labor Standards Act, June 25, 1938, and the subsequent increase in the minimum hourly wage to 36c effective March 1, 1941, this Carrier, in order to insure compliance with the Act, converted its method of paying extra help for cotton loading from a per bale to an hourly rate basis. The hourly rate paid to the individuals for services rendered at Chaffee, which resulted in this claim, was in excess of the minimum hourly rate prescribed in the Fair Labor Standards Act.

The record establishes the existence of a practice of hiring extra help to load cotton antedating the first agreement with the Brotherhood dated July 1, 1922 and the same practice was in existence when the agreement was revised August 1, 1923, September 15, 1924, November 11, 1925, and when the current agreement was entered into effective January 1, 1946. The existence of this practice is also confirmed in Award 191 of this Division which antedates the date of the current agreement by almost ten years.

The employes' claim rests upon the scope rule of the agreement, and to resolve the issue here presented, this Division is called upon, as in Award 5404, to determine whether under the facts and circumstances and the established practice the scope rule of the controlling agreement (which this Division in Award 4827 said does not describe the work incorporated within it) gives to employes covered thereby rights to the performance of the disputed work.

In Award 5404 it was held there is a line of decisions basically founded upon the fundamental and universally recognized legal principle that where a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself, and that such decisions in no sense conflict with the oft repeated principles that a long existing practice does not change the clear terms of an agreement and repeated violations thereof, even though acquiesced in, do not preclude enforcement of its expressed terms.

The record also establishes, with one exception, not here material, that the language in current Rule 1, paragraph (3), has remained unchanged from July 1, 1922 to the present date, and during that time three revisions and a new agreement were negotiated. Thus, it cannot be said there has been a change in the express terms of the rule which changed or abrogated the existing practice, and having definitely established by an Award of this Division (Award 191) that the practice antedates not only the current agreement but also the first agreement with the Brotherhood July 1, 1922, the employes are not in position to disclaim knowledge of the working conditions when the current agreement was executed (Award 5404). The work of loading cotton is work that may be performed by agents and other station employes but it is work that also may be performed by others such as extra help or individual contractors. This work is not encompassed within the scope rule of the current Clerks' Agreement nor is it work that is traditionally and customarily performed by clerical employes to the exclusion of all other classes or crafts or non-employes.

The agreement rules, facts and circumstances, do not justify a sustaining award and this Division is requested to so find.

All data used in support of the Carrier's position have been made available to the employes and are made a part of the question in dispute.

(Exhibits not reproduced.)

**OPINION OF BOARD:** There is some difference in the facts in this docket and those involved in Award 6670, but the same principle is applicable. Here the Carrier called claimants out on a holiday to assist in unloading cotton when a fire was discovered in the car. When it was decided to reload the same cotton after the fire had been extinguished the Carrier called upon outside labor to perform the work. Although the commodity handled was not

"company" material so long as the handling was for Carrier's account, that factor affords no basis for distinguishing this case from the prior one. For the reasons stated therein, we find that this claim should be sustained.

**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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 15th day of June, 1954.