**Award No. 12941**

**Docket No. CL-13797**

## 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

## SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5243) that:

(a) Carrier violated the Rules of the Clerks' Agreement at Roseville, California, Stores Department, when, on April 27, 1960, and through the period of May 3 to May 15, 1960, it required and/or permitted employes not covered by the Clerks' Agreement to go into the Stores Department and pick up and deliver materials to point of use; and

(b) Carrier shall now be required to allow Mr. P. H. Hockabout, Lift Truck Operator, Roseville Stores Department, two hours' additional compensation at time and one-half rate April 27, 1960; and eight hours' additional compensation at time and one-half rate each date May 3 to May 15, 1960.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including revisions, (hereinafter referred to as the Agreement) between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Employes) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

1. Carrier maintains a local store at Roseville, California, which is located approximately eighteen rail miles from its General Stores at Sacramento, California.

This dispute involves the propriety of Mechanical Department employes at Roseville going into the Roseville Store when no Stores Department employes are on duty for the purpose of obtaining and delivering repaired diesel cylinder

is the function of good management to arrange the work, within the limitations of the Collective Agreement in the interest of efficiency and economy." **(Emphasis ours)**

Carrier is not restricted by any provision of the current agreement in the assignment of work giving rise to this claim.

Insofar as the claim for overtime rate is concerned, if there were any basis for claim submitted, which Carrier denies, nevertheless the contractual right to perform work is not the equivalent of work performed. That principle is well established by a long line of awards of this Division, some of the latest being 6019, 6562, 6750, 6873, 6854, 6875, 6974, 6978, 6998, 7030, 7062, 7094, 7100, 7105, 7110, 7130, 7222, 7239, 7242, 7288, 7293, 7316, 8114, 8115, 8531, 8533, 8534, 8568, 8766, 8771, 8776, 9748 and 9749.

## CONCLUSION

Carrier has conclusively shown herein the claim is unwarranted and totally lacking in merit, and if not dismissed for lack of proper notice to other interested parties, Carrier asks that it be denied.

**OPINION OF BOARD:** It is undisputed that on April 27, 1960, the basement section of the Carrier's diesel store at Roseville, California, was opened at some time during the 12:00 A. M. to 8:00 A. M. night shift by employes other than those coming under the Clerks' Agreement, who proceeded to move certain diesel parts from stores to point of use at diesel ramps by means of a hand-operated "Jack Stacker". As the Carrier describes the situation, without contradiction by Petitioner, the section was opened by a Caboose Supplyman who was then assisted by four Mechanical Department employes in moving the items.

Certain other background facts are revealed by the record. Prior to November 16th, 1959, some five months before the occurrences which are the subject of the claim, there existed at this location the position of "Store Attendant", hours twelve midnight to 8:00 A. M., whose duties were to dispense materials and supplies to the Mechanical Department. On November 16th, the Caboose Supplyman was notified that the Store Attendant's job at the diesel store was abolished and that effective that date, "In cases of necessity, the Mechanical Department people will call on you to open diesel store to get them material." The Caboose Supplyman was further notified that he would be paid the Store Attendant's rate for any time he was called upon to issue material from diesel store. The record shows further that transporting of parts from the Roseville store to the diesel ramp is the regularly assigned work of Store Department employes during hours other than the 12:00 midnight to 8:00 A. M. Shift.

It is thus clear that the work in issue has been customarily assigned to employes of the Store Department classification coming under the Clerks' Agreement and is still so assigned on other shifts. A question presents itself as to whether the instituting of a new arrangement some five months before the instant claim arose, did not create a newer history of practices which broke the chain of customary and traditional exclusivity which we require to support work encroachment claims under the general type of Scope Rules such as this Agreement contains. In the absence of any showing that there was conscious acquiescence in and acceptance of the transfer of work from Store Attendant to Caboose Supplyman during the period from November 16, 1959

to April 27th, 1960, we are of the opinion that there has not been a waiver by practice.

We have held in the past that unprotested past violations do not necessarily in themselves nullify claims. Awards 3444, 5834, and 6308. In the claim before us, a long past history of assignments and the surrounding practices (i.e., on other shifts) outweigh the relatively short period during which the new arrangement was put into effect on one shift. The latter does not destroy the showing of substantial past practice of exclusive assignment, especially where there is no showing of condonation of the change by Claimants.

**CLAIM FOR MAY 3rd to MAY 15th, 1960**

On May 4th, 1960, six days after the occurrence of the incident on April 27th, the wire screen that separated the store section from the shop area was removed and between May 3rd and May 15th, 1960, Mechanical Department employes moved material from store to point of use when needed, on the 12:00 midnight to 8:00 A. M. shift. The Petitioner alleges that this constituted a continuing violation from day to day such as that which occurred on April 27th, and demands payment for Claimant at the rate of time and one-half for eight hours for each day between May 3rd and May 15th, 1960.

On May 15th, 1960 the Carrier established a position of Lift Truck Operator (a position coming under the current Agreement) on the 4:00 P. M. to 12:00 midnight shift, and all heavy items of material or pool items of material were placed in point of use along the ramps by this operator, thus according to the Carrier, avoiding need for further request for emergency material on the 12:00 midnight to 8:00 A. M. shift. The events subsequent to May 15th, 1960 are not embraced by the instant claim and are not before us.

As to the arrangements of May 3rd to May 15th, 1960, insofar as Mechanical employes were substituted for the movements previously accomplished by Store employes, we detect no difference between such actions and the violation which occurred on April 27th. The claim for compensation for full shifts at the time and one-half rate is not however, supported by a specific showing of the extent to which such work actually was usurped on the midnight to 8:00 A. M. shift. The record suggests the likelihood that picking up of material during those hours occurred only when unusually heavy requirements on the earlier shifts exhausted the diesel ramp stock, and it is unlikely that materials were picked up continuously throughout an eight hour period on each of those days. With respect therefore to this portion of Petitioner's claim, we will allow the claim only to the extent that it can be ascertained from the Carrier's records there was actual moving of material from store to point of use, payment at the time and one-half rate to be made for two hours for each of such incidents.

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 Agreement was violated to the extent stated in Opinion.

AWARD

Claim is sustained for two hours additional compensation at time and one-half rate for the violation which occurred on April 27th, 1960; claim is sustained for additional compensation at time and one-half for two hours for each violation which occurred during the period between May 3rd to May 15th, 1960.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1964