

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, 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 (GL-5679) that:

(a) The Southern Pacific Company violated the Agreement between the parties at Yuma, Arizona, when on February 5, 1962 and subsequent dates it transferred the work of delivering engine-men's pay checks from assignments of Roster 2 employees to Roster 3 employees; and,

(b) The Southern Pacific Company shall now be required to allow Mr. R. R. Magdaleno eight (8) hours' additional compensation at the applicable rate of Engine Crew Dispatcher Position No. 390 February 5, 6, 10, March 6, 7, 9; and to allow Mr. R. R. Magdaleno and/or his successors eight (8) hours' additional compensation at the applicable rate of Position No. 390 April 22, 23, 24, 25, 1962 and each date thereafter that said violation continues; and,

(c) The Southern Pacific Company shall now be required to allow Mr. F. G. Magdaleno eight (8) hours' additional compensation at the applicable rate of Engine Crew Dispatcher Position No. 391 February 21, 22, 23, 26, 27, March 6, 7, 8, 9, 12, 21, 22, 23, 26, 27; and to allow Mr. F. G. Magdaleno and/or his successors eight (8) hours' additional compensation at the applicable rate of Position No. 391 April 21, 22, 23, 24, 25, 1962, and each date thereafter that said violation continues.

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 employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Employees) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

CARRIER'S STATEMENT OF FACTS:

1. There is in evidence an agreement (hereinafter called the current agreement) between the Carrier and its employees represented by the Petitioner, bearing an effective date of October 1, 1940 (reprinted May 2, 1955, including revisions), a copy of which is on file with the Board, and is hereby made a part of this submission.

2. Carrier maintains a crew dispatchers' office at Yuma for the purpose of constructing and calling crews at that point. The crew dispatcher on duty may from time to time have to absent himself from said office to call members of engine crews who live within the prescribed calling limits for service or deadhead.

Prior to February 5, 1962, engine crew dispatcher at Yuma, as a matter of accommodation, delivered pay checks to enginemen at that point. However, as a result of complaints received from enginemen's organizations that their respective members were required to wait for delivery of their pay checks when engine crew dispatcher was out of his office, commencing February 5, 1962, Carrier placed responsibility for delivery of pay checks for enginemen with the Assistant Chief Clerk in the Yuma Yard Office, who was already delivering pay checks to trainmen and switchmen at Yuma.

Engine Crew Dispatchers at Yuma are carried on Seniority Roster 2, Assistant Chief Yard Clerk at that point is carried on Seniority Roster 3.

The instant claims arose when the delivery of enginemen's pay checks was given to a Roster 3 employee.

Copies of correspondence exchanged in connection with this claim beginning with initial submission by Petitioner's Division Chairman and continuing through the normal course of handling in chronological order are attached as Carrier's Exhibit A, Sheets 1 through 8, involving claim of R. R. Magdaleno, February 5, 6, 10, March 6, 7 and 9, 1962; Carrier's Exhibit B, Sheets 1 through 8, involving claim of R. R. Magdaleno and/or his successors, April 22 through 25, inclusive, 1962, and subsequent dates; Carrier's Exhibit C, Sheets 1 through 7, involving claim of F. G. Magdaleno, February 21, 22, 23, 26 and 27, March 6, 7, 8, 9, 12, 21, 22, 23, 26 and 27, 1962; and Carrier's Exhibit D, Sheets 1 through 6, involving claim of F. G. Magdaleno and/or his successors, April 21 through April 25, inclusive, 1962, and subsequent dates.

When Carrier's Assistant Manager of Personnel denied the claims to Petitioner's General Chairman (see Sheet 8 of Carrier's Exhibits A and B, Sheet 7 of Carrier's Exhibit C, and Sheet 6 of Carrier's Exhibit D), he stated that the work of the character here involved is not work of a particular class of employee, and while it may be assigned to clerical employees, claim was not supported by Rule 30 of the current agreement or by any other provision thereof.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to December of 1941, all pay checks at Yuma, Arizona, were distributed by the Cashier at the Freight Station on the daylight shift and by the ticket clerks at the passenger station on

the other two shifts. These employees held seniority rights on Roster 3 of the Tucson Division.

In the latter part of December, 1941, the Carrier, unilaterally, and without any objection of Brotherhood, assigned the issuing of pay checks of engine forces to Engine Crew Dispatchers, whose seniority rights are on Roster 2, Tucson, Arizona. This included the issuing checks to engineers, firemen, hostlers, roundhouse laborers and clerks under the jurisdiction of the Motive Power and Mechanical Department. Train Crew Dispatchers on Roster 3 continued to deliver pay checks to the train and yard employees.

On February 5, 1962, the Carrier without consulting the Brotherhood, unilaterally transferred and assigned the issuing of pay checks from Roster 2 to Roster 3. It is not denied that from December, 1941 to February, 1962 the work transferred was exclusively performed by Roster 2 employees at Yuma, Arizona.

After the transfer of the duty of delivering the pay checks from Roster 2 to Roster 3, Claimants filed their respective claims. The Brotherhood does not assert that the Claimants were furloughed or lost any working time by reason of the loss of the duties performed by them prior to the transfer nor was there any evidence that any new employees were engaged to perform such duties in Roster 3. The Claimants continued to work their same number of hours and days as before. The only difference was that their duties were diminished.

The Brotherhood contends that the unilateral transfer of duties, performed by the Claimants on Roster 2 since December of 1941, violated the seniority rights of the Claimants; that the Agreement between the parties gave no such right to the Carrier; that the duties involved in these claims have since December, 1941 at Yuma been exclusively performed by the Claimants, coming within the working agreement between the parties was and is now being violated.

The Carrier, when this matter was handled on the property, denied the claims on the ground that "the work of the character here involved is not work of a particular class of employee and, while it may be assigned to clerical employees, there is no provision of Clerks' Agreement which contemplates said work to be exclusively assigned to employees of a particular roster or to the Claimant's position. Claim is not supported by Rule 30, or any other provision of the Clerks' Agreement, and is denied."

It is evident from the record that the Carrier did not dispute the fact that at Yuma, Arizona, the Claimants were assigned and did perform exclusively, since December of 1941, the duties that were transferred from their Roster in February of 1962.

The Carrier also takes the position that the work performed in this dispute is not reserved exclusively to the employees of Roster 2 and that such work or duties is performed by members of other crafts at various other points on the property and/or system of the Carrier, and, therefore, Carrier had the right to assign such duties to others.

We have held by numerous awards that the fact that the work is assigned to one craft for a long period of time at a station is not of controlling importance when it appears that such and/or similar work was

assigned to different crafts at different points within the Agreement on the question of whether or not the work involved was the exclusive work of Clerks on the Carrier's property and/or system.

In the present case, the Carrier never denied on the property that the work was performed by the Claimants for upwards of 25 years under the Agreement. In its rebuttal submission the Carrier attempts to submit certain evidence in an effort to establish that this type of work is being done by members of other crafts outside the Clerks' Agreement on its property and/or system.

We cannot consider such evidence, as it was raised neither timely nor properly.

The Brotherhood does not claim a violation of the Scope Rule in asserting its rights. It claims a violation of seniority rights under Rules 30 and 31 of the Agreement.

The effective date of the Agreement before us is October 1, 1940; that from on and after that date and until December of 1941 the work was performed by employees under Roster 3; that in December of 1941 until February 5, 1962, the work was performed by employees of Roster 2; that the parties to this dispute, since December of 1941, conducted negotiations with reference to the original agreement on several occasions and did not abrogate nor change the rule with reference to the duties and/or work performed by the Claimants in this dispute.

In Award 10585 (Russell) we held:

"When 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."

(See also Award 5747 (Wenke); Award 11790 (Seff))

In Award 12390 (Stack) we held:

"Where employees of one craft for thirty years have exclusively performed the work at one facility of a Carrier and the employees' job description in the effective Agreement does not specifically include this work does the Carrier violate the Agreement in assigning this work to outside forces?"

We hold that it does.

* * * * *

However a practice once established continues in force until specifically abrogated by the parties, and where a contract is negotiated and existing practices are not rescinded or altered by its terms, such practices are enforceable to the same extent as the provisions of the contract itself, as though written therein.

The meaning of a contract is arrived at by ascertaining the action of the parties in implementing it."

Under all the facts and circumstances of this dispute, we must conclude that it was mutually understood and agreed between the Carrier and

the Brotherhood that at least at this station, Yuma, Arizona, this work of delivering payroll checks to engineers, firemen, hostlers, roundhouse laborers and clerks under the jurisdiction of the Motive Power and Mechanical Department was reserved and performed exclusively to clerical employes, such as Claimants, who hold rights on Seniority Roster No. 2 of the Agreement. It is intended, however, that the conclusion reached in this dispute is applicable only to the facts and circumstances of this particular case, and is not to be considered in any respect as a precedent award.

See Awards 6284 (Wenke); 14084 (Hall); 11835 (Engelstein); 12414 (Coburn).

This finding is not in conflict with those awards cited and relied on by the Carrier. In those awards, there was a defense of system wide practice. Such a defense is lacking in this dispute.

The claims will be sustained, but only to the extent of the actual losses sustained by the named Claimants. (See Award 12414 (Coburn).)

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 the Agreement was violated.

AWARD

Claims sustained to extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14532, DOCKET CL-15364 (Referee Perelson)

This award correctly notes, "... The Claimants continued to work their same number of hours and days as before. The only difference was that their duties were diminished." In these circumstances, the Claimants sustained no actual losses, and by limiting recovery to "actual losses sustained" by named claimants the award properly denies any monetary recovery.

The award is in error, however, in finding that there was any violation of the Agreement in this case. The record does not support the finding that ". . . it was mutually understood and agreed between the Carrier and the Brotherhood that at least at this station, Yuma, Arizona, this work . . . was reserved and performed exclusively to clerical employees, . . . on Seniority Roster No. 2 . . ." The Employees' evidence fell far short of proving such a mutual understanding, and the authorities cited in the award, when correctly applied to the evidence of record, actually require a finding that no such understanding has been reached. For this reason, we dissent.

G. L. Naylor
R. A. DeRossett
H. K. Hagerman
C. H. Manoogian
W. M. Roberts

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS'
DISSENT TO AWARD 14532, DOCKET CL-15364**

Contrary to the Dissenters' Opinion, Award 14532, Docket CL-15364 is quite correct, and the remedy contemplates that Claimants be paid to the extent of the work lost.

The "actual losses sustained" when work one is entitled to perform is given to others is measurable in hours of work lost, and such damages are capable of being made mathematically certain. Most assuredly, mere assertions in a dissent cannot establish the "actual losses sustained." Award 12414 was cited in Award 14532 as support for, or in reference to, the language that "The claims will be sustained, but only to the extent of the actual losses sustained by the named Claimants.", and under that Award, and very similar circumstances, the named Claimants received a total of approximately \$3,000.00 which obviously represented payment for the work wrongfully removed from them. Moreover, that settlement was arrived at between the parties on that property and there is no indication in the dissent thereto that the Carrier Members disagreed with the damages or attempted to dictate a monetary settlement of that claim as does the Dissenters here.

There is no error in Award 14532 and the dissent does nothing to detract from the soundness thereof but instead merely repeats arguments that were considered before the Award was adopted.

D. E. Watkins
Labor Member
8-8-66