

Award No. 10326
Docket No. CL-8639

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas C. Begley, 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:

(a) Carrier violated and continues to violate the Clerks' Agreement at Los Angeles, California, when it requires or permits persons not covered thereunder to perform work of transporting crews; and

(b) Mr. John A. Diaz, Assistant Crew Dispatcher, be allowed a two-hour call at pro rata each date October 8, 9, November 3, 4, 6, 8, 11, 12, 13, 19, 23, 1954; two two-hour calls at pro rata rate each date November 16, 20, 24; three two-hour calls at pro rata rate November 17, and eight hours' compensation at time and one-half rate each date November 1, 7, 15, 21 and 22, 1954, and for a "call" each subsequent date that he is not called and used for work of transporting crews when outsiders, having no seniority rights under the Agreement are used therefor.

EMPLOYEES' STATEMENT OF FACTS:

1. There is in full force and effect an agreement between the Southern Pacific Company (Pacific Lines) hereinafter referred to as the Carrier, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, hereinafter referred to as the Employees, governing rates of pay, wages, hours of service and other conditions of employment, for employees of the Carrier covered thereunder. This Agreement, effective October 1, 1940, includes revisions to May 2, 1955, copy of which is on file with the Board, and by reference thereto is hereby made a part of this submission.

2. Immediately prior to the cause of this dispute the following involved positions were in existence:

Position	Assigned Hours	Rest Days
Train Crew Caller No. 96	4:00 PM to 12:00 MN	Mon & Tues
Train Crew Caller No. 188	12:00 MN to 8:00 AM	Tues & Wed

During handling on the property, petitioner did not refer to any agreement provision which would prohibit the handling afforded in this case and the claim in this docket is merely an attempt on the part of petitioner to secure through an award of this Board a new agreement over and above that agreed to by the parties. The burden to come forward with and to sustain that which it claims and intends to prove rests solely on the petitioner. It is obvious that the petitioner has failed to sustain the burden in this case.

Inasmuch as the petitioner's position cannot be sustained by any rule or agreement, the carrier respectfully submits that within the meaning of the Railway Labor Act, the instant claim involves request for change in agreement, which is beyond the purview of this Board.

It is a well-established principle that it is not the function of this Board to modify an existing rule or supply a new rule where none exists. To accept petitioner's position in this docket would be tantamount to writing into the agreement a provision which does not appear therein and was never intended by the parties.

CONCLUSION

The carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support and requests that said claim be denied.

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

The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

OPINION OF BOARD: The Organization states that the clerical employees in the Los Angeles Terminal Area were used exclusively to perform the duties of transporting crews in that area since January 6, 1920. This was so prior to the effective date of the first Clerks' Agreement on the property which was February 1, 1922 and subsequent to the effective date of the current Agreement which was dated October 1, 1940 this work belonged under the scope and operation of the Clerks' Agreement. The only exception was in cases involving availability, when other members of Crew Dispatching Force, i.e., Chief Crew Dispatchers and Assistant Crew Dispatchers were used therefor.

The employees further state that on September 17, 1954 and currently with the establishment of a Tube System, Caller Position No. 103 was abolished effective September 20, 1954, Caller Positions Nos. 96 and 188 were abolished effective September 21, 1954, and the duties thereof assigned to the incumbents of Motor Vehicle Messenger Positions Nos. 18, 35, 51, 55, 56 and 57. Caller Position No. 104 remained in effect; however, the assigned hours were changed 12:00 Noon to 8:00 P. M. on September 21, 1954. Relief Position No. 57 was abolished on September 21, 1954. On October 8, 1954, without negotiation and agreement, as provided in Rule 69 of the Agreement, the work of transporting crews in the Los Angeles Terminal Area was removed

from the scope and operation thereof and assigned to the Yellow Cab Company, whose employees are not covered by the Clerks' Agreement. These infractions occurred on that and other subsequent dates specifically listed in the Employees Statement of Claim.

The Carrier states that during the entire life of the current Agreement, which became effective on October 1, 1940 and for years prior thereto, the services of the Yellow Cab Company have been utilized in transporting crews in the Los Angeles Area. Various other public facilities, as well as employees not covered by the Clerks' Agreement, have also been so utilized. Clerks have not exclusively performed the work of transporting crews in the Los Angeles Area.

The question to be decided in this claim is whether or not the work of transporting crews comes under the Clerks' Agreement.

The awards of this Board dealing with the Scope Rules of Agreements have followed a rather consistent pattern for some considerable time. As to Scope Rules similar to the rule here involved, we have held that while they do not purport to describe the work encompassed, they merely set forth the classes of positions to which they are applicable, yet the traditional and customary work assigned to those positions constitutes work falling within the Scope of the Agreement, and it is a violation of the Agreement for the Carrier to permit persons not covered by the Agreement to perform such work. The proposition of removal of work from the scope of an agreement and turning it over to non-employees has been considered by this Board and other boards handling disputes growing out of the application of working agreements.

Award No. 5700, this Division states:

"It is a fundamental rule that work of a class covered by an agreement belongs to those for whose benefit the contract was made. A delegation of such work to others not covered by the agreement is in violation of the agreement, except as the parties in their agreement may otherwise provide." (See Awards 180, 323, 351, 360, 521, 1647, 2686, 4513 and 4934).

The Clerks claim that they have exclusively performed the work of transporting crews in the Los Angeles Terminal Area. The Carrier states that the Yellow Cab Company has been used for many years and therefore this work is not the exclusive work of the Clerks. The Clerks have offered statements and an exhibit, showing when the Yellow Cab Company performed this work after October 8, 1954. The statements of the employees submitted to this Board by the Clerks and the Exhibits showing when the work was performed by the Yellow Cab Company after October 8, 1954 were not submitted to the Carrier on the property. The Carrier has submitted statements by supervisory employees and exhibits showing when the Yellow Cab Company was used prior to October 8, 1954, but these statements and exhibits were not shown to the Organization on the property. The Carrier, however, admits that clerical forces did perform the work of transporting employees in the Los Angeles Terminal, and that the Yellow Cabs were also used to transport employees in the Los Angeles Terminal. The Organization admits that Yellow Cabs were used infrequently, and only when clerks were not available or during emergencies.

The Organization has shown that on two different occasions when the Organization complained of employees not within the Scope of their agree-

ment performed the work of transporting employes in the Los Angeles Terminal Area and performing other clerical work, that the Carrier, upon receiving claims on April 23, 1945 and on September 13, 1947, discontinued this practice and established a Crew Caller Position to handle this clerical work, except in an emergency.

From an analysis of the Record, the work of transporting employes in the Los Angeles Terminal Area has been performed by clerical employes. It is apparent that some of this work was also performed by the Yellow Cab Company prior to October 8, 1954. The record reveals that the Yellow Cab Company has performed most, if not all, of the work of transporting employes in the Los Angeles Terminal Area since October 8, 1954. Due to the fact that the Record is not complete as to when the Yellow Cab Company was used to perform this work prior to October 8, 1954, this claim is remanded back to the parties to make a joint check as to when the Yellow Cab Company was used. Should a joint check show that the Yellow Cab Company was used only when a clerk was not available or in an emergency, it follows that this work comes within the scope of the Clerks' Agreement and cannot be farmed out to outside employes. Should the joint check show that this work was performed by the Yellow Cab Company only when a clerk was not available and during an emergency prior to October 8, 1954, the claim of John A. Diaz will be allowed for the dates set forth in the claim and for each subsequent date that he is not called and used for the work when the Yellow Cab Company was or is used, at the pro rata rate for all dates of the claim.

Should the parties fail to reconcile their differences, the dispute may be referred back to the Board by either party for final adjudication.

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 Claim be remanded in accordance with Opinion.

AWARD

Claim remanded, as outlined in concluding two paragraphs of the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1962.