Award No. 12939
Docket No. CL-12191

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, 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-4799) that:

(a) Carrier violated and continues to violate the Rules of the Clerks' Agreement at Roseville, California, Store Department, when on April 21, 1958, and on dates thereafter it required and/or permitted employes, not covered by the Agreement, to pick up and deliver material and supplies; and,

(b) That all pick up and delivery work herein involved removed from the Scope and Operation of the Clerks' Agreement be restored thereto; and

(c) That Mr. Wayne Ellis shall be compensated at the rate of time and one-half of his assigned position of Truck Driver to the extent of fifteen (15) hours and fifteen (15) minutes account not called and used to perform the involved work as follows:

April 21, 1958 – 4 hours	May 5, 1958 – 2 hours
April 24, 1958 – 2 hours	May 7, 1958 – 2 hours
May 2, 1958 – 2 hours	Jan. 20, 1959 – 3 hours 15 minutes

EMPLOYES' STATEMENT OF FACTS:

1. There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including revisions, 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, which Agreement (hereinafter referred to as the Agreement) is on file with this Board and by reference thereto is hereby made a part of this dispute.

has been in effect for decades, during which time the agreement has been repeatedly revised, yet nothing has been added to the agreement to abrogate the practice.

Furthermore, Carrier has never agreed to limit the use of any type of vehicle to the Stores Department.

Since the utilization of trucks involved by using departments was entirely proper and is not limited in any respect by the Clerks' Agreement, the claim is clearly without basis, and should be denied. In this connection Carrier quotes below from the Opinion in Third Division Award 4978, which denied claim of the Employes in a similar situation:

> "There is nothing in the submissions to show that trucks operated in the Maintenance and Equipment Departments are limited to special uses or purposes; and, it may be presumed that the trucks used in these departments are capable of performing general hauling. Such requirements would include the hauling of material and supplies from whatever place they may be obtained to wherever the supplies or materials may be required by the respective departments. If the Stores Department truck has the exclusive right to transport supplies from wherever they may be held in reserve by the Carrier to the place where needed, then there would be little need for the general purpose trucks of the other departments.
>
> Under the circumstances where several departments are operating their own trucks, there is bound to be some overlapping in work. It appears that trucks were operated by the Maintenance of Way and Maintenance of Equipment Departments when the Clerks' Agreement was adopted. Thus, when the parties entered into an agreement restricting auto truck operators under the Clerks' Agreement to 'Stores Department', they did not intend that such truck operators would have the exclusive right to the work of transporting supplies from a reserve stock to the place where they were to be used by another department. It follows, therefore, that the claimant did not have the exclusive right to the work described in this case."

Carrier's position is fully supported by the reasoning employed in Award 4978 and also Awards 1149, 3695, 7308, 7310 and 8308 of this Division.

This claim is obviously invalid in its entirety; but, even if it were valid, the penalty allowable to claimant each date would be at the straight time rate, and not at the overtime rate claimed — see Awards 7094, 7222, 7239, 7242 and 7316, to cite a few.

CONCLUSION

The claim in this docket is entirely lacking in either merit or agreement support and Carrier requests that it be dismissed, and if not dismissed, it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The occurrences on which the Petitioner bases its claim of violation of the Agreement are not disputed by the Carrier. They involve eight instances on six different dates in April and May, 1958,

and January, 1959, wherein employes at Roseville, California, other than those covered by the Clerks' Agreement were used in the transportation of various materials.

Petitioner claims compensation at the rate of time and one-half of assigned position of the truck driver's rate for employe Wayne Ellis, who was off duty at the times when the involved work was performed.

Petitioner relies essentially on Rule 1 of the effective and controlling Agreement. This is a general Scope Rule, merely naming the job titles which are the subject of the terms and conditions of the Agreement. Our well established position on claims of usurpation of work by employes outside the Agreement, when there is a general Scope Rule such as the one here, is that rights to exclusive assignment to work must be established by proof of history, custom and tradition. The statements of the parties are in direct conflict on this subject. We must, then, determine whether the record shows the Petitioner to have affirmatively established a case in this regard which survives the refutations put forward by the Carrier.

An examination of the copies of correspondence between the parties on the property concerning this dispute shows that all of such correspondence does not appear therein. Carrier includes as its exhibits seven letters from Petitioner and six from Carrier.

Of those letters, copies of which are included among Carrier's exhibits (Exhibit A), two communications from Petitioner Organization make a reference to past practices. One is in a letter dated October 11, 1958, bearing the File No. SA-5820, which is in response to Carrier's denial of claim concerning the pickup of certain brake shoes and other material. This letter quotes the Carrier's statement:

> "In view of the fact that there is no stores delivery service from Roseville to Planehaven and such materials have been transported by the Mechanical Department in the past, no basis or merit exists for the claim presented, and it is denied."

Petitioner responds in its letter of October 21, 1958:

> "We cannot accept either of the reasons advanced by Mr. Henton in support of his decision. The Stores Department has a twice daily van service from Roseville to Sacramento and the involved materials could reasonably be handled through such service. Respecting past practice, the National Railroad Adjustment Board has consistently held that unless agreed to by the parties, it means nothing, no matter how long continued."

Thus, on the specific subject of past practices in making these assignments, Petitioner does not here make a claim of customary exclusivity, but denies instead that it is relevant.

In another letter from Petitioner, included in Employers' Exhibits A (File No. SA-6008), dated June 8, 1959, Petitioner again responds to Carrier's denial of a claim dealing with the transportation of oxygen and acetylene on January 20th. It quotes Carrier as having written:

> ". . . It has not been the practice in the past for Roseville truck to deliver material to any location east of Roseville. . . ."

Petitioner responds in its June 8th letter:

"We cannot accept Mr. Mount's statement as either correct or persuasive. We contend that Roseville Stores Department truck has been used in the past for such deliveries. In fact, on April 5th, 1958, Roseville Store Truck delivered fifteen cotton matresses to Colfax, the very location here involved. See your file 013.3 respecting claim filed in behalf of Section Stockman John F. Rhoads of Sacramento General Stores.

Moreover, employes covered by the Agreement, for many years in the past have delivered materials to points east of Roseville via supply train; therefore, contrary to Mr. Mount's assertion, it has been the practice in the past for Roseville Store Department employes to deliver materials to points east of Roseville, either by truck or supply train."

The foregoing constitutes an assertion concerning past assignments to covered employes. No contention appears that such work was limited solely to said employes to the exclusion of others.

In its submission to this Board, Petitioning Organization states very emphatically:

"* * * This work by custom, tradition, and practice has been exclusively assigned and performed by Store Department employes for years prior to the inception of the first collective bargaining agreement between the parties effective February 1, 1922. The same work continued under the Agreement for a period of over thirty-five (35) years until Carrier began seeking ways and means to circumvent the agreement application to the detriment of the employes covered thereby."

As support thereof, there are submitted separate signed statements by three employes. One of these employes, described as the "oldest available Store Department employe at Roseville" states that Store Department employes used the first and only company truck when it was put into use in 1924 for hauling baggage, mail, express and material to and from stations and at freight house, as well as for small chores around the shop. It further states that about 1930 or 1931 when a larger truck was received, the work was expanded to haul materials from one place to another for all departments in Roseville, and then later to haul material and men on the road to repair bad order cars. The statement goes on to declare that in 1941 a larger truck was received with more work of this kind then being done.

The signer does not make any statement as to whether others were or were not doing the same work with other vehicles or in any other manner.

Copy of another employe's statement is exhibited which states that there was a single truck in use in the Store Department "which did the hauling for the Store Department and all other departments requiring truck service, including jobs on the road. It was the only truck in service at this terminal."

On December 17, 1941, another truck was put in use at the Roseville Store and the two trucks continued to service all departments.

This statement does not attest to circumstances or knowledge of circumstances concerning whether, in addition to this truck servicing all departments, any or all of these departments were at the same time serviced by other employes doing transporting work.

The third statement is from an employe who started in Rosseville in 1933 and refers to the same single truck which was in operation at that time. The signer lists a wide variety of materials and points between which these various materials were delivered. Again there is no information concerning whether or not this was exclusively the work of said employe or employes of this classification.

Petitioner contends that the record in Docket No. CL-2442, Award No. 2586, reveals that the Carrier acknowledged that the Store Department employes were exclusively the employes engaged in pickup and delivery service of the kind claimed here. However, we do not find that the quotation cited makes any such statement or admission. It does reveal that trucks operated by Store Department truck drivers at Roseville were used for both service on the city streets and in and around the store. It tells us nothing concerning whether the same type of work was simultaneously carried on by other employes.

The same characterization may be made of information submitted by Petitioner in its Submission Statement concerning the widening of categories within the Store Department force as time went on, and the recognition thereof by inclusion of more titles and rates in the Agreement.

Petitioner further states in its Submission that "sometime during the latter part of 1953, or subsequent thereto . . ." the craft organization, such as Maintenance and Way, Signal, Water Service and others, negotiated with Carrier the rates of pay covering the classification of truck driver, but that these crafts "did not infringe upon our fundamental right to continue to deliver material and supplies to the point of use and render service in connection therewith as heretofore required."

Petitioner goes on to charge that during or about 1958 Carrier commenced reducing the Store Department force at Roseville and gradually required and/or permitted other craft employes to perform the pickup and delivery service "which to this time had been exclusively performed by employes rated and classified under the Agreement." Figures are then submitted to show that the number of Store Department force employes had fallen by more than fifty percent between January, 1953 and March, 1960.

Carrier, on the other hand, contends in its Submission that the various departments throughout the Carrier System have for many years had company trucks assigned to them for transporting men, materials, tools and supplies as need and such truck is identified as in use at the Car Department at Roseville, and "in addition thereto there are numerous circumstances wherein employes' privately owned vehicles are used in connection with the performance of work incidental to the department in which the employe is engaged. These practices have been in effect for many years before the last revision of the current agreement." As the Carrier describes the kind of work done by other than those under the Clerks' Agreement, it is in the using of departmental or private trucks which are incidental to the regular duties of these employes, and are not those explicitly assigned conventionally and exclusively to Stores Department employes.

In its reply statement to Petitioner's Submission, Carrier includes statements from four employes supporting past practice in the work claimed as having been performed by other than employes coming under the Clerks' Agreement. One of these statements is by an employe who identifies himself as a foreman of the Track Sub-Department of the Maintenance of Way De-

partment, Roseville, for the past eight years where he specifically describes the handling of deliveries, such as picking up drums of Diesel fuel oil at the Store at Roseville and transporting it to the west end of the Heavy Rip Track at Roseville to use for burning leaves along the right of way, as that which has "generally been done by Maintenance of Way employes in the past." He also makes the general statement that "it has been my personal observation that the general practice has always been for Maintenance of Way employes to pick up materials and supplies at the Store and deliver them to the specific point where used in Maintenance of Way work."

The second of these statements is by a Water Service Mechanic and Foreman employed at Roseville for about nine years prior to the incidents in issue. He addresses himself to "hauling materials in Roseville Yard, such as" the picking up and transporting of waste oil for use in the Maintenance of Way Department stating, "I have personally observed that Maintenance of Way employes have handled such deliveries of materials for use in the Maintenance of Way Department."

The third of these letters lists five of the transportation incidents here in question, and states, concerning thereof:

> "I have been employed in Roseville in the capacity of Master Car Repairer since April 1, 1956, and during all that period of time it has been the general practice for the Mechanical Department employes to handle the types of supply deliveries mentioned above."

This employe's employment history extends over a period of approximately two years up to the time of the occurrence of these incidents.

The last of these letters addresses itself to four of the incidents included in the claim and states:

> "I have been employed at Roseville in the capacity of Car Foreman since January 6, 1947, and during all that period of time it has been the general practice for the Mechanical Department employes, rather than Stores Department employes to handle the types of supply deliveries mentioned above."

In this Reply Submission, Carrier undertakes to contradict directly Petitioner's statement that the work in issue had been exclusively employed by Stores Department employes for more than thirty-five years, and supported by Petitioner by the further statement that the various other departments had no motorized equipment at the time of the first agreement with the Clerks, nor "for years thereafter."

Carrier states in this regard that the Agreement covering Maintenance of Way employes which was in effect prior to the first Agreement with Petitioner's organization, covered Truck Departments. Although it is admitted that the Stores Department "was one of the first departments to which trucks were assigned following the adoption of such vehicles by business in general", it is contended that other departments as well were also assigned trucks as needed to carry on their various duties, such trucks taking the place of hand-operated vehicles to move equipment and material incidental to the normal activities of these various departments.

Carrier cites the fact that it had approximately 653 trucks assigned to its Maintenance of Way, Water Service, and other departments associated with its Engineering, Maintenance of Way and Structures, 147 trucks as-

signed to its Mechanical Department, 236 trucks assigned to its Signal Department, and 63 trucks assigned to the Stores Department at about the time of these occurrences.

Carrier claims that it "has always" utilized trucks in other departments without complaint from Petitioner until the instant controversy.

Carrier's general position is that while drivers coming under the Clerks' Agreement are used and have been used to deliver material to all departments, they do not and have never delivered all material to all departments and thereafter to point of usage. It is contended that as far back as 1921, the Maintenance of Way Agreement contained a work classification of "Teamsters and Auto Truck Drivers handling material for the Maintenance of Way Department." It goes on to say, "This Agreement antedated the first Clerks' Agreement on this property, and Maintenance of Way Department has had truck drivers to handle materials and supplies used by that Department continuously throughout the life of all Clerks' Agreements." It is further asserted that use of trucks by Signal Department employes started approximately in 1923 and has continued since and that the first Agreement dated October 16th, 1937, with the System Federation Union, AFL, covering Mechanical Department employes, included "Motor Truck Operators" in the Scope Rule covering already existing utilization of Truck Drivers in the Mechanical Department, as well as continuous utilization of such employes since the Agreement was negotiated.

CONCLUSIONS

Examination in detail of the respective contentions and intentions and support thereof submitted by the parties reveals that Petitioner has failed to establish by necessary proof the condition which is requisite for its claim to prevail — that the claimed work has been exclusively assigned as a customary matter of traditional and historical standing to the class of employes exemplified by the Claimant.

Petitioner's statements and proofs show only that work of this type has been performed by its constituents employed here, but not that they were the only ones doing such work. It is obvious that exclusivity of assignment cannot be said to exist when the same work is done by others as well.

The record suggests that many years ago employes coming under the Clerks' Agreement were the only ones handling all or substantially all of Stores transportation work with the only motor vehicle in use being manned by them for such purposes, but Petitioner has not established that since that time and for a substantial period prior to the dates of these occurrences other employes, as part of jobs included in the Scope Rules of other Agreements, have not also performed work of the nature challenged in these claims.

The claim must, therefore, fall on the basis of failure to show a history of exclusivity of assignment.

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 not violated.

AWARD

Claim denied.

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.