

Award No. 13637
Docket No. CL-12585

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, 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-4905) that:

(a) Carrier violated the Rules of the Clerks' Agreement at Roseville, California, when on July 8, 1959, it failed to call and use Elio Andreotti and Q. D. Swanson to transfer contents of PFE Car 5242; and,

(b) That Elio Andreotti and Q. D. Swanson shall each be compensated five (5) hours at the rate of time and one-half of their assigned positions under the provisions of Rule 21.

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 employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, 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.

2. On Wednesday, July 8, 1959, PFE Car 5242 loaded with 400 crates of carrots and 300 crates of cauliflower arrived Roseville, California, in bad order condition. The car was spotted at the Freight Station Platform and contents transferred to PFE Car 63639 between the hours from 8:00 A. M. to 1:00 P. M. Carrier called and used various clerical employees to perform the work, as follows:

Name	Seniority Date	Status
A. J. Falappino	July 15, 1943	Assigned
M. De Vries	July 18, 1936	Assigned
R. M. Reed	June 27, 1959	Unassigned
R. D. Brokaw	(newly hired July 8, 1959)	

cable to the instant case and does not in any way support the claim in this docket.

It should also be understood in connection with this claim that the extra unassigned employees who were used were available under all applicable agreement provisions in that they had not performed five days or forty hours service in their work weeks, they had not performed prior service on the same calendar day, and they were eligible to work pursuant to Memorandum of Agreement of February 1, 1937, appearing at pages 92 to 95 of current Clerks' Agreement (copy attached as Exhibit "I"). Furthermore, the use of extra unassigned employees for extra work as here involved is in keeping with the practice throughout the life of the current agreement and all prior agreements, and no agreement provision requires the use of regular employees on overtime in lieu of available extra unassigned employees.

It is noted that overtime rate of pay is claimed in this case. Even if there were some basis for the claim submitted, which carrier denies, 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 6750 (this property), 6873, 6875, 6974, 6978, 6998, 7030, 7062, 7094, 7100, 7105, 7110, 7138, 7222, 7239, 7242, 7288, 7293, and 7216.

CONCLUSION

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

(Exhibits not reproduced.)

OPINION OF BOARD: On Wednesday, July 8, 1959, PFE Car 5242 containing crates of vegetables arrived at Roseville, California in bad order condition. Carrier assigned four employees to transfer the contents to another car. Two of them were regularly assigned employees with seniority who were paid on an overtime basis. The other two were extra unassigned employees who were paid straight time. To complete the task, these men worked a period of five hours each between the hours 8:00 A. M. to 1:00 P.M.

Messrs. Elio Andreotti and Q. D. Swanson claim that they are entitled to compensation for five hours of work at time and one-half rate of pay because Carrier failed to assign them to transfer the contents of PFE Car 5242 to PFE Car 63639. They argue that this work belongs to regularly assigned employees and has been traditionally performed by them before and after regular hours and on rest days. Under these conditions they have been compensated at the overtime rate provided for in Rule 21.

In its denial, Carrier asserts that the work involved is not reserved exclusively to employees covered by the Clerks' Agreement. It also maintains that the work is not part of any assignment and hence, Rule 20 (e) is applicable, for this regulation provides that work not part of any assignment may be performed by an available extra or unassigned employee. Carrier further urges that it acted properly according to the well established practice in meeting such emergencies as the transfer of a bad order car when it gave the first call in seniority order to extra unassigned employees to fill extra trucker positions.

This dispute turns on whether the work in question is part of a regular assignment or whether the work is irregularly performed and not part of any assignment.

The record reveals that for many years regularly assigned employees have been called upon to perform work of transferring contents of bad order cars before and after their regular hours and on their rest days. When so used, Carrier compensated them under Rule 21. The work involved in the instant case, we find, is part of the regular assignment and not work of an irregular nature. Since Rule 20 (e) is applicable only when the work is on a day not part of any assignment, it is not pertinent to this dispute.

Carrier justifies the use of two extra unassigned employees on the basis of its right to employ extra truckers, which positions were established to meet such situations as that in the instant case. However, it does not give evidence that it established these new positions of extra truckers in accordance with Rule 34 (b). Furthermore, Carrier did not contend that it had established extra trucker positions when the dispute was handled on the property.

Carrier had an obligation to assign the work to the two Claimants, regular employees who were available and qualified. They are accordingly entitled to compensation under the rate established by Rule 21.

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 Employees involved in this dispute are respectively Carrier and Employees 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

The Agreement of the parties was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1965.