

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21011
Docket Number DC-20760

Dana E. Eischen, Referee,

PARTIES TO DISPUTE:

{ Joint Council of Dining Car Employees
Local 370
{ Robert W. Blanchette, Richard C. Bond, and
John H. McArthur, Trustees of the Property
{ of Penn Central Transportation Company,
{ Debtor

STATEMENT OF CLAIM:(a) Claim of the Joint Council of Dining Car Employees Local #370 on the property of the Penn Central Transportation Company for and behalf of employees Madaline Wyleczuk, John M. McGrath, and Eugene Rivera et al, who were denied their working rights on Trains #160 and #161 when the Penn Central Transportation Company on April 29, 1973 unilaterally put on there trains in the Buffet Coach and the Parlor Lounge Car8 employees of another Union (Food Workers). There trains were operated within the limits of the New Haven Region and the other Union (Food Workers) did not have a collective bargaining agreement covering this territory. In so doing the Penn Central Transportation Company not only violated the collective bargaining agreement of Local 370, but did this to circumvent in particular Rule 6 paragraph 3 of the Agreement dated October 1st, 1953, which was and is still the recognized collective bargaining agreement, including all the supplemental amendments.

(b) That the Penn Central Transportation Company make these employees whole for all wages, vacation time and any fringe benefits that may have been impaired by this action on the part of the Carrier. That the Carrier be admonished to adhere to the Collective Bargaining Agreement as well as Section 6 of the Railway Labor Act.

OPINION OF BOARD: Analysis of the instant record indicates that, although voluminous, it is substantively anemic and factually sparse. Although the claim references three named claimants and includes the comprehensive designation et al, there is no support in the record for a finding that other than the three, who were formerly employed on Trains 160 and 163 (New York to Boston and return) are covered by the claim.

As nearly as we can determine from this record the following are the operative facts: Carrier until April 29, 1973 provided buffet coach and parlor lounge service on Trains 160 (New York to Boston) and 163 (Boston to New York). Claimants, based in New York, worked these runs and made one round trip each day. Effective April 29, 1973 Carrier discontinued food service on those trains and initiated such service on Trains 179 and 176 (Washington to Boston and return). Claimants had an opportunity to bid on

these new positions but elected not to do so. Claimant John M. McGrath, who is the Organization's General Chairman, protested these changes before they were initiated and filed the instant claim after the changes, alleging violation of various schedule agreements as well as the Merger Protective Agreement. The claim was handled through various stages on the property without resolution and was appealed to our Board.

While the matter was pending before our Board, and before the record was closed by receipt of ex parte and reply submission, the General Chairman and Carrier officials renewed discussions on the property on July 1, 3 and 9, 1974. Carrier maintains that an oral agreement to settle the claim was reached during these discussions and commemorated in a letter of July 19, 1974 from its Manager-Personnel & Labor Relations to General Chairman McGrath. That letter reads as follows:

'This has reference to the discussions we had on July 1, 3 and 9, 1974, in connection with the claim of the Joint Council of Dining Car Employees, Local 370, on behalf of employees Madeline Wyleczuk, John M. McGrath and Eugene Rivera, which was submitted to the National Railroad Adjustment Board.

As a result of our discussion, and on the basis of discussions previously had during the handling of this case on the property, it is understood that the only claimants involved are Madeline Wyleczuk and John M. McGrath. In addition, it was agreed that you would arrange to have the case withdrawn from the Board. In consideration thereof, and without prejudice to our position, you agreed to accept a total of \$250.00 for each claimant, i.e., Madeline Wyleczuk and John M. McGrath, as complete and final settlement of this case.

Arrangements have been made to compensate the employees accordingly."

Curler avered that following the alleged settlement, General Chairman McGrath advised that the International Secretary-Treasurer of the Union refused to honor the settlement and refused to withdraw the claim from the Board. Carrier therefore urges that the claim be dismissed as moot in that it was settled on the property and cites substantial authority in the Awards of the various Divisions for this position. Curler also contended strenuously in its ex parte submission that the claim was untimely appealed to our Board. Finally, Carrier's advocate raised a jurisdictional issue in oral argument in this case, to wit: that the claim is premised upon alleged violations of the Merger Protective Agreement which contains its own exclusive dispute settlement machinery and, accordingly the claim is outside the scope of this Board's jurisdiction.

The Petitioner Organization on behalf of the employees contends that the General Chairman had no authority to settle the claim or to arrange for the withdrawal of the claim from the Third Division. Additionally, the Petitioner denies that McGrath did in fact agree to the settlement referenced in the July 19, 1974 letter and contends that raw is a deliberate attempt fraudulently to mislead the mud. Alternatively, Petitioner asserts that the question of settlement is "a new issue that was not part of the handling of the claim on the property and cannot be considered by the Board." Petitioner also denies that the claim was not timely processed to our Board, citing numerous Awards to support its method of computing the time requirements for filing rather than that used by Carrier.

We have reviewed carefully the petition for dismissal of the Carrier, the numerous grounds cited therefor and the reply arguments of the Petitioner with respect to each. We shall treat these matters seriatim as they were raised on the record. With respect to the timeliness question, we understand that this defense was abandoned in oral argument and we need not address it further herein. The motion for dismissal based on settlement and mootness, as well as the jurisdictional objection flowing from allegation of Merger Protective Agreement violation stand on a different footing and may not be ignored.

Our review of the record convinces us that there was a settlement between General Chairman McGrath and Carrier's Manager-Personnel & Labor Relations on or about July 9, 1974. Petitioner correctly asserts that the letter of July 19, 1974 is not a jointly executed Letter of Agreement and may not itself be considered the settlement agreement of the parties. But there is no Agreement provision to which our attention has been drawn which requires a written settlement agreement, albeit such a practice would seem advisable to avoid situations such as the one presented herein. Nonetheless, it is well understood that oral settlement agreements, premised upon the informed good faith and integrity of the respective representatives, are commonplace in the handling of grievances. Even more basic is the accepted principle of labor relations that settlements in grievance handling by duly authorized representatives are final and binding on both parties and, absent express contractual requirement, are not subject to ratification or rejection by either party away from the table. To hold otherwise would be to undermine the integrity and validity of the lower level grievance procedures on the property which are designed to facilitate and encourage prompt, equitable and binding resolution of claims short of arbitration.

While there is no signed settlement agreement on the record, and the July 19, 1974 letter is not itself that agreement, the letter may be taken as some evidence that such a settlement was had. We are also impressed by the lack in the record of any disavowal whatsoever from General Chairman McGrath that the settlement was made. Rather, all such protestations come from the International Secretary-Treasurer who avers

that McGrath did not have authority to settle and, therefore, could not make an agreement to settle the instant claim. We do not concur. The General Chairman on the property customarily and ordinarily processes claims, as did McGrath in this case. There can be no doubt that he is cloaked with actual and apparent authority to settle such claims in a final and binding fashion. Moreover, the evidence of record taken as a whole, even though circumstantial and not direct, compels a conclusion that he did settle this claim on the property after it was submitted to this Board. The Agreement is silent on the point but it cannot be gainsaid that the policy of Section 3, First of the Railway Labor Act is to encourage and promote such settlements which might be made at any time short of an Award disposing of the claim.

In consideration of the entire record and for the reasons set forth hereinabove we conclude that the claim is moot. An agreement to settle has been made on the property and, accordingly, the claim shall be dismissed and the parties directed to implement the settlement agreement reached on the property.

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 Employee 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 an agreement to settle was reached on the property.

A W A R D

The claim is dismissed and the parties are directed to implement the settlement agreement reached on the property.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1976.

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760

Award 2101.1 is not **only erroneous** but **lacks a basis in reason or fact**, violate6 well-established **principles** of this Board a6 to when a record **becomes** closed prohibiting the **submission** of new **issues**, new evidence or exhibits, twist.8 the fact8 to **lend support** to a **decision** not based on **reason or fact**, exceeds the jurisdiction **granted** to this **Board** by **making an** Agreement for the parties **and** endorses fraud.

pocket DC-20760 should not have presented the problems evident **in** most **cases** wherein facts and circumstances are presented by each **party** and are often contested **and/or** disputed. The Carrier **in** Docket DC-20760 **did** not present any facts so **there was** no conflict with the facts presented by the **Employees**. The **record** shows that **Carrier** asked for, and was granted, the **maximum** mount **overtime** allowed to reply to the **Employees' Ex Parte** Submission, **including** the **facts** detailed therein. But after asking for **all of this time** to **make** reply, the Carrier wrote the **Executive Secretary** stating "The Carrier doe6 not desire to file a reply".

The Carrier did not deal **with** the **merits** of the claim in its **Ex Parte** Submission **merely** making a petition to the Board to dismiss the claim on two **procedural** grounds. The **Employees' Ex Parte** Submission **addressed itself** to the merit6 of the **claim** making material factual statements. The Carrier **advised** the Third Division that it did not desire to **file a** reply to the **Employees' Ex Parte** Submission leaving the material factual **statements** contained therein **concerning** the merits of the claim **uncontroverted** and undenied. The following **Awards** involving such situation6 were twice presented to Referee Eischen for consideration at **two** panel argument **sessions** regarding Docket DC-20760 before **Award 21011** was adopted:

Award 19927 (Lieberman) -

"In addition to the foregoing, Petitioner **did** not **elect** to **file a rebuttal** statement to Carrier's **ex parte** submission thus leaving material factual **statements** **uncontroverted** and undenied. See Award 19849 and **First Division Awards** 22230, 22231, and 19808."

Award 20041 (Sickles) -

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760 (Cont'd)

"*** Awards of this Division have concluded that when **material** statements **are made** by one party and not denied by the other party, so **that the allegations stand un rebutted**, the material statements **are** accepted as established **fact** (especially when there is both time and opportunity to deny). See Awards 9261 (Hombeck), **12840 (Hamilton)**, 14385 (Wolf). See also Awards 14399 (Lynch), 15035 (**Franden**) and **18605 (Rimer)**."

The Statement of Claim presented in Docket DC-20760 is shown in Award 21011. **This** Statement of **Claim** clearly set forth the **cm%** of the dispute, **stating in part**:

"(a) **Claim** of the Joint Council of Dining Car **Employees Local #370** on the property of the Penn Central **Transportation Company** for **and behalf** of employees **Madaline Wyleczuk, John M. McGrath, and Eugene Rivers et al.**, who were denied their working rights on **Trains #160 and #161** when the Penn Central **Transportation Company** on April 29, 1973 **unilaterally** put on these trains in the Buffet Coach and the Parlor Lounge Cars employees of another Union (**Food Workers**). These trains were operated within the limits of the New Haven Region and the other Union (**Food Workers**) did not **have** a collective bargaining agreement covering this territory. ***"

Award 21011, considering the facts set forth in the **Statement** of Claim and fully **detailed** in Docket **DC-20760**, states in part:

"**Analysis** of the **instant** record indicates that, **although voluminous**, it is substantively **anemic and factually sparse**. Although the **claim** references three **named claimants** and includes the comprehensive designation **et al.**, there is no support in the record for a **finding that other than** the three, who were **formerly** employed on **Trains 160 and 163** (New York to Boston and return) are covered by the **claim**."

"**As nearly as we can determine from this** record the following **are** the operative facts: Carrier until April 29, 1973 provided buffet coach **and** parlor lounge service on **Trains 160** (New York to Boston) **and 163**

"(Boston to New York), **Claimants**, based in New York, worked these runs and **made** one round trip each **day**. Effective April 29, 1973 Carrier discontinued food service on those trains and initiated such service on Trains 179 and 176 (Washington to Boston and return). Claimants had an opportunity to bid on these new positions but elected not to do so. **Claimant** John M. McGrath, who is the Organization's **General** Chairman, protested these changes before they were initiated and filed the instant **claim** after the changes, **alleging** violation of various schedule agreements as **well** as the Merger Protective Agreement. **The claim was handled through** various **stages** on the property without resolution and was appealed to our Board."

The "operative facts" set forth in Award 21011 are as far fetched and illogical as the determination regarding the alleged agreement to settle the claim. Award 21011 states "**Analysis** of the instant record **indicates** that, although voluminous, it is **substantively anemic** and factually sparse". **Actually, Award 21011 is "substantively anemic"** or worse when correct facts are ignored and replaced by what are **alleged** to be facts which are not **supported** by the record and/or the Statement of Claim which, if they had been read and considered, **reveals** the actual facts. Award 21011 is "factually sparse" **in** terms of considering the facts detailed **in** the record or in terms of providing a sound **basis** for what it put into Award 21011 as being the basis for and/or the cause of the dispute **in** Docket DC-20760.

If the Statement of **Claim alone** had been read and considered, it should **have been apparent that the trains involved in the dispute were No. 160 and No. 161** not trains No. 160 and No. 163 as stated in **Award 21011**. Contrary to what **Award 21011** states, the Carrier did not discontinue food service on trains No. 160 and No. 161. The food **service was** continued on these **trains** but by using **employees** not covered by the applicable **Agreements** to **man** or work these trains. That was what the **dispute was all about as** the Statement of **Claim** clearly **revealed**.

As there was no substitution of **food service** on trains Nos. 179 and 176 for the food service on trains Nos. 160 and 161 as **Award 21011** states, there is **hardly** any need to refute the statement in **Award 21011** reading "**Claimants had an opportunity** to bid on these new positions but elected not to do so".

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760 (Cont'd)

The **two paragraphs** in Award 21011 supposedly **detailing** the "operative facts" **contain** a "**voluminous**" **misconstruction** of what the undisputed and **uncontroverted facts** were in **this dispute**. Regardless of the **size** or extent of the record, the facts contained **in** the record should be considered to adjudicate a dispute **and** the decision should be based on facts rather than fantasy as **in Award 21011**.

The basis for the decision in **Award 2101.1** is that the **claim was** moot because it was settled by agreement between the **parties** on the property. Yet the AWARD is "**The claim is dismissed and the parties are directed to implement the settlement agreement reached on the property**". This is **an** admission within Award 21011 itself that a **settlement** of the claim had not yet been made, i.e., the case **was** not withdrawn from the Board **and** no money payments were made, which w-are the two terms or conditions of the **alleged** Agreement.

Award 21011 states "**Carrier maintains that an oral agreement to settle the claim was reached during these discussions and commemorated in a letter of July 19, 1974 from its Manager-Personnel & Labor Relations to General Chairmsn McGrath**". The **last page** of the **Employes' Reply or Rebuttal Submission** pointed out that the Carrier **was** being dishonest, stating "**The Carrier's petition for the Board to dismiss the claim because a cash settlement has been made and/or an agreement made to settle the claim on the property, and, therefore, the claim is moot is untrue and a deliberate attempt to fraudulently mislead the Board and should not be allowed**".

Award 21011 states "**While there is not a signed settlement agreement on the record, and the July 19, 1974 letter is not itself that agreement, the letter may be taken as sane evidence that such a settlement was had**". This is entirely wrong because this **allowed** reising issues before the Board that were not presented on the property, **allowed new evidence to be presented and/or** accepted exhibits that were dated **after** the dispute was submitted to the **Board** (in fact dated after **all** the **normal** extensions of time requested by the Carrier for **filing** its **Ex Parte** Submission **had** ran out). But even more important is the **fact that Referee Eischen's** attention was specific- drawn to the fact that the **July 19, 1974** letter was fraudulent evidence.

In each of the **panel argument** sessions regarding Docket DC-20760 the **following** statements, which appeared on **page 2** of the Carrier's **Ex Parte** Submission, were pointed out:

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760 (Cont'd)

"On July 17, 1974, General Chairmen **McGrath**, without further explanation, advised Mr. **Blake** that Mr. Richard W. Smith, Secretary-Treasurer of the Dining Car Employees Union refused to honor the agreed-upon settlement and refused to withdraw the claim **from** the Board.

and

"*** The terms of this agreement, which are set forth in Mr. Blake's letter of July 19, 1974, Attachment 'A', provided that only **Claimants** Madeline Wyleczuk and John M. McGrath were involved in the **dispute** and that the General **Chairman** would arrange to have the **claim with-** drawn from the Board in consideration of the payment of \$250.00 to each Claimant, **Madaline** Wyleczuk and John M. **McGrath**, as complete **and** final settlement of the **claim**. The Carrier has **arranged** to **pay** the Claimants the agreed-upon sums."

Award 21011 states "Carrier **maintains** that **an** oral agreement to settle the **claim** was reached during these discussions and commemorated **in** a letter of **July 19, 1974** from its **Manager-Personnel & Labor Relations** to **General Chairman McGrath**. That letter reads as follows: ***". Award 21011 after citing "that letter" in full states "Carrier avers that following the **alleged** settlement, General **Chairman** McGrath advised that the International **Secretary-Treasurer** of the **Union** refused to honor the settlement and refused to withdraw the claim from the Board". But do you **commemorate** a settlement that has not been reached **and/or** has been rejected? If you do commemorate it, what is the purpose of such **commemoration**?"

The Carrier stated that on **July 17, 1974** the settlement was refused. Then, pray tell, what **was** the purpose of the Carrier (two **days** after it admits being advised that there **was** no existing agreed-upon settlement) writing the **July 19, 1974** letter which "commemorated" **an oral** settlement which the Carrier **says** had **already** been rejected. The dates the Carrier itself entered into the record show the obvious **purpose was** to fraudulently establish there was an **oral** agreement to settle the **dispute**. The Carrier stated "Arrangements have been **made** to compensate the employees **accordingly**" but no **money** payments were **actually** made. The Carrier **did not intend to make money payments** as two days

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760 (Cont'd)

prior to the July 19, 1974 commemorating letter the Carrier states it had been advised the settlement, if in fact proposed, was rejected. **The Employees** pointed out that the **record** shows no evidence of monetary payments being made, though such evidence surely would have existed if **payments** had been tendered, and proof of money payments should have been presented. **The** reason no evidence of money payments was presented was because such evidence did not exist and this clearly showed that an Agreement had not been consummated **and** further showed that the Carrier knew there was no such Agreement.

The record **in** this regard shows the Carrier desperately wished to reach **an** Agreement to settle the **dispute** because the Carrier had nothing to offer on the merits, but being unable to obtain such **an** Agreement the Carrier proceeded to fraudulently create **an** Agreement to settle the dispute for whatever value it might have. The pathetic **part** of it is that Award 21011 going counter to the record took the bait - hook, **line and sinker - and swallowed** the story that there was an **Agreement consummated** to settle the claim and thereby endorsed the Carrier's fraud.

The Carrier did not **make any** comments on the merits of the **dispute** in its E-x **Parte** Submission and **elcted** not to make a reply to the **Employees' Ex Parte** Submission. The only exhibit **presented** by the Carrier was **Exhibit A** to the Carrier's **Ex Parte** Submission, **which** is the letter dated July 19, 1974 quoted in Award 21011. **The Employees' letter** of intention to file an **Ex Parte** Submission, closing the record on the property, is dated **February 8, 1974**. **The final** date for **Ex Parte** Submissions, after four extensions of time requested by the Carrier, was **July 10, 1974**. **The July 19, 1974** letter **came** much too late to be considered as an issue raised on the property and, hence, properly before the Board **for** consideration. If the Carrier had complied with the Third **Division's** requests and/or **instructions** for filing of the Carrier's **Ex Parte** Submission, a letter dated July 19, 1974 would not have been available to submit to the Third Division. The **Carrier** failed to comply with the Executive Secretary's instructions but was given sn additional extension of time to present its **Ex Parte Submission**.

Referee Eischen was presented ample **Award** authority on the **following** points:

- (1) Awards **showing** that the record is closed upon giving a Letter of Intent to file an **Ex Parte** Submission with the **Third** Division:

14355 (Ives), 20123 (Blackwell), 20587 (Sickles), 20773 (Sickles), 19832 (Sickles), 18120 (Dorsey).

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760 (Cont'd)

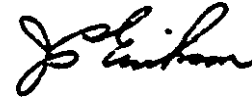
- (2) Awards **showing** that new issues **cannot** be raised for the first time before this **Board**:
4-3245 (**Eischen**), 4-3280 (**Eischen**).
- (3) Awards showing that new evidence **cannot** be presented to the Board:
2-6883 (O'Brien), 16053 (Kensn), 20214 (Sickles), 20558 (Liebermsn), 20598 (Eischen), 20607 (Sickles), 20620 (**Sickles**).
- (4) Awards showing that exhibits dated after the date the dispute **was** submitted to the Board **must** be rejected and **cannot** be considered **as** evidence by the Board:
13029 (**Hall**), 18635 (**Devine**).
- (5) Awards **showing** that it must be proved **an alleged oral understanding** or **agreement was** reached:
17060 (Dugan), 12251 (Seff), 20190 (Sickles).
- (6) Award showing that a party should not be faulted for **engaging** in discussions or attempts to settle a dispute:
4-3289(Eischen).
- (7) Awards showing that the Board has no power to **make** Agreements for the parties but is limited to applying and/or **interpreting** Agreements **already made**:
4480 (Carter), 18423 (O'Brien).

The facts in Docket DC-20760, Award authority, and firmly-established principles of the Third Division were **all** ignored when Award 21011, written by Referee Eischen, was adopted by a Majority **comprised** of Carrier Members and Referee Eischen. Referee **Eischen's adamant refusal** to consider the facts and Award authority (**and all** of the points detailed herein were presented - **many** of them for the second time when the case was reargued) or to correct **the** obvious errors in Award 21011 (a revision of the original proposed Award resulted only **in** correction of a typographical omission **and** a punctuation correction) leaves room for doubt as to his ability to perform the function as **detailed** in Section 3 First (1) of the **Railway** Labor Act, i.e., "a neutral person, **to be known** as 'referee', **to sit** with the division as a member thereof **and make sn Award**".

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760 (Cont'd)

Award **21011** thwarts the purpose for which the **National** Railroad Adjustment Board was created, which is to adjudicate disputes by interpreting or applying agreements as written by considering the facts and data in evidence.

I hereby register the strongest possible dissent to **Award 21011** which is at the very best a travesty of justice **and/or** the adjudicating process.



J. P. Erickson
Labor **Member**

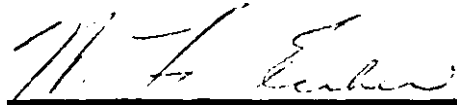
CARRIER MEMBERS' **ANSWER** TO LABOR **MEMBER'S DISSENT**
TO AWARD 21011, DOCKET DC-20760. (Referee Eischcn)

While the mission of a dissent has been **described by us in** previous documents, we **hasten** to point out again that nothing is gained **from** personal denunciations of referees. If the award, as contended, "endorses fraud" then it should be the purpose of the dissent to spell that out and in doing so, meet the areas of concern set forth by the Referee.

In the present case, the Majority made the excellent point that the **General Chairman** was alleged to have made an agreement settling the **dispute**. There was no disclaimer of such an **agreement** by the General Chairman, although there was full opportunity to do so. It is well **recognized** that **silence** and inaction when there is a duty to speak, amounts to assent in contractual matters and **is** treated as an **estoppel**, or at the very least, a justifiable inference may be drawn **from** the silence. Restatement of Contracts **§72** and Williston on Contract **§91**.

In any event, the actions of the parties as evidenced by the record presented to **the** Board, represented a novation or an accord and satisfaction of the original claim which **fully extinguished** the debt, even assuming the original claim was meritorious. The

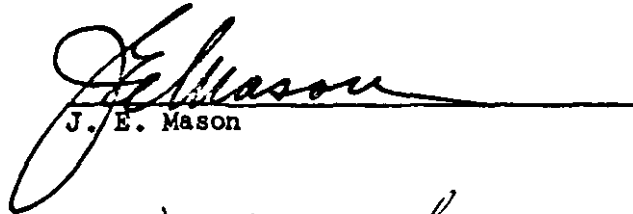
Majority's decision is **well** founded and we **concur**.



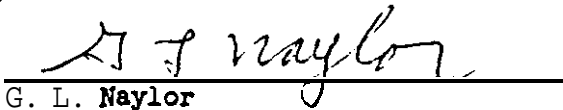
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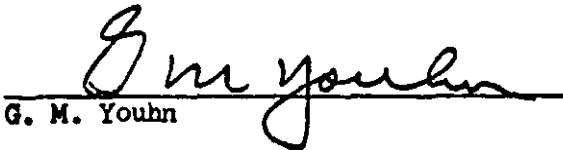
P. C. Carter



J. E. Mason



G. L. Naylor



G. M. Youhn