NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19963
THIRD DIVISION Docket Number CL-20023

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline & Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Duluth, Winnipeg and Pacific Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7237) t h a t :

(1) Carrier violated Special Agreement of October 7, 1955, and the effective Clerical Agreement, particularly Rules 1, 19(f), 39, 47 and 48, effective August 1, 1971; and each Saturday, Sunday and Holiday thereafter when the work of Claimant R. A. Mallett, Locomotive Foreman's Clerk, was performed on Claimant's rest days and holidays by Carrier employes not of this Craft and Class.

(2) Claimant Mallett shall now be compensated at his effective protected rate at the rate of 8 hours pay at time and one-half for August 1, 1971; and each subsequent Saturday, Sunday and Holiday that the work of the Locomotive Foreman's Clerk position is performed by Carrier employes not of this Craft and Class.

(3) The work on Saturdays, Sundays and Holidays shall be returned to employes of this Craft and Class.

OPINION OF BOARD: This claim was triggered by the abolition of a swing position on July 31, 1971. Petitioner asserts that as a result of this action work performed by Claimant was performed by employees not of the proper Craft and Class on his rest days and holidays. Petitioner argues that this action resulted in a violation of the Special Agreement of October 7, 1955 as well as a violation of various rules of the applicable Agreement, especially the Scope Rule and the Unassigned Days Rule.

The basis of this dispute is the alleged transfer of certain work to employees not covered by the Agreement, I" the face of Carrier's denials and assertions with respect to changes and reductions in the work load, it was incumbent on Petitioner to establish, by competent evidence, that the work in question was being performed by a" improper Craft or Class of employee. The record reveals considerable argument but no evidence whatever as to specific work performed by specific employees, other than those covered by the Agreement, on the rest days or holidays.

We deem it unnecessary to deal with the other arguments advanced since there is no evidence to support the basic position that work has bee" removed from performance by employees covered by the Scope Rule of the Agreement.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.

LABOR MEMBER'S DISSENT TO AWARD 19963 (DOCKET **a-20023)**
Referee Lieberman

The Majority in Award **19963** holds that the record contains "* * * no evidence whatever as to specific work performed by specific employees, other than those covered by the Agreement, on the rest days or holidays."

This Finding is either absurd, inane or incompetent - perhaps all three - because it is neither supported nor is it provable by the facts of record - especially when read alongside Carrier's own admissions. To make such a manifestly incorrect holding the Majority was required to first ignore one of Petitioner's sworn statements reading:

> "By Carrier's own admission, Employes' Exhibit H, work performed Monday through Friday exclusively by Claimant, the handling of the Motor Power Service Report, Form **8951,** continued to be necessary and was performed by the Locomotive Foreman on Saturday, Sunday and Holidays through Hovember 29, 1971; a date subsequent to tne date of this claim."

Then, next ignore Carrier's own admission on this point as written in their February 25, **1972** letter to the General Chairman, Employes' Exhibit "H" and, thirdly (but not finally), ignore point (f) contained on Page 9 of Carrier's Submission. Any one of the three ignored points cited above, standing alone, to say nothing of their collective impact, would when under proper consideration be sufficient to meet the test of "competent evidence".

It is difficult to understand a "no evidence" problem when Carrier admits In both its initial submission, and also in its

rebuttal statement, that some work (Motive Power Service Report, Form 8951) was improperly assigned outside of the Agreement during the period August 1, 1971 through November 29, 1971.

It is unfortunate that the Majority decided to dismiss the claim for lack of evidence; completely irregular on the basis of this record - rather than dispose of the claim on the basis of the parties own arguments.

The Award is a nullity and requires vigorous dissent.

J. C. Fletcher,
Labor Member
10-5-73