

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(The Lake Terminal Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10148) that:

(1) Carrier violated the effective Clerks' Agreement on various dates in June 1985 when it required and/or permitted employes not covered thereby to perform work reserved to covered employees;

(2) Carrier shall now compensate the first-out qualified extra or furloughed employe eight (8) hours' pay at the straight time rate of a yard clerk position for each of the dates and shifts set forth in Employees' Exhibit 'A'."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Organization herein has the following "positions or work" rule as Rule 1 of its Agreement with the Carrier:

"These rules shall govern the hours of service and working conditions of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees, subject to such modifications as are included herein. Positions or work coming within the scope of this agreement belong to the employees covered thereby, and nothing in this agreement shall be construed to permit the removal of positions or work from the application of these rules, except between the parties signatory hereto."

The Organization refers to the work of the position of Yard Clerk & Checker, responsible for track checks of cars in various yards.

The claims here concern the allegation that Trainmasters and Assistant Trainmasters performed clerical duties of this nature, in alleged violation of Rule 1.

The Carrier states that supervisory employees "did not perform a yard check or prepare an interchange report," duties which the Carrier concedes are reserved to clerical employees.

In support of its claims, the Organization relies on Third Division Award 21933 and Public Law Board No. 4363, Award No. 6, involving the same parties. The Board finds no fault in the conclusions reached in these two Awards. The difficulty here, however, is the direct contradiction in the positions of the parties as to the facts of the matter. The two cited Awards concerned admitted track checks made by other than Clerks. In this instance, the record is not persuasive that such occurred here.

The dispute, at best, concerns data placed on "switching orders" or "yardmaster orders," rather than definitive proof that "yard checks" were made by those alleged by the Organization to have performed the work. The Board is therefore unable to apply here cited Awards favorable to the Organization based on the "positions or work" Rule. As stated in Third Division Award 13330:

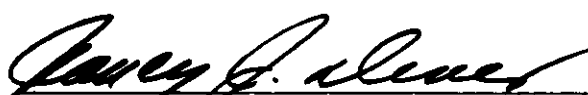
"There are two incontrovertible principles:
(1) Petitioner has the burden of proving its claim; and (2) conflicting assertions, without a preponderance of corroborative evidence supporting one against the other have no probative value....

We find that Petitioner has not satisfied its burden of proof."

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of January 1989.

LABOR MEMBER'S DISSENT TO
AWARD 27670, DOCKET CL-27569
(REFEREE MARX)

Award 27670 dismisses a valid claim on a fallacy of facts and evades the obligation of this Board to resolve disputes on their merits. The Award self-servingly states:

"The dispute, at best, concerns data placed on "switching orders" or "yardmaster orders," rather than definitive proof that "yard checks" were made by those alleged by the Organization to have performed the work."

The Majority opinion has written a contradiction in facts and logic. The record is clear that "Switching Orders" are a track check which lists car initial, number, contents, destination and track being checked. The purpose for making such is to give an engine crew switching instructions. Clerks have historically checked tracks for that purpose. Prior Third Division Awards 21933 and Public Law Board No. 4363, Award No. 6 codified that work as being protected and belonging exclusively to the clerical craft on this property. The Majority opinion does not dispute the validity of either of the aforementioned Awards, but insteads states the Organization has failed to meet it's burden of proof.

Their opinion flies in the face of the unrefuted evidence presented on the property and is contrary to the Carrier's argument. Employees Exhibit "A" & "B" pages 1 thru 48 are examples of Supervisors making out track checks wherein they signed them. In Carrier's letter of November 6, 1985, (Employees Exhibit "D") they stated the following:

"It is the Carrier's position that the Yardmaster orders were prepared by supervisors from information on the uncompleted switch orders." (Underlining our emphasis).

The Carrier never argued that their supervisors didn't make out the forms they instead argued that because the track check appeared on a different form it was not subject to the scope of the agreement.

The Majority opinion went fishing for a reason to dismiss the Claim and reeled in a non-existent excuse.

Dismissing the Employees' claim in this instance constitutes grievous error and requires dissent as it's contrary to precedential Awards on the property.


William R. Miller, Labor Mem

Date: January 24, 1989