

Award No. 8234
Docket No. CL-7621

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Clerks' Rules Agreement when on October 16, 1950, it abolished Position No. 219, Clerk at Franklin Park, Illinois, which position had theretofore been established and filled pursuant to rules of the Clerks' Agreement, and by unilateral action transferred the work normally attached to Position No. 219 to the Agent, an employe outside the scope and application of the Clerks' Agreement.

2. Carrier shall return the work of Position No. 219, as it existed immediately preceding October 16, 1950, to the Clerks' Agreement and the employes covered thereby.

3. Employe H. S. Plaster be compensated for all loss suffered as a result of the abolishment of Position No. 219 retroactive to October 16, 1950.

EMPLOYEES' STATEMENT OF FACTS: Prior to October 16, 1950 the Carrier had in effect Position No. 219, Clerk at Franklin Park, Illinois.

Employe H. S. Plaster has a seniority date in Seniority District No. 30, which district includes Franklin Park, Illinois, of September 25, 1943 and occupied Position No. 219 subsequent to that date.

The clerical duties of Position No. 219 consisted of accounting, billing, making reports, maintaining records, checking industry and team tracks, making demurrage records, handling the cash book and ticket register and making out ticket reports, all of which duties were assigned to and performed by Employe Plaster.

On October 6, 1950, Assistant Superintendent G. F. Wilson wrote the Agent, Mr. George Hampton, as follows:

[659]

All data submitted in support of Carrier's position has been presented to the Organization and conference has been held on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: We are initially confronted with the due-notice issue raised by the Carrier in its original ex parte submission.

This issue has been before this Board on many occasions and the Opinions of the Board have been divided. The issue appeared in Award 8079, with the present Referee participating.

Subsequent thereto several Awards have been adopted with an opposite conclusion. We are aware of such decisions and the reasons therefor, but we are not persuaded to deviate from our position in Award 8079 for the reasons therein set forth. We shall proceed to the issues in this case.

Here Organization charges Carrier violated Rule 1(e) of the applicable Agreement when it abolished Position 219, Clerk at Franklin Park, Illinois, and, by unilateral action, transferred "the work normally attached to Position 219" to the Agent, an employee outside the scope and application of the Clerks' Agreement.

Rule 1(e) of the applicable Agreement reads:

"Positions 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 from the application of these rules, except in the manner provided in Rule 57."

As to the duties of the position here at issue we have two questionable Exhibits: Carrier's exhibit A at page 25 of the record and Organization's exhibit F at page 58 of the record. Neither is admissible under this Board's rules. We are, therefore, left with the Bulletin description of the duties of the involved position:

"Duties: General Office work around depot and handling freight, checking River Grove Team Track daily."

There is no disagreement among the parties that the job—Position 219—had been assigned to Claimant Plaster, that it was a position covered by the Agreement or that it was abolished October 16, 1950.

Carrier states that between 1937 and prior to 1944, "the agent was furnished a temporary clerk to assist him due to a seasonal increase in business," that such temporary clerical position functioned "from about May 15 to July 10" of each year.

It is further stated by Carrier that as a result of a "heavy increase in express business * * * in lieu of the clerk being assigned on a temporary basis as previously, Claimant Hattie S. Plaster, a clerk, was assigned on a permanent basis on April 1, 1944."

Carrier also states:

"When the express work was taken from the agent-telegrapher by the Railway Express Agency on October 16, 1950, the need for any assistance to the agent-telegrapher by the clerk disappeared in the same manner as it had arisen in the original instance and just as effectively and permanently as if Claimant had been a clerk of the Railway Express Agency."

Carrier states at page 21 of the record:

"Since the abolishment of the clerical position at Franklin Park on October 16, 1950, the agent-telegrapher has operated the

station as a one-man station without assistance even through what has been its seasonal peaks of business."

Carrier argues further:

"It would certainly be inequitable and an interference with the prerogative of the management for the Board to rule that the Carrier must maintain a clerk at a point where one is no longer needed."

We would concur with this statement of the Carrier as an abstract proposition, except that the Carrier here concerned jointly negotiated with the Organization here concerned that positions, such as Position 219 here, "belong to the employees covered * * * and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 57," which means by mutual agreement.

A covered position having been abolished, and in the absence of any proof that "the work normally attached to Position 219" was assigned to an employee or employees covered by the Clerks' Agreement, a sustaining Award is in order. This conclusion is supported by many prior Awards of this Division, including Award 8079.

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 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

That the Agreement was violated.

AWARD

Claim (1), (2) and (3) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 7th day of February, 1958.

DISSENT TO AWARD NO. 8234, DOCKET NO. CL-7621

In the opening paragraph of the Opinion in this Award the majority stated:

"We are initially confronted with the due-notice issue raised by the Carrier in its original ex parte submission."

and in the second paragraph proceeded to say:

"* * * The issue appeared in Award 8079, with the present Referee participating."

and then in the third paragraph of the Opinion held:

"Subsequent thereto several Awards have been adopted with an opposite conclusion. [Contrary to the holdings in Award 8079.]

We are aware of such decisions and the reasons therefor, but we are not persuaded to deviate from our position in Award 8079 for the reasons therein set forth. We shall proceed to the issues in this case." [Parenthetical insertion ours.]

Award 8079, like the confronting Award, required that due notice be extended to a third party at interest, i.e., the Telegraphers. In dismissing the issue of due notice in Award 8079, the Referee (Edward A. Lynch) held, among other things:

"The Referee certainly lacks the authority to pass upon an Act of Congress—he may pass upon and decide the case on its merits—and he likewise has no intention, much less authority, to substitute his judgment for that of the Supreme Court of the United States."

The dissent to Award 8079 sets forth various decisions of the U. S. Courts, up to the Supreme Court of the United States, all of which were called to the attention of the Referee before he submitted his Award in Docket CL-7621 (Award 8234). The dissent to Award 8079 in Docket CL-7545 is, therefore, made a part of this dissent.

In recent Award No. 8106, by Referee Guthrie, in Docket No. TE-7747, which involved due notice to the Carrier, Order of Railroad Telegraphers, and Brotherhood of Railway Clerks, it was held:

"Consideration of and decision on the merits is deferred pending notice by the Division to the parties, Carrier, Order of Railroad Telegraphers, and Brotherhood of Railway Clerks, as contemplated by Section 3, First (j) of the Railway Labor Act as interpreted by the Courts."

See Award No. 8200 by Referee Wolff; also, Award 8220 by Referee Johnson.

Here, it is clearly apparent that Referee Lynch has failed to comply with the provisions of Section 3, First (j) of the Railway Labor Act as interpreted by the Courts.

Insofar as the merits of the claim herein are concerned, we shall show that Award 8234 is based solely upon erroneous premises.

Furthermore, for some reason not disclosed therein, Award 8234 is a complete reversal of an Award in this Docket, as at first proposed by Referee Lynch, in which he found that the Agreement had not been violated and denied the claim on the basis of the following conclusions he held to be controlling over the issues involved herein. The Award in this Docket, as first proposed by Referee Lynch, is as follows:

"OPINION OF BOARD: Here Organization charges Carrier violated Rule 1 (e) of the applicable Agreement when it abolished Position 219, Clerk at Franklin Park, Illinois, and by unilateral action transferred 'the work normally attached to Position 219' to the Agent an employe outside the scope and application of the Clerks' Agreement.

"Rule 1 (e) of the applicable Agreement reads:

'Positions within the scope of this agreement belong to the employes covered thereby and nothing in this agreement shall be construed to permit the removal of positions from the application of these rules, except in the manner provided in Rule 57.'

"Of considerable importance to a decision in this case are the duties involved in the abolished position.

"Two prior Awards of this Division, with the same Referee participating, involved the same general violation as here. Awards 7785 and 7839. They were sustaining Awards, but in each, decision turned on Carrier's refusal to agree on a joint check of the duties involved in the abolished positions. There was no such request in this case, and therefore those Awards are not in point here.

"As to the duties of the position here at issue we have two questionable Exhibits—Carrier's Exhibit A at Page 25 of the record and Organization's Exhibit F at page 58 of the record. Organization had objected to Carrier's exhibit on the ground it had not been presented in the handling on the property, but subsequently conceded its Exhibit F had likewise not been presented on the property. Neither is admissible. We are, therefore, left with the Bulletin description of the duties of the involved position:

'Duties: General Office work around depot and handling freight, checking River Grove Team Track daily.'

"Carrier states emphatically, without denial from the Organization, that 'all work of checking tracks which had been performed by the station clerk (Claimant) at Franklin Park was transferred to clerical employees at other locations in Chicago Terminal.'

"There are certain statements of Carrier, dealing with events coincident with and preceding the assignment of Claimant Plaster to the position in question, which must be considered.

"These statements, and they are not denied by the Organization, aver that between 1937 and prior to 1944, 'the agent was furnished a temporary clerk to assist him due to a seasonal increase in business;' that such temporary clerical position functioned 'from about May 15 to July 10' of each year.

"It is further stated by Carrier that as a result of a 'heavy increase in express business * * * in lieu of the clerk being assigned on a temporary basis as previously, Claimant Hattie S. Plaster, a clerk was assigned on a permanent basis on April 1, 1944.'

"Carrier continues:

'Being a female employe, Agent Hampton found it necessary to make revision in the duties which he had delegated to the temporary male clerk assigned to assist him as she would be unable to handle the LCL freight and express.'

"Carrier having stated previously that checking of River Grove team track was assigned to other clerical employees, the only portion of Claimant's bulletined duties which can be involved here is 'general office work around depot.'

"We must observe that there is a lack of admissible evidence from either party as to the detail of such work of what portion of Claimant's work day it consumed.

"Among the many Awards cited by, or in behalf of Organization, is Award 8079, in which the present Referee participated. The main Rule there at issue (1 (b)) is identical with that (1 (e)) here obtaining.

"There are, however, certain facts evident in the present case which distinguish it from Award 8079.

"The position involved in Award 8079 was that of Ticket Seller, and it was conceded by the Carrier there involved that Claimant's position of Ticket Seller had been abolished and all

the work of his position was assigned to two persons not covered by the Agreement there applicable.

"Here, the position abolished was that of 'Clerk', an admittedly broad designation. In Award 8079, the Organization had argued the abolished position (Ticket Seller) was a 'distinctive classification' and its inclusion as such in the Scope Rule 'plainly shows that the position and work here involved is definitely fixed within the Scope of the Agreement.'

"In the case now before us, only 'general office work around depot' could, by the record established, have been assigned to the Agent. At best it could only constitute a portion however large or small, of the work of the abolished position.

"Another Award cited by the Organization, and relied on most heavily, is Award 5785 (Wenke). It was a sustaining Award on a Rule identical with Rule 1 (e) here.

"Much of that Award might be held to be in support of Organization's claim here.

"However, before considering that Award, it is necessary to set out here certain statements of the Organization appearing in this Docket:

"The representatives of the Organization have never at any time contended that all of the station work was exclusively that of a clerk. They do, however, emphatically contend that such clerks * * * when assigned to positions at stations, are there to perform work and do perform the work required of them. Therefore, * * * the work assigned * * * and performed by them likewise is covered by that Agreement.

* * *

"The employees have not * * * asked your Honorable Board to make an exclusive award of station work at Franklin Park to employees included within the scope of the Clerks' Agreement. * * *

"Award 7784, with a Rule similar in principle to that here, cited as one of several points precedent to a denial of the claim there, that the Organization had 'failed to prove that this work belongs to its Members to the exclusion of all other classes or crafts.'

"To revert to Award 5785, Referee Wenke had the following to say:

"Scope rules which cover classes of employees by referring to positions, generally reserved to them all work usually and customarily performed by the occupants thereof at the time of the negotiation and execution of the Agreement. In the case of the Clerks' Agreement it has been held that it does not purport to reserve all clerical work to clerks. This is evidenced by the many Awards of this Division recognizing certain qualifications thereof or exceptions thereto. However, clerks have the right to perform all clerical work in the absence of its falling within such qualifications or exceptions. See Awards 2334 and 3003 of this Division.

"These exceptions and qualifications include the right of Telegraphers to perform it, although they cannot be

detached from their post and be sent elsewhere to perform it nor can the work be brought to them. See Awards 636, 4288 and 4867 of this Division.'

"There being no proof or claim that the Agent was 'detached from his post and sent elsewhere' to perform Claimant's general office work, or that the work was 'brought' to him, a denial Award would be indicated here.

"In summary, the conclusion here is inescapable that the Organization has failed to prove that the Agreement was violated, and the preponderance of the evidence proves it. A denial Award will be made.

"Before doing so, it should be pointed out that in Docket CL-9022, this day decided by Award , we had a case somewhat similar but not identical to this case.

"In CL-9022, no position was abolished, but Carrier did transfer some of the duties of a Freight Inspector Position, covered by the Clerks' Agreement, out from under the Scope of that Agreement. By Award , we sustained Organization's claim principally because the Rule obtaining there said that 'positions 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 by agreement between the parties signatory hereto.'

"Rule 1(e) here does not contain the words 'or work.' Therein lies the distinction.

"**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 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

"That the Agreement was not violated.

"AWARD

"Claims (1) (2) and (3) denied."

The Award, supra, as first proposed by Referee Lynch, would have been valid and final and binding on the parties under the amended Railway Labor Act. It also would have been consistent with the policy followed by this same Referee in Awards 7783, 7787, 7851 and 8092, in each of which he denied claims because the Organization had failed to prove that the Agreement had been violated.

The Referee's holding in Award 8234, viz.,

"a sustaining Award is in order"

is based upon erroneous premises as follows:

"1. That there was an absence of any proof that 'the work normally attached to Position 219' was assigned to an employee or employees covered by the Clerks' Agreement, and

"2. That Award 8079 supports the conclusion reached."

The Award, as first proposed by Referee Lynch, showed as follows from the record:

"Carrier states emphatically, without denial from the Organization that 'all work of checking tracks which had been performed by the station clerk (Claimant) at Franklin Park was transferred to clerical employes at other locations in Chicago Terminal.'

"* * *

"Carrier having stated previously that checking of River Grove team track was assigned to other clerical employes, the only portion of Claimant's bulletined duties which can be involved here is 'general office work around depot.'"

The Award, as first proposed by Referee Lynch, also quoted the following admissions of the Organization from the record:

"The representatives of the Organization have never at any time contended that all of the station work was exclusively that of a clerk. * * *

"* * *

"The employes have not * * * asked your Honorable Board to make an exclusive award of station work at Franklin Park to employes included within the scope of the Clerks' Agreement. * * *

Accordingly, as recognized by Referee Lynch in the Award he first proposed, Award 7784 was precedent to a denial Award herein because the Organization had

"failed to prove that this work belongs to its Members to the exclusion of all other classes or crafts."

Award 8081 cited the same reason and Award 7784 as authority for denying the claim therein. Mr. Lynch also participated as Referee in Awards 7784 and 8081.

Furthermore, Carrier's alleged violation of the Agreement was limited by Employes' Statement of Claim herein to its unilateral action of transferring

"the work normally attached to Position 219 to the Agent, an employe outside the scope and application of the Clerks' Agreement."

As Referee Lynch recognized in Awards 7783, 7787, 7849, 7851 and 8092, hereinbefore cited, the burden was on the Organization to prove that the Agreement was violated.

The Award in the instant case, as first proposed by Referee Lynch, showed as follows:

"We must observe that there is a lack of admissible evidence from either party as to the detail of such work or what portion of Claimant's work day it consumed."

Accordingly, Referee Lynch should have denied the instant claim, as his first proposed Award did, for the same reason he denied the claims in the other Awards cited, viz., that the Organization had failed to prove that the Agreement had been violated.

The Award, as first proposed by Referee Lynch, assigned additional reasons for a denial Award and he stated therein as follows:

"In summary, the conclusion here is inescapable that the Organization has failed to prove that the Agreement was violated, and the preponderance of evidence proves it. A denial Award will be made."

Award 8079 does not support the conclusion that a sustaining Award was in order. In the Award, as first proposed by Referee Lynch, he distinguished the instant case from that covered by Award 8079, as follows:

"There are, however, certain facts evident in the present case which distinguish it from Award 8079.

"The position involved in Award 8079 was that of Ticket Seller, and it was conceded by the Carrier there involved that Claimant's position of Ticket Seller had been abolished and all the work of his position was assigned to two persons not covered by the Agreement there applicable.

"Here, the position abolished was that of 'Clerk', an admittedly broad designation. In Award 8079, the Organization had argued the abolished position (Ticket Seller) was a 'distinctive classification' and its inclusion as such in the Scope Rule 'plainly shows that the position and work here involved is definitely fixed within the Scope of the Agreement.'

"In the case now before us, only 'general office work around depot' could, by the record established, have been assigned to the Agent. At best it could only constitute a portion however large or small, of the work of the abolished position."

In addition, in Award 8236, in which case Mr. Lynch also participated as Referee, and which case is referred to as Docket CL-9022 in the Award as first proposed by Referee Lynch herein, he distinguished between Scope Rules which include the words "or work," and Rule 1 (e) in the instant case which does not include such words.

To interpret a Rule such as Rule 1 (e) herein as Referee Lynch has done in both Awards 8234 and 8079, so as to require Carriers to maintain unnecessary positions, gives such rules an absurd rather than a sensible meaning (Award 807), and a meaning not intended by the parties in negotiating such rules. We have consistently held that this Division lacks authority to order restoration of an abolished position, e.g., Award 8203.

The Award, as first proposed by Referee Lynch, contained the following Findings and Award:

"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 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

"That the Agreement was not violated.

"AWARD

"Claims (1) (2) and (3) denied."

There was no change in the record in the instant case to justify this reversal on the part of Referee Lynch and Award 8234 does not divulge any reason for his doing so.

For the foregoing reasons Award 8234 is clearly in error on the merits. Furthermore, as pointed out at the outset, Award 8234 is null and void for failure to give notice and opportunity to be heard to The Order of Railroad Telegraphers, as required by 45 USCA Sec. 153 First (j) of the Railway Labor Act. We therefore dissent. An Award of this character increases the difficulties confronting Carriers in their struggle for survival.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp

REFEREE'S COMMENT ON CARRIER MEMBERS' DISSENT
TO AWARD 8234, DOCKET CL-7621

In their dissent, the Carrier Members state:

"Furthermore, for some reason not disclosed therein, Award 8234 is a complete reversal of an Award in this Docket, as at first proposed by Referee Lynch, in which he found that the Agreement had not been violated and denied the claim * * *."

The Referee made full disclosure of the reason for reversing his position in this Docket to the Carrier Member who argued the case before him.

It is therefore necessary to make such disclosure for the record.

This case involved Rule 1 (e) which is quoted in the Award. It refers to "positions"; the word "work" does not appear.

The position involved was composed of three parts, based on admissible evidence of record:

1. General office (clerical) work, which Carrier concedes at page 9 of the record "amounted to not more than 4 hours."
2. Checking River Grove Team Track.
3. Handling freight. This must be considered a "gray portion" of the position because Claimant's name indicates a female employee, although such employees can and do such work.

Carrier Member, in offering argument, stated that the work of checking team tracks "was transferred to clerical employees."

Circular No. 1 of this Board requires that no evidence which has not been presented while the claim is being handled on the property may be presented thereafter.

For this reason, the Referee did not double check Carrier Member's statement.

So, handling baggage being a "gray portion" of the job and the checking of team tracks being thus eliminated, there remained only the clerical portion of the position to be transferred to "an employee outside the scope and application of the Clerks' Agreement."

Inasmuch as Rule 1(e) made no mention of transferring "work", the Referee wrote a denial Award and copies were distributed to the Members of the Board.

The Labor Member who argued the case thereupon requested reargument, and it was granted, with the Carrier Member participating.

The Labor Member, upon being told by the Referee that he had turned his original Award on Carrier Member's statement that the checking of team tracks had been assigned to other clerks, proved that this statement first appeared in the Carrier's fourth submission to the Board, under date of October 14, 1955; that Carrier had denied the claim on October 17, 1950, May 19, 1954 and June 18, 1954, and Organization's notice of intent to file the claim with this Board bearing the date of May 20, 1955, such statement by Carrier was not presented while the claim was being handled on the property and consequently was clearly inadmissible under the procedural rules of this Board as outlined in Circular No. 1.

The Referee admitted he had erred in not checking the admissibility of such statement; Members of the Board should be fully aware of the requirements of Circular No. 1. He advised the two Board Members he was withdrawing his Award, as originally drafted, and would write a new Award in lieu thereof.

Thus, with the checking of team tracks and the clerical work of the abolished position remaining, it was clear that all the duties of the abolished position, covered by admissible evidence, were assigned outside the scope of the Agreement. A sustaining Award was then definitely in order and it was written and adopted by this Board February 7, 1958.

When the Referee advised the two Board Members he was withdrawing his original Award he specifically told them, and so ruled that—

The original Award having been withdrawn, it thereupon ceased to exist; it had no status, parliamentary or otherwise.

The Carrier Members, in reproducing the first draft of the Award in their dissent, took a wholly unwarranted action for these reasons:

1. A Referee may, and many often do, write and rewrite an Award several times before it finally comes before the Division, formally convened with the Referee participating as a member thereof, for the specific purpose of considering the Award.
2. Until such an Award is formally presented to the Division duly convened by the Chairman for its consideration, it is the property of the Referee.
3. A proposed Award is not part of the record in any case—this one included—unless and until it is thus presented and adopted by a majority vote of the members of the Division.

/s/ Edward A. Lynch,
Referee.

**REPLY TO REFEREE'S COMMENT ON CARRIER MEMBERS'
DISSENT TO AWARD NO. 8234, DOCKET NO. CL-7621**

Reasons for the Dissent by Carrier Members to Award 8234, Docket CL-7621, are set forth therein and it is not our purpose to repeat them unnecessarily in answering Referee's comment thereon, but the following statements are essential for clarity of record.

The Referee's comment states that, "1. General office (clerical) work, which Carrier concedes at page 9 of the record 'amounted to not more than 4 hours.'" The Carrier's complete statement which started at page 8 and extended to page 9 of the record is as follows:

"Claimant continued in the clerk's position up until October 16, 1950 when the position was abolished except for a period of about

a year in 1947 when she was displaced by a male clerk who had returned from the armed forces. This male clerk not only was able to perform all the clerical work performed by claimant but was able to spend about four hours of his eight-hour tour of duty assisting Agent Hampton with the LCL freight and express. Actually, therefore, the station work performed by the female clerk as far back as 1947 amounted to not more than 4 hours."

As is apparent from this quoted statement, in generalizing on the background of the work the Carrier illustrated the performance of a male clerk on the position in the year 1947. This obviously was not a positive showing that there was as much as 4 hours' of such general office clerical work per day required in 1947 and it had no decisive bearing on the situation when the position was discontinued October 16, 1950.

The Referee's comment states further, "Carrier Member, in offering argument, stated that the work of checking team tracks 'was transferred to clerical employees.'" The fact is that this was the Carrier's statement, which was quoted by the Carrier Member as follows:

"The duties shown on the bulletin also include checking River Grove Team Track daily. In that regard the Carrier wishes to advise that **all work of checking** tracks which had been performed by the station clerk at Franklin Park was transferred to clerical employees at other locations in Chicago Terminal. In other words, employees covered by the scope of the Clerks' Agreement at other locations in the same seniority district performed all remaining work in connection with checking team tracks and industry tracks that was previously performed by the station clerk at Franklin Park."

As to the admissibility of the portion of the record just quoted, Circular No. 1 states under "Form of Submission", "* * * all data submitted in support of employes' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute," and "* * * all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute." Under the caption "Hearings" it states, "The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence." These requirements of the Board pertain to the original written submission.

However, at the hearing on August 2, 1955, the Division stipulated 30 days, expiring September 2, 1955, within which written replies might be made to oral argument of the other presented at the hearing and, further, on September 12, 1955, stipulated time to expire October 19, 1955, within which to make written reply to each other's surrebuttal statement. The Carrier's statement made in rebuttal, pursuant to these latter stipulations, contained, among other things, the quotation above taken from the record. That statement, irrefragably, constituted a "rebuttal" as defined in Webster's New Collegiate Dictionary—

"Act of rebutting; * * * the giving of evidence in a suit to destroy the effect of evidence introduced by the other side in the same suit."

and is in accord with the definition of "rebut" as contained in that same dictionary—

"* * * to contradict; to refute, esp. formally, as by evidence and arguments."

On October 21, 1955, representative of the Employees was granted time to expire November 21, 1955, to make written reply to Carrier's statement

dated October 14 and did make written reply thereto as it appears at pages 73 and 74 of the record. But no denial was made of Carrier's statement of the disposition of the team track checking in the Employes' written reply, supra, and no evidence contrariwise was presented; nor was any objection to it entered in the record. Consequently, it was properly accepted by the Referee in his first proposed Award because it was also accepted by the Division and turned over to the Referee as a part of the record.

These indisputable facts of record are a manifestation of the fallacy of the conclusion that the statement of Carrier (referred to as "Carrier Member's statement") was not admissible under the procedural rules of this Board. The referred-to statement was made by Carrier in rebuttal according to stipulations of the Division and was admitted and made a part of the record, and the file in the Docket thereafter was closed on November 21, 1955. It was properly before the Division.

The Award first proposed was in the usual form and was distributed to all Members of the Division. It contained the detail shown in the Carrier Members' Dissent, including the Referee's observation that, "We must observe that there is a lack of admissible evidence from either party as to the detail of such work or what portion of Claimant's work day it consumed," and the Referee's conclusion that, "In summary, the conclusion here is inescapable that the Organization has failed to prove that the Agreement was violated, and the preponderance of evidence proves it. A denial Award will be made."

The seriousness of the about-face evidenced by Award 8234 and the gravity of the situation warranted the Carrier Members' Dissent in the form and manner now appearing in this Docket. The analysis made and the impartial conclusions expressed in the first proposed Award could not be so well displayed by the Carrier Members in their Dissent in any other way. The circumstances were extraordinary and, an extraordinary Dissent was most essential to make the record complete.

The first proposed Award became a matter of record and was pending before the Division for consideration after the Referee had released it to the Executive Secretary for distribution to all Members of the Division. Its use in the Dissent in this instance was not improper, nor was it in conflict with any procedural rule.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp