Award No. 10645
Docket No. CL-9578

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope, by the use of conductors to perform the assigned duties of clerks in checking car riders over hump, 53rd Street District, Philadelphia, Pa., former Philadelphia Terminal Division.

(b) C. N. Parkinson, Jr., and other clerical employes to be named, be paid a day's pay for each date and tour that this violation occurred, from January 17, 1950, to July 1, 1953, as a penalty on account of this violation. (Docket E-962)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimants in this case held positions and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

For many years before and during the period of this claim the Carrier maintained a large classification yard and related facilities including a "hump" at what is termed the 53rd Street District, Philadelphia, Pa., on the Carrier's former Philadelphia Terminal Division, now a part of the Philadelphia Region. The usual type of operation was maintained here whereby cars were pushed over a hump by a yard engine, cars were cut off according to destinations,

trial of this matter, and the establishment of a proper record of all of the same.

(Exhibits not reproduced.)

OPINION OF BOARD: For many years the Carrier maintained a large classification yard and related facilities, including a hump, in its 53rd Street District at Philadelphia, Pa. With respect to the hump operation, cars were pushed to top of the hump by a yard engine, the cars were cut off according to destination and a car rider (a yard brakeman) rode the cars down into the classification yard — slowing or stopping the cars by means of the car hand brake. Until May 1952 the hump operation was conducted on all three tricks, seven days per week. The operation was fully discontinued as of July 21, 1952. The subject claim is based on events occurring before the discontinuance of the operation.

The hump activity was conducted under the immediate supervision of conductors, one of whom was on duty on each trick. It was the conductor's responsibility to assign the car riders to the cuts of cars. As a car rider rode over the top of the hump he called out his number, which was entered on a copy of a teletype list showing the train to be classified, the number of cars, their identification, etc. Until June 20, 1948 Group 1 clerical employes, one on each trick, checked the car riders over hump. As each car rider called out his number, the clerk wrote the number on the teletype list next to the number of the car or cars the rider was riding.

This claim arises because in June 1948 the Carrier abolished the subject clerical positions and thereafter assigned to the conductors the duty of writing on a copy of the appropriate teletype list, which was furnished the conductors for that purpose, each car rider's number next to the car or cars he was riding over the hump. Both prior to and after the disputed change the teletype lists in question were retained as permanent records.

The Organization contends that the assignment to conductors of the subject work, which previously had been regularly performed by Group 1 clerical employes, was a violation of the Clerks' Agreement. The pertinent provision of the contract is Rule 3-C-2(a), which is quoted in the parties' ex-parte submissions.

Following the abolishment of the subject clerical positions there were no other clerical positions remaining in existence at the location where the work of the abolished positions was to be performed. There were three clerical positions still assigned to work at the yard office, about 500 feet away, and there also remained three other clerical positions the duty of which was to chalk cars in the yard. None of the remaining clerical employes were assigned to work at the top of the hump, however, and under the confronting facts this was the location where the disputed work remained to be performed. The subject circumstances are not to be confused with the type of situation in which, for example, two clerical positions are worked in adjacent or contiguous offices and where, following the abolishment of one of the positions, such work as remains can be performed by the clerk in the other office. In the present case the remaining work of the abolished positions was tied to the top of the hump. It cannot be said that the yard as a whole was the location where the remaining work was to be performed.

Although the elapsed time for the disputed work that had been performed by the incumbents of the abolished clerical positions extended over a full

work day on each trick, there remained substantially less than four hours of actual work to be performed per trick. This work was assigned to supervisory employes (the hump conductors) and was incident to their regular duty of assigning car riders to cuts of cars.

In view of the foregoing, it is concluded that the Carrier's action here in dispute was properly handled in accordance with Rule 3-C-2(a) (2) of the Agreement. A denial award is required.

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 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June 1962.

LABOR MEMBER'S DISSENT TO AWARD NO. 10645,

DOCKET NO. CL-9578

A review of the record will show that the Referee exceeded the authority vested in him by the Railway Labor Act, as amended, and Circular No. 1, National Railroad Adjustment Board's Rules of Procedure, when he considered new assertions by Carrier, that had not been made a part of the dispute on the property, as a basis for a denial award.

On two different occasions prior to the adoption of Award 10645, I informed the Referee that he had no alternative than to sustain the Employes' claim, as the facts developed on the property conclusively showed that eight hours of disputed work remained on each shift and the assignment thereof to conductors violated Rule 3-C-2(a). However, he refused to change his award.

The instant dispute was referred to the Board on December 26, 1956, and it was not until July 10, 1957, that Carrier first contended that " * * *, the work performed by the Hump conductor, which is complained of here, did not, at its maximum, consume more than one (1) hour on any single tour of duty."

It did not so contend on the property, nor in its original submission to the Board in accordance with Circular No. 1. Consequently, the Board had no authority to consider something that was not in issue between the parties prior to an appeal to it. This is fully supported by the Railway Labor Act, Circular No. 1 and other authorities.

Section 3. First (h) of the Railway Labor Act gives the various Divisions of the Adjustment Board jurisdiction over "disputes" between certain specified employes and carriers. It does not give the Board jurisdiction over matters that are not in dispute. Section 3. First (i) provides that "disputes" between the parties involving grievances, shall be handled in the usual manner up to and including the chief operating officer before being referred to the appropriate Division of the Board with a full statement of the facts and all supporting data bearing upon the dispute. Carrier did not comply with this Section, as no allegation was made in its original petition that the work complained of did not amount to more than one hour on any single tour of duty.

That the Board has no jurisdiction over new issues, contentions, allegations, assertions and extraneous matters that have not been presented to the other party on the property and made a part of the dispute, is clear from the Railway Labor Act and the Board's Circular No. 1. Section 3. First (u) of the Act, authorized the Board to "adopt such rules as it deems necessary to control proceedings * * * not in conflict with the provisions of this section." It is apparent that the Board cannot by rule either extend or limit its jurisdiction; at any rate, it has not attempted to do so, for, after copying in its Rules of Procedure, that outlined in Section First (i) providing in part that, "disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of facts and all supporting data bearing upon the disputes", the Board has merely added that:

> "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934."

Circular No. 1 further provides that in the parties submissions under "Statement of Facts" each party shows separately the facts as they respectively believe them to be and that under their respective "Positions" the parties must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form and that all data submitted in support of their respective positions must affirmatively show the same to have been presented to the other party and made a part of the particular question in dispute.

That the Board's functions are appellant in nature is clear from the Railway Labor Act. Congress created the Board as an administrative agency to settle disputes that could not be settled by the parties themselves. That the Board has no jurisdiction to decide disputes on points not in issue between the parties prior to appeal to the Board is fully recognized by the Carrier Members (See their Dissent to Award 9988), who joined the Referee in adopting Award 10645.

The following Third Division Awards by various referees have also recognized this jurisdictional restraint and refused to decide disputes on new

matters introduced by either party for the first time after appeal to the Board:

AWARD 1485 — Referee Richards:

"* * * This Board has expressed disapproval of the injecting by the Carrier of new matters in course of appeal to justify what was complained of on the hearing appealed from. * * * Accordingly, the question of defective sight as a good ground for the removal is not, in the opinion of the Board, presented for present decision. * * *"

AWARD 3950 — Referee Carter:

"* * * the Carrier did not question the similarity of the work on the property. It was not until the case was presented here that this point was pressed. **Ordinarily one who mends his hold after an appeal has been taken to this Board will be permitted no advantage to be gained thereby.** * * *" (Emphasis ours.)

AWARD 5095 — Referee Coffey:

"We believe it is decisive of the fact question that the Carrier now seeks to change its position after the impact of its admission in the earlier case was brought home to it, which it cannot do. See Award 3950. * * *"

AWARD 5140 — Referee Coffey:

"Objections to the Board's jurisdiction have been noted and overruled. No objections were made by either party to handling the claim on the property, until the case reached this Board. Through all steps of the grievance procedure, the claim was entertained and a decision made on the merits. The objections now come too late."

AWARD 5457 — Referee Parker:

"* * * All of the foregoing reasons would have been far more impressive if they had been asserted by the Carrier's highest ranking appellate official at the time of his denial of the Employes' claim. If they had been, the record would not be open to an inference that perhaps most of the reasons now relied on by the Carrier as justification for its action are the product of the fertile minds of ingenious advocates instead of the real reasons for the Carrier's action at the time it contracted the work. * * *"

AWARD 5469 — Referee Carter:

"Carrier asserts that Claimant's work was not kept up without expense to the Railway Company in accordance with the provisions of Rule 67. **This question was not raised on the property, and cannot be raised before this Board for the first time. Parties to disputes before this Board will not be permitted to mend their holds after they reach the Board on appeal, and thereby create variances in the issues from what they were on the property.**" (Emphasis ours.)

AWARD 6215 — Referee Wenke:

"The basic philosophy underlying these holdings is that a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in the same or successive actions. That is, a person who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention. Such would be against public policy."

AWARD 6500 — Referee Whiting:

"The Carrier did not raise any question as to the delay in filing the claim in the handling thereof, on the property so we decline to base our decision thereon."

AWARD 6657 — Referee Wyckoff:

"**Third.** This claim started and ended on the property as a dispute on a single issue of fact; and both parties still recognize it fundamentally as such, although the submissions have fanned out into a variety of other questions which, so far as we can ascertain from the record, were neither presented nor discussed on the property. Such being the case, they are not properly before us."

AWARD 7036 — Referee Whiting:

"The Carrier asserts that its records show that no painting was performed by the traveling carpenter on the dates mentioned in the claim. **However, it appears that such issue was not raised on the property where it could readily be resolved.** * * *"
(Emphasis ours.)

AWARD 7601 — Referee Cluster:

"There was no mention in the claim or Petitioner's original submission of the fact that when Claimant was assigned to relieve at Jackson, he was instructed to cover his position at New Albany at the same time. This was brought out by Carrier in its submission as a defense to the claim that Claimant was forced to suspend work on his own position. Subsequently, in its Supplemental Statement filed at the Hearing, the Organization took the position that the assignment of Claimant to two positions at once was a violation of the Agreement. **Since this contention was not made in the handling on the property and was not part of the claim, we make no ruling upon it at this time.**" (Emphasis ours.)

AWARD 8225 — Referee Johnson:

"Therefore we need not consider whether the 60 days limit for the presentation of Mr. Phillips' claim started running on December 17, 1954, when the vacation schedule was adopted, or on May 9, 1955, when he was required to start his vacation at a time not of his choos-

ing, and therefore became directly affected. **For that question was not raised on the property.** Awards 3950, 5095 and 7848."

(Emphasis ours.)

AWARD 8324 — Referee McCoy:

"* * * No such evidence was introduced on the property. Nor was any evidence introduced or even referred to while the claim was being progressed on the property as to any interpretation placed on the language by past practice. No issue was made as to past practice.

"The issue of past practice was first injected into the proceedings after the claim was appealed to this Board. The Organization filed its Ex Parte Submission on July 21, 1954. On October 25, 1954, in its Ex Parte Submission, the Carrier raised the issue of past practice and cited a number of instances where seniority rosters had shown the seniority dates of agents identical to their temporary assignments. Five of these instances had occurred before the case before us arose. This would be quite persuasive evidence if we were permitted to consider it. But **it is well settled by our awards that new issues not raised on the property, and evidence not brought to the other party's attention while the case was in progress on the property, cannot be considered by this Board.** Awards 1485, 3950, 5095, 5457, 5469, 6657, 7036, 7601, 7785, 7848, 7850. **There have been a few departures from this principle, under special circumstances, but in the main the rule has been adhered to.**

"**The reason for the rule is obvious. Genuine efforts should be made to settle disputes on the property, to avoid cluttering the calendar of this Board with cases that could have been settled if the full facts had been brought out and considered. Only by full disclosure of positions and evidence while the case is on the property, can the parties hope to reach agreement.**

"There being no evidence of past practice properly before us, we must confine our consideration to the language of the Agreement. The issue is, what is meant by the words 'regularly assigned.'"
(Emphasis ours.)

AWARD 8567 — Referee Sempliner:

"The carrier has attached certain statements to its submission, pages 106-113 of the docket file. These statements appear for the first time as a part of the carrier's ex parte submission. They are clearly new evidence, not previously presented during the disposition of the claim on the property. Not being evidence submitted on the property, they cannot be considered."

AWARD 8572 — Referee Sempliner:

"* * * letters were written by the organization on April 6, 1957, and August 6, 1957, and this claim of 'faulty investigation' was not raised. Only on submission of the ex parte on September 20, 1957 did

the question arise. The failure to raise the claim on the property and properly dispose of it when the information needed was available, bars the claim at this time."

AWARD 8721 — Referee Daugherty:

"* * * The evidence presented by Carrier at the oral hearing before the Board is not admissible because (1) it was not discussed on the property; * * *."

AWARD 8758 — Referee Sempliner:

"The issue raised by the Carrier, namely laches in failing to make a timely claim, not having been raised on the property, cannot be considered here."

AWARD 8784 — Referee Bakke:

"* * * However, under the rules of procedure of this Board (Circular No. 1, issued October 10, 1934) and Awards 8234, 8377, 8411 and 8484, **the Carrier may not rely on that Memorandum here because it was not urged or used as a defense on the property.**" (Emphasis ours.)

On this same subject see Third Division Awards 9314, 9315 (Johnson); 9334, 9936, 9965, 10015, 10067, 10069 (Weston); 9393 (Hornbeck); 9419, 9552 (Bernstein); 9505, 9506 (Elkouri); 9647, 9746 (Crowther); 9951 (LaDriere); 10025 (Larkin); 10034, 10036, 10061 (Daly); 10074, 10075, 10076 (Webster); 10079 (Begley); 10378 (Dolnick).

The Seventh Circuit Court of Appeals in Walters v. C.N.W., 216 F 2nd 332, ruled:

"It has been specifically held that statements of fact in a brief that are not supported by the record may not be considered on appeal."

Regardless of these authorities, however, the Referee refused to decide this dispute on the undisputed fact that eight hours work remained on each shift, which was assigned to hump conductors in violation of Rule 3-C-2(a), the pertinent part thereof reading:

"(a) When a position covered by this Agreement is abolished, the work previously assigned to such position which remains to be performed will be assigned in accordance with the following:

(1) To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed.

(2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yardmaster, Foreman, or other Supervisory employe, provided that less than 4 hours' work per day of the

abolished position or positions remained to be performed; and further provided that such work is incident to the duties of an Agent, Yard Master, Foreman, or other Supervisory Employe."

In order to bring the instant dispute under the exceptions contained in Rule 3-C-2 (a) (2) and thereby deny the Employes' claim, it was necessary for the Referee to accept the Carrier's untimely and absurd contention that the "Apex of the hump" was a location, by holding: "none of the remaining clerical employes were assigned to work at the top of the hump, however, and under the confronting facts this was the location where the disputed work remained to be performed." There is nothing in the clear language of Rule 3-C-2(a), the facts of record, nor, Awards of this Board that supports such an untenable conclusion, quite the contrary.

During the handling of the dispute on the property, Carrier's sole defense was based on the contention that Rule 3-C-2 (a) had not been violated because the disputed work was incident to the duties of the Yard Conductor. In fact, the record shows that it had previously settled a similar dispute on the property when the same duties were reassigned to a brakeman. No contention was there made by the Carrier that the "apex of the hump" was a location. It was not until after an appeal was made to the Adjustment Board, that Carrier realized its defense that work was incident to the duties of the Yard Conductor would not stand up in view of the clear language in Rule 3-C-2(a), that it changed its plea, which now constitutes the basis for the Referee's decision.

That the Referee's tortuous interpretation of the word "location" is not supported by the clear language of Rule 3-C-2(a) is clear. Neither is it supported by any Award of this Division. Quite the opposite. In Award 10638, Referee LaBelle, the Board rejected Carrier's contention that "location" was confined to a certain office by ruling:

"Many Awards have been cited in connection with this matter, but none to the direct point involved here, except an Award in Docket No. 12, Special Board of Adjustment 192, involving Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and The Baltimore and Ohio Railway Company, where a similar rule was involved, wherein the following Findings were made in part:

'. . . Rule 1(c)1 requires that when a covered position is abolished the work assigned thereto which remains to be performed will be reassigned to position or positions covered by the agreement when such position or positions remain in existence at the location where the work of the abolished position is to be performed. Although the Carrier argues that there were no covered positions remaining in the Division Engineer's office it is shown that there were covered positions at Grafton in an adjacent office. The rule is not confined to a given office but rather treats of a **'location'**. Clearly an adjacent office under the circumstances here present would come within that designation.'

We agree with the foregoing. We do not believe that the 'location' should be given the narrow and limited construction as claimed by

the Carrier. We hold that there were clerk positions remaining at the location where the work of the abolished position was to be performed."

In a long line of Awards involving disputes between the Clerks' Organization and the instant Carrier and others, where Rule 3-C-2(a) and similar rules were in issue, the Board has never placed such a narrow and strained construction on the word "location", as the referee did here.

In Award 3583 (Erie), Referee Rudolph ruled that there were remaining clerical positions at Warren, Ohio.

In Award 3870 (Pennsylvania), Referee Douglas held that the Transfer Yard at Indianapolis, Indiana, was a location.

In Award 4044 (Pennsylvania), Referee Fox held that there were remaining clerical positions at a location known as Jefferson Yard, on the Indianapolis Division of the Carrier, and that Carrier violated Rule 3-C-2(a) when it re-assigned clerical duties to a Yardmaster. He further stated: "Both the Carrier and the Petitioner are bound by the quoted rule, and we may not go outside its provisions."

In Award 4045 (Pennsylvania), Referee Fox, Carrier agreed in substance that a Store Department in Altoona, Pennsylvania, constituted a location. It did not there contend that a desk, particular physical point, or a sub-department constituted a location, as here.

In Award 4046 (Pennsylvania), Referee Fox ruled that the Southbound and Northbound platforms at 30th Street Station, Philadelphia, Pennsylvania, were within the same location by stating:

"* * * There can be no reasonable explanation of the Carrier's action in assigning that character of the work, in the same station, to an usher on one platform, and to an assistant station master on the other; if it was ushers' work, as we think it was, it should have been assigned to them on both platforms."

In Award 4291 (Pennsylvania), Referee Radar held in effect that Carrier's Philadelphia Transfer was a location, when he ruled:

"On the proposition that 'there were other positions at this location to which the work of the abolished positions should have been assigned * * *,' there are cited Rule 3-C-2 and Awards 3583, 2825, 2826, 3870, 3871, 3877, 3878, 4043, 4044, 4045, 4086 and 4140."

It will also be noted that the Referee attempts to change the rule by confining the remaining work to each "trick". He states:

"Although the elapsed time for the disputed work that had been performed by the incumbents of the abolished clerical positions extended over a full work day on each trick, there remained substantially less than four hours of actual work to be performed per trick."

This theory, even if applicable here, was rejected in Award 10314 (Webster), B.R.C. v. G.T.W., by holding:

"The facts show that the Carrier, prior to the alleged violation, had 3 clerks assigned to the Chevrolet Yard in Flint, Michigan, one clerk per shift. On July 29, 1956 the Carrier abolished the position of the second trick yard clerk on the ground of slackening of business. The third trick yard clerk, whose position was not abolished, filed the claims which have been processed by the Organization to this Division.

The Carrier denied the claims on the ground that the work performed was less than four hours and therefore paragraph (2) of Rule 15(e) was applicable.

Rule 15(e)(1) is clear and unambiguous. It provides that where a position has been abolished, the work previously assigned shall be assigned 'to another position . . . or other positions covered by this agreement when such position or other positions remain in existence, at the location where the work of the abolished position is to be performed.' **The Carrier is in effect asking for a modification of its own Agreement. There is no question from the record that there still existed 2 other clerk positions at the location. In order to sustain the position of the Carrier, it would be necessary to expand 15(e)(1) to read 'no position at the location AT THE TIME' which would be a modification of the Agreement which this Board has no power to do.**" (Emphasis ours.)

It is obvious from what has heretofore been said, that Award 10645 is based entirely upon new allegations made by the Carrier that was beyond the jurisdiction of the Referee to consider. That the untenable conclusions reached were not based on the controlling rule or pertinent facts, is obvious. For that reason, I dissent thereto.

/s/ **J. B. Haines**
J. B. Haines
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD NO. 10645, DOCKET NO. CL-9578

The Dissenter's charge that Award 10645 is based on matters not handled on the property is unfounded .

Carrier defended its action of abolishing the positions involved under Rule 3-C-2 (a) (2) in a letter to the General Chairman under date of December 23, 1954, (two (2) years before the case was referred to this Board) wherein it stated, —

"Under the circumstances, it is our position that the clerical positions in question were properly abolished in accordance with Rule 3-C-2 (a) (2), and the claim is denied."

Rule 3-C-2 (a) (2) reads, —

"In the event no position under this Agreement exists **at the location** where the work of the abolished position or positions is to be performed, then it may be performed by an Agent, Yard

Master, Foreman, or other supervisory employe, **provided that less than 4 hours' work per day of the abolished position or positions remains to be performed**; and further provided that such work is incident to the duties of an Agent, Yard Master, Foreman, or other supervisory employe." (Emphasis ours.)

That the positions were properly abolished under Rule 3-C-2 (a) (2) in and of itself is an assertion that less than four hours' work per day of the abolished positions remained, that no positions remained at the location (apex of hump), and that the work was incidental to the duties of a supervisory employe.

Award 10645 correctly denies the claim in accordance with the applicable rules.

/s/ R. A. Carroll
/s/ P. C. Carter
/s/ W. H. Castle
/s/ D. S. Dugan
/s/ T. F. Strunck

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD NO. 10645, DOCKET NO. CL-9578.

The fallaciousness of the Carrier Members' arguments are clearly manifested by a review of the awards in my Dissent. They are engaging in the fantastic in a frantic attempt to change the facts of record and supply Carrier with a defense that it did not see fit to make on the property. In a dispute between these same parties, Referee Parker, in Award 6024, rejected a similar contention by ruling:

"* * * There is nothing in the record of proceedings, either on the property or before this Board, indicating Carrier's action in the present case was due to conditions resulting from such order or is defended on that premise. **Under such conditions we cannot speculate as to the facts or supply Carrier with a defense which it did not see fit to make itself.** * * *." (Emphasis ours.)

It is self-evident that Carrier Members are laboring under the delusion that a flat allegation that a position was "properly abolished in accordance with Rule 3-C-2 (a) (2)", relieves the Carrier of its obligation under the Railway Labor Act and the burden of proving the facts constituting its defense. That there is no logical basis for such an erroneous conclusion, is apparent. Their further untenable contention that the mere abolishment of a position "in and of itself is an assertion that less than four hours' work per day of the abolished positions remained, * * *.", is beyond the realm of rational reasoning.

Inasmuch as Carrier relied upon Rule 3-C-2 (a) (2), which is an exception to the Scope Rule, the burden was upon it to prove that its action was

in compliance therewith. This it failed to do. See Third Division Awards 2737, 2819, 4538, 5136, 10109 and 10229.

It is clear that there is no substance to the Carrier Members' contentions.

/s/ **J. B. Haines**
J. B. Haines
Labor Member