Award No. 11963
Docket No. CL-11951

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

William N. Christian, 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 Rule, when it used Car Repairman Charles O'Neal, and other named M. of E. Department employes to operate the Stores Department motor truck and perform other work which accrues to, and had formerly been performed by, Group 2 employes at the Storehouse, Holton Street Car Shop, Cleveland, Ohio, Lake Region.

(b) Claimants George M. Layer, D. E. Krahn, C. A. Foulkes, Harvey Winfrey and Walter Marshall, should be allowed payment, as a penalty, for all time worked by the M. of E. Department Car Repairmen in the performance of Group 2 work on the dates specified.

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.

such suit the findings and order of the Adjustment Board shall be prima facie evidence of the facts therein stated."

This provision contemplates that such suit "shall proceed in all respects as other civil suits" with the exception that the findings of the Adjustment Board as to the stated facts will be accepted as prima facie evidence thereof. It is clear this provision contemplates the application of the same rule of damages and the same rule against penalties in enforcing contracts as are applied in civil suits generally. An award contrary to these principles would be unenforceable as a matter of law.

For the foregoing reasons, it is respectfully submitted that your Honorable Board may not properly enter such an award in this case.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement in the instant case and that the Claimants are not entitled to the compensation which they claim.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimants, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

All data contained herein have been presented to the employes involved or to their duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: The work involved is the driving of a "wreck truck." The truck is used to haul Car Repairmen and other Car Shop em-

ployes, and their equipment, to and from wrecks and derailments. On May 31, 1957, Carrier assigned the work to a Maintenance of Equipment employe (not covered by the Clerks' Agreement).

Formerly, the work was assigned at this location to employes of Claimants' class, "Chauffeurs, (Stores and Station Departments)". The history of the work is: For many years Carrier owned two motor trucks assigned to the Stores Department at Holton Street Car Shop in Cleveland, Ohio; the trucks were used to haul materials and supplies between the Store Room and other locations in the Cleveland area; the work of driving the trucks was assigned to employes of Claimants' class. After assignment of the truck driving work to employes of Claimants' class, Carrier discontinued the use of "wreck trains" and unilaterally designated one of the trucks as a "wreck truck" to be used when required, in lieu of a "wreck train." Carrier thereafter determined that it no longer needed two Chauffeur positions in the Stores Department. Carrier abolished the Chauffeur position which had theretofore performed the incidental work of driving the wreck truck. Thereafter, a member of the wrecking crew drove the truck to wrecks; this gave rise to the claim.

Employes urge the application of Rule 3-C-2 which provides in part:

> "(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."

Carrier answers the reliance upon Rule 3-C-2 is a fatal variance from the claim as presented on the property. Employes reply that its charge of a violation of the Rules, "particularly the Scope Rule," includes a charge of violating Rule 3-C-2, upon authority of Award 6024; and, further, that the Scope Rule specifies Rule 3-C-2 therein as an exception. The Scope Rule does expressly refer to Rule 3-C-2, but as to Group 1 Employes; the Scope Rule does not refer to Rule 3-C-2 as to Group 2 Employes, to which group the Claimants and positions herein belong.

While in a proper case Rule 3-C-2 would apply to both Group 1 and Group 2 Employes, there is no occasion for application of Rule 3-C-2 in the confronting claim. Obviously, the parties intended by Rule 3-C-2 to preserve to the Organization under stated circumstances that work which belonged to the Organization exclusively before abolishment of a position; it would be illogical to presume that the parties intended by Rule 3-C-2 to grant work exclusively to the Organization thereby which had not theretofore been the exclusive work of the Clerks.

The Scope Rule is general in character; it does not expressly assign to the Organization the work here involved. Under these circumstances, resort must be had to custom, tradition and past practice. Employes have failed to sustain the burden of proving a system-wide practice of their performance of this work to the exclusion of other crafts. Award 10615 (Sheridan).

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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.

LABOR MEMBER'S DISSENT TO AWARD 11963, DOCKET CL-11951

Award 11963 is not judicious in any sense and does violence to the very processes established for the orderly disposition of disputes in the railroad industry. Whatever else may be said of those processes, they are designed so that "minor disputes" culminate in arbitration. The Referee (Arbitrator) sits with the Board composed of equal numbers of Carrier and Labor Members (advocates) and renders a decision which, insofar as the Organizations are concerned, is final. (See dissent to Award 11882 and note in particular the reference thereto with regard to the uninhibited exercise of "such awesome powers" as is reposed in this Board.)

In the instant Award, the Referee just did not measure up to his obligations; and the proposed Award was so clearly erroneous that he was asked no less than four times to forego voting for adoption, thus permitting the case to pass to another Referee. Having done all else to avoid this unfortunate mishap, and since no appeal is available, the writer is compelled to dissent thereto as vigorously as possible.

Even without benefit of the entire Agreement, or all the supporting facts and arguments, enough is written in the "Opinion of Board" to demonstrate this Award to be so palpably erroneous that it cannot possibly serve as precedent. The great harm it can cause, though, is that such an Award is at cross purposes with the very law under which this Board was created, and will be seized upon in any similar dispute and will, no doubt, act as the catalyst to create additional disputes. It, therefore, errodes the only purpose for this Board's existence.

The Award cannot, therefore, go unchallenged; nor can the Referee be left "scot free," unanswered, and uninformed. Thus, two purposes are proposed in this dissent: (1) to challenge the Award and (2) to attempt to enlighten the errant Referee.

First, rather than deal with assertions, the salient facts, proven, irrefutable, and uncontested, will be set forth as briefly as possible:

1. Since its inception, the work involved had been assigned to and performed by one of several chauffeurs, occupants of positions under the Clerks' Agreement;

2. One such chauffeur position was abolished;

3. One such chauffeur position remained in existence at the location where the work of the abolished position remained to be performed;

4. Work of the abolished position was not assigned to the position under the Agreement remaining at the location involved;

5. Agreement Rule 3-C-2 specifically covers; and

6. A dispute arose because the Carrier assigned and/or permitted an employe outside the involved Agreement to take over and perform work of the abolished position.

These six basic and salient points were known to the Referee. Agreement Rule 3-C-2 has many times heretofore been interpreted by this Board; and, since the rule is quoted, fully dealt with and analyzed completely there, it will not be repeated here. These Awards were cited to the Referee. Examples of this Board's rulings in prior Awards between the same parties, same Rules Agreement, follows:

Award 3870, Referee James M. Douglas

"Carrier argues that it was authorized to assigned clerical work of the abolished clerk's position to the yardmasters because the time consumed by each of the yardmasters in doing such work did not exceed two hours per day, and that Rule 3-C-2 (a) (2) permits assigning such work to a yardmaster provided that less than four hours' work per day of the abolished position remains to be performed.

However, Carrier overlooks the provision in that same subparagraph (2) that such work may be assigned to a yardmaster only in the event there is no clerk's position remaining in existence at the location where the work is performed. In this case we have two clerks' positions at such location still existing. And under subparagraph (1) Carrier is required to assign the work of the abolished position to other existing positions under the agreement remaining at the location where the work is to be performed.

It is a well established rule of construction that all related provisions of an agreement must be read together, and when we do this with Rule 3-C-2 (a) it is plain that sub-paragraphs 1, 2, 3, and 4 of (a) are not independent rules of the agreement but are interdependent, and all relate back to (a) and apply only when the conditions provided in (a) occur. See Award 3583."

Award 3877, Referee John W. Yeager

"As long as there was no clerk at this point to whose position these duties were assigned they, as incidental duties of a Yard Master, could be performed by a Yard Master. However, after the clerical positions (position at the time of the incident of the claim arose) came into being and the Carrier assigned to them these duties which had been performed as incidental duties of a Yard Master, the clerical position and these duties came under the Scope Rule of the Clerks' Agreement, there to remain unless and until properly removed.

If we assume that there was no proper removal the effect of what was done was about as follows: The first trick Yard Master was, instead of performing incidental duties of his own position, required to perform duties covered by the Clerks' Agreement and he was to that extent assigned in relief of and in division of the duties of position B-49-G.

Was there a proper removal? The agreement does not specifically point out how incidental duties of a Yard Master, once removed by placing them under another agreement, may be returned as such but we think that the method may be found by reference to Rule 3-C-2, the pertinent part of which is the following:

'3-C-2. (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, 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.'

The conclusion drawn from this is that in order that former incidental duties of a Yard Master, once withdrawn and assigned to a clerks' position, may not be withdrawn therefrom and returned as incidental duties of a Yard Master unless and until (1) the clerical position wherein the duties are performed is abolished, (2) and not then unless no position under the agreement exists at the location where the abolished position is to be performed, (3) and not then unless the work remaining is less than 4 hours per day and as applied to this docket incident to the work of a Yard Master.

No other method has been discovered which would, without violating the Scope Rule of the agreement, permit the restoration of incidental clerical duties of a Yard Master once they had been removed and placed within the Scope of the Clerks' Agreement."

Award 4043, Referee Fred L. Fox

"It must be kept in mind that we are here dealing with a rule said to be peculiar to this and one other carrier. The question frequently arises as to the proper construction of other agreements, where a position is set up to do work which is incident to the work of other crafts or classes, and such position so set up is abolished. Many awards cover this question, but it is unnecessary to deal with them here. The controlling rule 3-C-2 (a) sets at rest this question, so far as this Carrier is concerned. The rule covers work previously assigned to an abolished position, and undertakes to provide how the work of such position shall be assigned. **Therefore, the question of the incidence of work to the primary duties of other crafts and classes can only be considered in the manner provided in sub-sections (2) and (3) of Rule 3-C-2 (a).**

Recent Awards of this Division have dealt with Rule 3-C-2 (a). See Awards Nos. 3583, 3825, 3826, 3871, 3877 and 3906. The views **we have here expressed are in line with the uniform holdings of said Awards.** In Award No. 3871, it was said:

> 'Carrier relies chiefly on sub-paragraph (3). But that sub-paragraph is not an independent rule of the Agreement. It is an interdependent provision of 3-C-2 (a) and relates back to (a) and must be construed with (a) * * *.'

When we follow this holding, as we do, and consider Rule 3-C-2 (a) in its entirety, and as one rule, we find that all deal with **work previously assigned** to a position which has been abolished. Sub-section (1) deals with a situation where some of the work of the abolished position remains to be performed at the location involved and positions remain which can perform such work; sub-sections (2) and (3) deal with situations where no such positions exist, and (2) says certain supervisory employes may, under certain conditions, perform remaining work, and under (3) members of other crafts or classes outside of the supervisory employes referred to in sub-section (2), may perform the same, if directly incident and attached to their primary duties. This construction of the Agreement answers the Carrier's contention that the position of the petitioner, if sustained, would make sub-section (3) meaningless. Sub-section (2) only applies to the positions referred to therein, while (3) is much broader in its scope and meaning. Both are necessary to cover all situations which might arise, and, in our opinion, supplement each other." (Emphasis ours.)

Award 4044, Referee Fred L. Fox

"This dispute must be settled on the terms of the Rule (Rule 3-C-2(a)) quoted above, which is said to be peculiar to this Carrier and one other. **Practices on other railroads, and awards based on agreements which do not contain this rule, may not be relied on. Both the Carrier and the Petitioner are bound by the quoted rule, and we may not go outside its provisions.**

There can be no doubt that when the abolished positions were established in November and December, 1944, certain work was

assigned to them, including some work which yard masters had theretofore performed, which work so transferred from yard masters was incident to and attached to the primary duties of yard masters; and that when these positions were abolished in August, 1945, a part of the work assigned to them was returned to yard masters, not covered by the Clerks' Agreement. This act of the Carrier appears to us to be in plan violation of sub-section (1) of the quoted Rule 3-C-2 (a). **That rule leaves the Carrier no power to assign any of the work of an abolished position to any employe not covered by the Agreement, so long as 'other positions remain in existence, at the location where the work of the abolished position is to be performed.'** Other clerical positions under the Agreement were in existence when the positions of the Claimants were abolished, and some of the work which claimants had performed were assigned to such positions. This being true, we cannot escape the clear and express provisions of sub-section (1) of the Rule aforesaid."
(Parenthical interpolation and emphasis ours.)

Award 4045, Referee Fred L. Fox

"* * * The question in issue is the interpretation of Rule 3-C-2(a) of the Clerks' Agreement, and, in substance, we have presented here the same questions which were dealt with by this Division in its awards Nos. 4043 and 4044 this day made.

* * * * *

* * * We have here a rule peculiar to this Carrier and one other, and as we have heretofore said, agreements are supposedly intended to be kept; therefore, we must deal with this dispute under the agreement of the parties which covers it.

Whatever may be our opinion as to whether the delivery work aforesaid was or was not, primarily, work belonging to employes of the Mechanical Department, working under their agreement, when the same was assigned to employes working under the Clerks' Agreement, on April 25, 1935, the fact remains that on that date it was transferred, except in special instances, to employes working under the latter agreement, and we are, therefore, called upon to deal with the dispute, here presented, under that agreement.

Rule 3-C-2(a) covers work previously assigned under the Clerks' Agreement, where a position performing that work is abolished. **Here work was assigned to positions which were subsequently abolished, and this brings the case within that rule.** The rule then provides how the work of the abolished position or positions remaining at the location where said work is to be performed, shall be assigned. Sub-section (1) of the rule provides that such remaining work shall be assigned '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.' **This is a plain and simple statement, the intent and meaning of which cannot, reasonably, be doubted, and must be applied to this dispute.**

But the rule does not stop there. It was, no doubt, anticipated that, where positions were abolished, situations would arise where

work would remain with no position in existence, at the location where the remaining work of the abolished position was to be performed, which could perform such work. To cover such a situation, sub-sections (2) and (3) were incorporated in the rule. By sub-section (2) it was provided that, under stated conditions, Agents, Yard Masters, Foremen, and other supervisory employes might do such work; and by sub-section (3) it was provided that, under certain stated conditions, employes of other classes or crafts might do the work. No question of a supervisory employe doing any of such work is here involved. In this case the work of the abolished positions was assigned to employes of another class or craft, and this could only be done under sub-section (3). The question is, therefore, whether, under the agreement, and considering Rule 3-C-2(a) thereof as a whole, sub-section (3) can be applied to the admitted facts of this case.

In the first place, Rule 3-C-2(a) must be considered as a whole. In interpreting agreements we consider all parts thereof in an effort to reach their true intent and meaning. **As stated above, sub-section (1) is clear and explicit, and furnishes the principle and philosophy sought to be established, a principle not out of line with the general rule of all labor agreements, that the employes of a particular class or craft are entitled to perform the work attached thereto.** So long as positions, working under the Clerks' Agreement, at the location where the work of the abolished positions was to be performed, were in existence, they were entitled to do the work of the positions abolished. Only in situations where no such positions are in existence, can sub-sections (2) and (3) of the rule be applied. Sub-section (3) does not specifically so state, but we think it is necessarily implied, because we do not believe we should construe the agreement in such a way as to create an unreconcilable conflict in its provisions, if such construction can possibly be avoided. Giving the rule the construction we follow, its provisions are reconciled, and each thereof given effect, which, we are persuaded, was what the parties thereto intended." (Emphasis ours.)

Award 4291, Referee LeRoy A. Rader

"Carrier presents many technical arguments to show that the positions in question were not regular but were extra positions. Also, that the claimants could have done several things to more carefully protect their job status, which they failed to do. However, the fact remains that claimants and others similarly situated held these positions over a long period of time, working every day, overtime, etc. The fact situation brings this claim within that as previously passed on by the Board in Award 3587, with Judge Herbert B. Rudolph sitting with the Board as referee. The reasoning expressed in that Opinion is well founded and will be followed in the instant case. * * *"

Award 7287, Referee LeRoy A. Rader

"That under the **Special Rule** dealing with the disposition of work remaining when a position is abolished, 3-C-2 (a) the first step is specifically provided for in paragraph (1), reading:

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

That in accordance therewith it was mandatory that the remaining work should have been assigned to the two other clerical positions covered by the Agreement, which were maintained at this location. That it is unnecessary to give any consideration to the other sections of Rule 3-C-2 (a), since they only become operative when and if Section (1) is not applicable, which it was. Cited in support of this position is Award 4045, same parties, in dealing with this same rule, also a like situation in Award 3877. Also Awards 3583, 3826, 3870, 3871, 4043, 4044, 4291, 5541, involving the same parties, same Agreement. Also cited Awards 5436, 6527, 6528 and 6529.

* * * * *

4. The rule under consideration in this claim is a Special Rule appearing only in a limited number of agreements, and

5. In keeping with numerous awards of this Division the facts as presented here as applied to this Special Rule warrant a sustaining award." (Emphasis ours.)

Particularly apropos to the situation is the following decision where, even though admittedly the work normally would accrue to Shop Craft employes, Referee John M. Carmody held in this Board's Award 4618:

"There can be little doubt about the convenience or reasonableness of having all work of precisely the same character, such as oil and grease mixing here, under one classification, under common supervision, and under one Agreement. The Carrier and the Organization appear to be in accord on that point. The Organization already has sought to have the other similar positions, covered into an agreement made with another craft in 1946, brought under this Agreement. The Carrier accomplished this, not by agreement as provided for in Rule 9-A-2, but by unilateral action.

Although many Awards have been brought to our attention, we cite none here, because this action is so clear a violation of the Agreement of May 1, 1942, decision can rest on its own bottom."

One of the principles which has been established by this Board is that prior Awards, especially on the same property and interpreting the same rules, must not be overturned unless it be clearly shown that they are palpably erroneous. See Awards 11402 (Hall), 11449 (Coburn), 11833 (Dorsey), 11897 (Hall) and others. The above shows this Award is in serious error and also shows that the Referee chose to ignore and go counter to the many prior Awards of this Board without any attempt whatsoever to distinguish them or show them to be erroneous.

This Board, including the Referees who sit with the Board and render decisions, are without authority to add to, take from, or write rules for the parties. Awards 871 (DeVane), 1230 (Tipton), 2029 (Shaw), 2612 (Shake), 3407 (Tipton), 4763 (Connell), 6959 (Coffey), 7577 (Shugrue), 7631 (Smith), 7718 (Cluster), 9253 (Weston), 9314 (Johnson), 9606 (Schedler), 10008

(McMahon). As an example, in Award 5864 (Jasper) and others, this Board has held that the Board is required to take the agreement as it is written and cannot re-write it by interpretation nor by interpretation put into it that which the parties have left out.

In addition to the above, there are numerous other cases from this same Board which hold that one should not strain and ignore the language of the Agreement; for example, Referee Levi M. Hall stated in Award 11485:

> "* * * The rules of contract construction require that unless indicated otherwise, words used in a contract are to be interpreted in their normal and popular sense."

and in Award 6867, wherein Referee Jay S. Parker held:

> "One of the well-established rules of contractual construction is that when clear and unequivocal the terms of an Agreement must be given their plain, ordinary and everyday meaning. * * *"

Another proposition ignored by this Referee is set forth in Awards 2490 (Carter) and 6732 (Parker), i.e.:

> "We adhere to the proposition that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section. * * *"

There is legal basis for the above, as evidenced by the following excerpts from Anson vs. Hiram Walker & Sons (United States Court of Appeals — Seventh Circuit — 222 Fed. 2d 100):

> "The intention of the parties must be found in the language used to express such intention; and if the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision.
>
> Consequently, the rights and remedies of the parties are to be determined from the plain unambiguous words of the contract upon which suit is brought, unattended by averments of other intentions or contemplations. The unequivocal words of the Agreement must speak for themselves."

Now, in turning to point (2), perhaps it would be well to spell out just how a Referee (arbitrator) is expected to function. The Dissenter will not rely on his own words for this purpose, but on the words of the Supreme Court of the United States, which clearly set out those duties and obligations in "UNITED STEELWORKERS OF AMERICA vs. ENTERPRISE WHEEL AND CAR COMPANY (363 U.S. 593):

> "* * * When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbi-

trator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, **yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.** * * *"
(Emphasis ours.)

In Award 11963, the Referee demonstrated either a total lack of understanding of the principles upon which the Agreements are founded or a determination to disregard those principles in favor of his own theories. By placing a one-way restriction on the Rule here involved, the Referee deprived the parties of their legal rights and obligations to make and maintain their own Agreements.

At the Referee Hearing in this case, Carrier representative argued that Rule 3-C-2 was not considered on the property; that to consider the entire Agreement would be an "unconscionable burden" on the Carrier. Evidently his prayer struck a responsive and sympathetic chord. The Referee's first proposed Award read in part:

> "In any event, there is no occasion for application of Rule 3-C-2 in the confronting claim."

The writer requested opportunity to discuss the proposed Award. At first, believing the Referee would have a reasonable amount of self-esteem and, therefore, feeling it useless to ask for a reversal of the proposed Award, the Referee was requested to strike all but the first and last paragraphs from his "Opinion", especially since Carrier concedes that Rule 3-C-2 applies both to Group 1 and Group 2 employes. As evidenced by this Award, the only thing which the re-argument and requests accomplished was a new and different attack on Rule 3-C-2, more vicious and erroneous than the first proposal. Thus, after four times refusing this writer's request to forego voting on his Award thereby allowing the claim to pass to another, and hopefully, more experienced Referee, the Referee persisted; and the Award, bereft of any attempt to distinguish or show that the many prior Awards on the identical issues were erroneous, was adopted.

Whatever the Referee's motives, he should not, without citation of one single authority or any attempt whatever to distinguish prior cases, have proceeded to overturn a long line of precedent Awards interpreting the very same rule, and conclude that "Obviously, the parties intended by Rule 3-C-2 to preserve to the Organization under stated circumstances that work which belonged to the Organization **exclusively** before abolishment of a position; it would be illogical to presume that the parties intended by Rule 3-C-2 to grant work exclusively to the Organization thereby which had not theretofore been the exclusive work of the Clerks."

Rule 3-C-2 is described as the "assignment of work" rule; and, perhaps, in view of its provisions, a more descriptive title would be "Preservation of Work" rule, for it is specifically designed to preserve to the employes under the Clerks' Agreement that work which they have been performing except under certain conditions, clearly spelled out in the rule, which conditions were not present here.

Award 11963 is in serious and harmful error. It is a gross and flagrant miscarriage of justice, repugnant to prior well-reasoned Awards on similar issues, and should be shunned by any Referee who recognizes and accepts his obligation as a "neutral" or "arbitrator" in a dispute.

For the foregoing reasons, among many others, the undersigned most vigorously dissents.

D. E. Watkins

CARRIER MEMBERS' ANSWER to LABOR MEMBER'S DISSENT TO AWARD 11963

The Dissentor improperly refers to our proceedings as "arbitration" and the Referee as an "Arbitrator." The Dissentor is advised to study Section 3, First of the Railway Labor Act covering the establishment and operation of this Board, including but not limited to Section 3, First (1) covering the selection of a "Referee," and then compare those provisions with Section 7, First, dealing with "Arbitration." He will find, without further need for comment, that we are not engaged in arbitration proceedings, nor is the Referee an arbitrator. This Dissentor in his conclusion, makes reference to the decision handed down in United Steelworkers v. Enterprise Wheel & Car (363 U. S. 593) and implies that the Court was there discussing the "power" of a referee. This situation, of course, is not germane to our case, but it should be noted that the Court was discussing the power of an arbitrator, not of a referee. The Court recognized that the rule-making power and rule-interpreting power may be combined in the arbitration proceeding, and held that so long as the arbitrator's award "draws its essence from the collective bargaining agreement" and does not "manifest an infidelity to this obligation" a Court cannot upset his award even though "by applying correct principles of law to the interpretation of the collective bargaining agreement, it can be determined that the agreement did not so provide and that therefore, the arbitrator's decision was not based upon the contract. . . ."

This Board, needless to say, is not a rules-making body, nor does this Board properly combine its interpretive functions with rules-making functions. An award of this Board is valid only to the extent that it can be supported by the ordinary rules of contract law. In Crowley v. Delaware & Hudson Railroad Corporation (63 Fed. Supp. 164), the Board said with reference to an award from this Board:

> "Such legal rights must be determined in accordance with the law of contract, . . . and to recover here plaintiff must establish that the bargaining agreement of June 24, 1940, has been breached by the defendant."

The Dissentor has been consistently attempting to have this Board interpret its authority and power as that invested in an arbitrator. However, the Board has already discussed this argument and rejected it. In our recent Award 10893, we said:

> "We are not of the opinion that the decision of the Supreme Court of the United States in the case of Steel Workers vs. Enter-

prise, reported in 363 U.S. page 593, cited by Petitioner has any bearing with respect to the authority vested in this Board. * * *"

The Dissentor attacks the validity of **Award 11963** on the frivolous grounds that the Referee lacked suitable experience. In this respect, our answer to the Labor Member's Dissent to **Award 11882**, is apropos and fully meets this unwarranted criticism.

The Dissentor also implies that this decision was made contrary to the weight of authority and in total disregard of established precedent. On the remote chance this assertion were to be taken seriously, it should be advised the Referee was handed **twenty-six awards** from the same property, covering an interpretation of either the Scope Rule or Rule 3-C-2, or both—**all of which** supported the Carrier's position. All of these decisions are later awards than those cited by Petitioner and that fact, coupled with their sound and rational interpretation of the contract, establishes them as the clear weight of authority. These awards were thoroughly discussed and evaluated, and it was clearly evident they constituted the most thoughtful analysis of the rules involved. Since the present award has been rendered, the Board has rendered seven (7) more decisions covering an interpretation of the same rules, and denied all of the claims. See **Awards 12106, 12107, 12108, 12109** (Seff) and **12175, 12177, 12178** (Stack).

Finally, the Dissentor concedes that Rule 3-C-2 is an "assignment of work" rule, but insists that a more descriptive title would be "Preservation of Work" rule. Incredible as it may sound, the Dissentor endeavers to tell the parties to the Agreement **they improperly** captioned the rule and its function. The Dissentor blatantly assumes a prerogative of the parties in his attempt to unilaterally redefine the special function of a rule and is piqued when the Referee refuses to accept his authority to do so. The Referee could not have honorably acted in any other manner.

From the foregoing, we can conclude the Dissentor's intemperate attack upon **Award 11963** and its author was ill-advised and groundless, as the award represents a sound and judicious opinion of this Board.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 11963, DOCKET CL-11951

Carrier Members' answer to Labor Member's Dissent is a prime example of reciprocity and was fully expected, for it is only fitting and proper that the Carrier Members should come to their "Referee's" defense. If they owed him nothing else, they at least owed him the obligation to defend and attempt to support his conclusion. The answer, however, is quite revealing,

and, if studied, may well disclose the reasons for the dissent far better than anything which could have been written.

As for their first page: Let the record stand and common sense prevail, for an Arbitrator is, by any other name, an Arbitrator — as "a rose is a rose is a rose" — and arbitration connotes but one thing which references and seeming enlightenment does not change. At least Carrier Members did not stultify themselves so much as to argue that we are "members" and not "advocates," which argument would be as sensible, and meaningless, as the argument over "Arbitrator" and "Referee." One can form his own opinion of parties who try to demonstrate that it is wrong to call a spade a spade.

The interesting portion of the Carrier Members' efforts, however, is found in their statement that:

> "This Board, needless to say, is not a rules-making body * * *."

yet proceed to admit that:

> "Nor does this Board properly combine its interpretive functions with [its] rules making functions." (Interpolation ours.)

This writer argued for, urged, implored, demanded and requested that the language of Rule 3-C-2 be given its common everyday meaning but that was rejected and the Referee applied the "exclusive test." In their answer, however, Carrier Members tip their hand and contradict their alleged "purity" and "appellate" purposes when they show that:

> "All of these decisions are later awards than those cited by the Petitioner. . . ."

That, precisely, was the gravemen of the dissent. The rule involved still reads the same — only the "Referees" have changed. Needless to say, it is most difficult, if not impossible, to make and maintain agreements when, while the "game" is still in progress, the Rules are changed, **not by the parties, but by interpretation of this Board, erroneous interpretations**, arrived at by resort to "General Rules" of this Board. Therefore, no better example of the reason for the interpolation of [its] above, could be made than is evidenced in Carrier Members' Answer to my Dissent to this "Award."

The very nature of the case here involved brought the matter specifically under Rule 3-C-2. Rule 3-C-2 is a special rule. It has, as its source, the Agreement. This Award, and the others arrived at by the "different" Referees, is based on a general rule which is not found in the Agreement. The test of "exclusivity" has erroneously been used to render Rule 3-C-2 of benefit only to the Carrier. Many prior well-reasoned Awards have been rendered which gave strict and literal meaning to the clear and unambiguous language of Rule 3-C-2. That language is still the same, only the Referees have changed. They have been persuaded to use a general rule, or test, promulgated by this Board, to invalidate a special rule which clearly and expressly forbids the removal of any work of an abolished position except under the conditions clearly spelled out in the rule.

D. E. Watkins