Award No. 13142
Docket No. CL-13137

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5126) that:

(a) Carrier violated the Agreement between the parties effective October 1, 1940, as amended, at Portland, Oregon, when on November 19, 1960, it failed to call and use Mrs. M. J. Holley for work required of her position on a day not a part of any assignment; and

(b) Carrier shall now be required to allow Mrs. M. J. Holley eight hours' compensation at the pro rata rate of Claim Clerk Position #44, Portland Freight Station.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including revisions (hereinafter referred to as the Agreement), between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Employes) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

1. At the time of this dispute, five claim clerk positions were in existence at Carrier's Portland Freight Station. They were:

Pos. No.	Incumbent	Seniority Date	Assigned Hours	Rest Days
44	M. J. Holley	May 19, 1960	8 A. M.–4:30 P. M.	Sat&Sun
45	V. W. Livesay	July 16, 1935	8 A. M.–4:30 P. M.	Sat&Sun
46	H. W. Klug	Sept. 18, 1936	8 A. M.–4:30 P. M.	Sat&Sun
47	W. E. Banz	May 17, 1934	8 A. M.–4:30 P. M.	Sat&Sun
47	A. L. Wostrel	Sept. 15, 1939	8 A. M.–4:30 P. M.	Sat&Sun

signed duties is purely to avoid overlapping or duplication. This division of work made for the sake of convenience cannot be construed as conferring on the Claimants any right to exclusivity, as argued by them.

On this record in this case we do not find that these claimants had the exclusive right to perform all the checking work in the area to which they usually are assigned.

The work involved is of a type reserved to the Yard Checkers as a class, and not to any incumbent of a particular position. As a consequence, where there are two or more employes in this class entitled to perform the work on an overtime basis, the senior employe in that class has priority (Award 5266, Robertson)."

AWARD 8872

"The prevailing duties covering the rate and route clerks' positions are identical on the three shifts being covered by the same bulletin covering rate and route clerks' positions; the yard clerks' positions are also identical on the three shifts, they being covered by the same bulletin covering yard clerk positions.

* * * * *

The evidence here shows that all yard clerk positions have the same identical duties, so we must agree that if the Yard Clerks used (called) were sufficient in number to perform the holiday work load, the preference rule has been complied with, as they, too, have the same preference to their regularly assigned work. There is no evidence contained in this record to show that any of the called employes performed work which they were not entitled to perform as part of their regular assignment."

In view of the foregoing, it is obvious that the employes utilized on date of claim were properly called to perform work within the classification of their positions of claim clerk by virtue of their seniority and that provisions of Rule 20(e) of current agreement were not applicable in giving a junior employe call preference over a senior employe to perform rest day service under that rule when such junior employe occupies a position of same title, work location, assigned hours and work days, and same agreed-upon rate for which work positions were classified as "Claim Clerk."

CONCLUSION

The claim in this Docket is entirely lacking in either merit or agreement support, and Carrier requests that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Mrs. M. J. Holley, an unassigned employe, had been working in Position No. 44, Claim Clerk, at the Portland Freight Station, for the two weeks preceding Saturday, November 19, 1960, under Rule 34 (b), pending permanent assignment under Rule 33. Four other Claim Clerk positions, numbered 45, 46, 47 and 48, at the Portland Freight Station were occupied by other employes with greater seniority than Mrs. Holley. All five positions were regularly assigned Monday through Friday five day positions.

On Saturday, November 19, the incumbents of Positions 46, 47 and 48 performed work claimed by the Organization to be work regularly assigned to Positions 44 and 48.

Organization claims that Carrier's assignment of the incumbents of Positions 46 and 47 to the Saturday work violated the Agreement, since neither was the "regular employe" within the intent of Rule 20 (e); and that the work should have been assigned to Mrs. Holley, who, as well as the incumbent of Position 48, was the "regular employe" intended in Rule 20 (e), since each performed the involved work as part of his regular assignment, Mondays through Fridays.

Carrier argues: 1. That the work of all five Claim Clerks is so intermingled in performance that each may be called the "regular employe" for the Saturday work involved; that for Mrs. Holley to be called the "regular employe" to the exclusion of the others, she would have to be shown to have been assigned the involved work to the exclusion of those others; and that, although the Organization asserts this to be the fact, Organization has failed to prove it. Carrier also argues: 2. That the classification and all the duties which may be assigned under the title "Claim Clerk", and not the position by number, is the proper concept for checking the work of the job for purposes of determining the "regular employe"; that, since all of the positions were posted without specifically assigning any particular portion of Claim Clerk duties to any particular position, and since the particular assignment of duties among the Claim Clerks is a management prerogative, all five Claim Clerks were the "regular employes" and the assignment of the senior one did not violate the Agreement.

There are several disputes regarding facts: Organization asserts and Carrier denies that the involved work was performed exclusively by the incumbents of Positions Nos. 44 and 48; Carrier claims and Organization denies that the incumbents of Positions Nos. 46 and 47 performed the involved work in the normal course of their regular five day assignments; Carrier claims and Organization denies that all duties assignable to the Claim Clerk classification were actually assigned and performed interchangeably among all of the variously numbered positions of the classification. While the first and last of these facts would be determinative of the identity of the "regular employe" which we seek in this case, if the facts were established to be as claimed respectively by the Organization and the Carrier, the record shows that these facts are not as claimed in these two cases.

The facts as they appear from the record do not establish the Carrier's argument numbered 1 above as valid. Even though he would be conclusively established as the "regular employe" if he performed the involved work exclusively (the record shows that Mrs. Holley did not), the "regular employe" need not have performed the work exclusively to be so identified. Nor would the fact that an employe performed the involved work to some degree as part of his regular duties require his identification as the "regular employe." If the facts were that the complex of work performed in each position of the classification were so intermingled and interchanged with that performed in each other position that it would be impossible to distinguish each position from the others by comparing the complex of work performed in each, then it could be said that the incumbent of each such position was the "regular employe." But, in its submission, the Carrier itself introduced evidence describing the work performed in Positions Nos. 46, 47 and 48 in such a way as to contradict its assertion that the work was so intermingled and interchanged.

Thus, we are left with Carrier's argument that Carrier's right to interchange the duties at will among all the Claim Clerk positions established the incumbent of each position as a "regular employe" for the purposes of Rule 20 (e). This position of the Carrier appears to be its basic position and is the only position maintained by it consistently throughout the record. In Carrier's submission, item numbered 6 in the Statement of Facts says: ". . . claim clerks may be required to perform any duties of a 'Claim Clerk'." Carrier makes its position in this respect absolutely clear in its rebuttal statement when it says:

> ". . . Additionally, no division has been made between positions of same title and rate classification to latch an individual to a certain position within the class for performance of work under Rule 20(e) merely because the individual performs only a segment of the overall work to be performed in his class during the work week.
>
> In this respect the sole question in this case is whether an employe who uses his seniority to bid in a position which has been described to him as follows under Rule 33 of the current agreement:
>
> Location — Portland Freight Station
>
> Position — No. 44, Claim Clerk
>
> Hours of Service — 8:00 A. M.–12:00 Noon — 12:30 P. M.–4:30 P. M.
>
> Rate of Pay — $20.22
>
> is entitled to overtime call under Rule 20(e) of the current agreement in preference to a senior employe who bid in positions entitled 'Claim Clerk' which were described in the same identical manner as above." (Emphasis ours.)

The meaning of the phrase "the regular employe" in Rule 20 (e) is the key to this case. It is not disputed that there can be more than one "regular employe": Carrier claims that there were five in this case to whom the work involved belonged, and Organization that there were two. Carrier cites many awards to support its contention that "the regular employe" is the one to whom the involved work is assigned on regular assigned days to the exclusion of the others (Awards Nos. 9987, 9944, 8198, 7137, 12047, 11227 and 6523, and others). Examination of the awards reveals that, while the factual situation in some is similar to this case, none is between the same parties as in this dispute.

Organization also cites a number of awards in support of its position; among them are two (6019 and 6562) which involve the same Agreement, the same parties, and similar basic factual situations.

The case in Award No. 6019 arose because allegedly Carrier there, on days not part of Claimant's regularly assigned days, assigned to a General Foreman work normally performed by Claimant, a Warehouse Foreman, on the Warehouse Foreman's regularly assigned days. Among other arguments in that case, Carrier claimed that the General Foreman was and the Claimant was not the "regular employe" within the meaning of that term as used in Rule 20 (e). The Board, after finding that the General Foreman was not the "regular employe" contemplated by the Rule, said:

". . . The fact, as Carrier suggests, that some of the work may have been work regularly assigned to and performed by the General Foreman on the work days of his five day position would not make him the regular employe, within the meaning of that term as used in such rule, for purpose of performing unassigned work of the type or character normally performed on the assigned work days of some other five day position.

Finally, the Carrier insists Claimant is not the 'regular employe', contemplated by Rule 20 (e). We concede decision of that question is difficult under the confusing facts and circumstances of record and confess we are loathe to hold that he is. . . . we are not required to pass on that question . . . and hence do not choose to do so. Once it is determined, as we already have, that the unassigned work in question was not assigned to the 'regular employe' within the meaning of Rule 20 (e), it becomes crystal clear the Carrier's action was in violation of such rule. If, as it contends, Claimant was not the regular employe because not entitled to perform all the involved work its obligation, under the confronting facts and circumstances, was . . . to comply with the requirements of Rule 20 (e) and assign Claimant on his rest days **the work normally performed** by him on his five day position. That, in our opinion, is the plain mandate of the rule." (Emphasis ours.)

Note that while it did not find the Claimant in that case was the "regular employe", the Board refused to find that he was not; but, the Board found categorically that, even though some of the involved work was performed by him as a part of his regular five day assignment, the General Foreman was not the "regular employe" contemplated by Rule 20 (e). We will here follow the reasoning in Award 6019; we find Carrier wrong in its contention that before an employe can be found to be the "regular employe" within the intent of Rule 20 (e), such employe must be shown to have been assigned the involved work to the exclusion of the other employes. As distinguished from the other precedent awards cited, Award 6019 was between the same parties, about the same basic facts and contractual issues as the dispute herein; since it is not contradicted by any other such award, it is controlling in this case. While in the case decided in Award 6562, the only other award cited involving the same parties, basic facts and Agreement, the issue of exclusivity of performance of the involved work was not involved, that Award did not change or amend the effect of Award 6019 on the application of Rule 20 (e).

Award 6019 states:

". . . The rule, firmly established by repeated decisions, is that work on rest days should be assigned . . . to the regular occupant of the **position** on an overtime basis. . . ." (Emphasis ours.)

Award 6019 uses the word "position", not the word "classification", repeatedly in connection with this discussion of the "regular employe" under Rule 20 (e); it is clear that the "regular employe" being referred to is the employe who is assigned to a position to which the involved work would normally be assigned if it came up in the course of an assigned day of that position; or, to put it in other, more commonly used language, Rule 20 (e) in this Agreement intends (in proper order of priority) to give the overtime work to the employe on whose job it usually is performed.

In this case two questions need to be answered: 1. Was Mrs. Holley one of the employes who would normally have done the involved work had it come up on one of her assigned days? and 2. Were the incumbents of Positions 46 and 47 employes who would normally have done the involved work had it come up on their assigned days? The evidence in the record is convincing that the answer to question 1 is "Yes", and to question 2 it is "No." We will, therefore, sustain the claims.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.

CARRIER MEMBERS' DISSENT TO AWARD 13142, DOCKET CL-13137 (Referee House)

This case was discussed in panel on three different occasions. After the first discussion the Referee submitted an erroneous and inconsistent proposed award which prompted the Carrier Member to ask for a second discussion. Following the second discussion the Referee submitted a revised and substantially different proposal which has since been adopted by vote of the Referee and the Labor Members as the award of the Board in this case. After receiving this revised proposed award and before its adoption, the Carrier Member submitted an additional memorandum to the Referee and the Labor Member which is quoted here because it not only discloses the error in the award, but also the untenable position taken by those who are responsible for its adoption.

ADDITIONAL MEMORANDUM FOR REFEREE HOUSE IN DOCKET CL-13137

"We have received a copy of "REVISED" proposed award in Docket CL-13137 and have noted that the following **emphasized** findings which appeared in the original proposed award have been expunged:

> "There is a dispute as to fact, which, it was urged on the Referee, is the turning point in this case. It is true that if the disputed

facts were proved to have been as claimed by the Organization, argument number 1 above on behalf of the Carrier would fail [Argument number 1 on behalf of Carrier was stated in the original proposed award substantially as it is stated in the third paragraph of the "REVISED" proposed award, namely, "that the work of all five Claim Clerks is intermingled . . .", etc.]; . . . however, **we do not consider the disputed facts to be controlling.**

* * * * *

. . . we need not resolve the dispute as to the extent of intermingling of work, if any, among the number positions."*

We concur wholeheartedly in the Referee's decision to eliminate those findings from the proposed award, for they are diametrically opposed to the ultimate finding in the concluding paragraph of the proposed award which holds that the controlling question is whether Claimant and the occupants of Positions 46 and 47 would "normally have done the involved work had it come up on their assigned days." The adoption of such contradictory and irreconcilable findings on a single issue in the same award would be both inexcusable and embarrassing.

We must, however, forcefully protest the substitution in lieu of the expunged findings the erroneous finding that the Employes have proved their case because:

". . . in its submission the Carrier itself introduced evidence describing the work performed in Positions Nos. 46, 47 and 48 in such a way as to contradict its assertion that the work was so intermingled and interchanged."

The Employes did not contend there was any such contradiction in the record. Also, we respectfully submit that this evasive finding does not satisfy the commitment which the Referee made during the re-argument wherein the Carrier Member directed the Referee's attention to the apparent defects in the original proposed award, and noted that the Referee had expressly based the sustaining award on a finding in favor of the Employes on the disputed facts. At that time neither the Referee nor the Labor Member could point to any competent evidence in the record that would support such a finding, and the Referee committed himself to again study the record in search of competent evidence. He further committed himself to revise the award and deny the claim if the record did not contain competent evidence proving that the involved work would not normally have been done by the occupants of Positions 46 and 47 "had it come up on their assigned days."

Implicit in these express commitments is the further commitment to identify and point out to the parties any evidence found to be material on the point. We respectfully submit that in these circumstances this evasive finding which charges Carrier with a self-contradiction that the Employes never found in the record but fails to identify the contradiction or point out where it is in the record does not satisfy either the commitment of the Referee or the obligation of this Board to make clear and sound findings of fact.

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*Emphasis herein by us unless otherwise indicated.

While there is error in other portions of the revised proposed award, our primary purpose in writing this memorandum and seeking a further opportunity to argue the case is to acquaint both the Referee and the Labor Member with the significant facts in the record, and particularly those in Carrier's submission, for we have painstakingly searched Carrier's submission and have been unable to find anything therein which contradicts Carrier's consistent contention that the occupants of positions 46 and 47 normally performed such work during their regular assigned hours.

As we read the record, Carrier has not contradicted itself on this point, but, to the contrary, throughout all handling of the claim Carrier has been consistent, clear and emphatic in asserting that the involved work is performed interchangeably by the Claim Clerks during their regular hours. The record appears clear and conclusive on this point. The General Chairman tells us (page 29) that this is the position taken by Carrier on the property. The Statement of Facts in Carrier's initial submission (pages 18 to 21) states that "this work is performed interchangeably" by the occupants of the involved positions and that the occupants of Positions 46 and 47 spend approximately 25 percent of all of their assigned hours doing this work.

Carrier's initial submission also states that all data therein had been submitted to the Employes (page 21). In their rebuttal the Employes comment on the various specific allegations of Carrier regarding work assigned to the Claim Clerk Positions (pages 41 and 47) and vigorously attempt to convince us that those allegations are not true; but, they do not deny the allegation that Carrier submitted all of this data to them on the property and properly made it a part of the dispute. In their rebuttal they do not suggest in any way that these allegations of Carrier are not properly before us in every respect, they do not assert that these allegations of Carrier regarding the assignment of work are new or inconsistent with any position taken by Carrier during handling on the property; neither do they assert that there is any inconsistency or contradiction in Carrier's submission. The Employes' failure to deny that during handling on the property Carrier properly and timely submitted to them all that is in Carrier's initial submission constitutes a binding admission of the truth of Carrier's assertions in that regard. (See **Award 13076,** where you, Referee House, invoked such an admission from failure to deny against the Carrier even though the issue had not been raised by the Employes in the record.)

The Employes' failure in their rebuttal to assert that there is any inconsistency or contradiction in Carrier's initial submission should be regarded by us as conclusive on that point also. The Employes were certainly in far better position to detect any inconsistency than we are, for they participated in all of the handling on the property, yet in their critical review and rebuttal of Carrier's initial submission, they did not find and did not pretend to find any contradictions. To the contrary, they simply met the disputed factual issue head-on and accepted it as the controlling point in the case. They were in no position to do otherwise, for the record establishes that they recognized this as the real issue on the property and in their initial submission. See page 29 for the Employes' statement of the issue on the property, and also note that in their initial submission they recognized this as the real issue in the case, for they repeatedly made allegations such as this (page 10):

> "As set forth in our Statement of Facts, **the work required and done on November 19 was work regularly assigned to and performed by the Claimant as incumbent of Position No. 44,** and A. L. Wostrel,

incumbent of Position No. 48. **This work is not assigned to and/or performed by the incumbents of Positions Nos. 45, 46 and 47 during the five days of their work weeks.**" (Emphasis ours.)

Also in their initial submission they cited as controlling Award 8284 which held:

"**. . . the language 'the regular employe' is broad enough to cover a man who normally and regularly does the work required as one of the duties of his position. . . .**"

They summarized the effect of the awards upon which they have relied as follows (page 14):

"**. . . in the above quoted Awards your Honorable Board held that such work must go to the senior employes who are regularly assigned to and perform it on the five days of their assigned work weeks.**"

Thus, it is crystal clear that the Employes recognized Carrier's position to be that all of the work performed on the claim dates was regularly assigned to and performed by all five of the Claim Clerks, and they further recognized that under their own authorities the claim would not be valid if that were true, but they stoutly contended that the occupants of Positions 46 and 47 never performed this work during assigned hours.

In obvious recognition of the fact that the claim must be denied under their own authorities if the occupants of Positions 46 and 47 performed this type of work during regular hours, the Employes devoted their entire rebuttal statement exclusively to an attempt to convince us that the occupants of Positions 46 and 47 never at any time during their regular hours did the involved work. In violation of our rules and the law, they placed in their rebuttal new evidence in the form of alleged statements of employes. (See **Award 13076,** in which you, Referee House, refused to consider such evidence brought in by Carrier in the rebuttal statement.)

As we have noted, the record establishes that the precise issue discussed on the property was whether the involved work was performed interchangeably by these Claim Clerks (page 29); therefore, if the Employes had any valid evidence to prove their side of the issue, they had ample opportunity to present it on the property. Instead of adducing evidence on the property, the General Chairman resorted solely to his own controverted arguments, and it is elementary that such arguments are not evidence. The Employes did not even submit evidence on the point in their initial submission, to which Carrier had an opportunity to respond; yet, as we have noted, their arguments in their initial submission clearly show that they were keenly aware that this disputed factual issue was a major point in the case. In these circumstances, not only our rules and the law, but also elementary good faith obviously dictate that statements such as those appearing in the Employes' rebuttal in this case should have been submitted to Carrier during handling on the property, when the parties were admittedly discussing this disputed fact.

Let us now consider in one paragraph other defects in the proposed award. While we disagree with many of the remarks in the proposed award in reference to Award 6019, in the interests of brevity we will simply state that award is entirely irrelevant to this case because it was explicitly based

on the admitted fact that the vast majority of the work performed on the dates of that claim would not have been performed by the General Foreman who was used had it been performed on assigned days, but to the contrary would admittedly have been done by the claimant Foreman in that case and another Foreman. It was also admitted in that case that on some dates involved the work normally performed by the claimant and never by the General Foreman during claimant's assigned hours was performed by the General Foreman during the entire period covered by the claimant's assigned hours. In the case at hand, according to Carrier's facts which have not been refuted with competent evidence, ALL of the work performed on the claim dates is work that is normally done during regular hours by the employes who worked on the claim dates as well as by claimant and one other. Due to the fact that the work is not of a type that must be done during specific hours of the day, but to the contrary, may be done at any time of day and may be bunched into one day or spread over several parts of days, there is absolutely no basis in the record before us for concluding that this same work would not have been done by the same employes if Carrier had elected to spread it out and have it done during the regular assigned hours of the Claim Clerks. What we have said regarding Award 6019 applies with even greater force to Award 6562 for the work involved in the latter award was admittedly not work that the employe used would have done during his regular hours. It should also be noted that on the point here involved Awards 6019 and 6562 are not inconsistent with numerous sound awards cited in our prior memoranda. We respectfully submit that the discussion of Awards 6019 and 6562 and particularly the remarks about "seniority", "class", "position", etc., clearly discloses that the Referee has failed to observe the position consistently taken by Carrier, which is simply this: All five of the Claim Clerks at the Portland Freight Station were regular employes for the type of work here involved because they were all REGULARLY ASSIGNED TO CLAIM CLERK POSITIONS AT PORTLAND FREIGHT STATION AND THIS WORK IS BOTH REGULARLY ASSIGNED TO AND REGULARLY PERFORMED INTERCHANGEABLY BY THE OCCUPANTS OF ALL SUCH POSITIONS DURING THE REGULAR ASSIGNED HOURS; therefore, when only three of such Claim Clerks were needed for work on an unassigned day, it was proper to call the senior three.

We have put this statement in memorandum form, as we want it to be permanently retained with the record, and we respectfully suggest that if the Labor Member believes in good faith that there is evidence in the record to substantiate the finding that the occupants of Positions 46 and 47 do not perform this work as a regular duty during their assigned hours, it would be appropriate for him to assist the Referee in this matter by submitting a written memorandum identifying such evidence. In this connection, we note that in the memorandum which the Labor Member previously submitted to the Referee he cited and relied upon the utterly inadmissible statements appearing in the Employes' rebuttal to prove the employes' case. Other than these inadmissible statements, the only matter in the record which he cited as evidence on this issue was Carrier's statement on the property that the work performed on the claim dates was a portion of the work embraced in the Claimant's position. He argued that this statement and Carrier's statement that this work was intermingled with other work on the five Claim Clerk positions and was performed interchangeably by the five occupants were contradictory and in making them Carrier had necessarily "reversed itself." If this work was intermingled and performed interchangeably on all five Claim Clerk positions, as Carrier has consistently alleged, it necessarily follows that such work was a portion of the work embraced in the Claimant's

position which was one of the five; and, the Labor Member's argument that Carrier necessarily reversed itself in making the two statements is obvious nonsense. Thus, we have not been referred to any competent evidence in the record that supports the basic finding of fact upon which the proposed award is expressly predicated, and we respectfully request at this time that any such evidence be identified in writing before any proposed award is submitted for adoption in order that we may have an opportunity to examine it in the light of the entire record and make an appropriate response.

Claim should be denied."

During the discussion that followed the distribution and reading of this memorandum, both the Referee and the Labor Member expressly declined to be more specific or to point to any evidence in the record that would support the finding which is expressly held to be controlling, namely, that the incumbents of Positions 46 and 47 would **not** "normally have done the involved work had it come up on their assigned days."

There is no admissible evidence in the record to support this finding. The only reference in the award to specific evidence is the Referee's novel and untenable contention that Carrier has contradicted itself on the basic question in its initial submission. **Such contention was not advanced by the Employes,** who responded vigorously and extensively to Carrier's initial submission, and who were in a far better position than the Referee to judge whether such a contradiction existed. In their handling of the case the Employe representatives were bright, alert, and aggressive, and our experience tells us that if Carrier had actually admitted itself out of court on this disputed question, they would have detected that fact and would have directed it to our attention in the record.

Should the Labor Member or the Referee file any statement in answer to this dissent, we are now precluded by our rules from responding thereto; therefore, we respectfully ask that any such statement be read in the light of their refusal to respond to our above-quoted memorandum at a time when we could have responded.

For the reasons noted, and others, we dissent.

G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian
W. M. Roberts

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 13142, DOCKET CL-13137

"A man convinced against his will is of the same opinion still."

It would be useless here, as it was during the last few discussions in regard to the case, to attempt to convince the Dissentor that the Carrier violated the Agreement in the manner and to the extent as charged by the Employes and found by the Referee.

During the last discussion, whereat the Dissentor's additional memorandum was presented, the Dissentor was of the frame of mind, as I suspect he shall always be, whereby he refused to be convinced.

The positions and statements of the parties are set out in the printed Award. The Award rendered on the basis of facts there found is sound in all respects. The mere fact that the Dissentor does not agree with the decision does not, in any manner, detract from the soundness thereof.

D. E. Watkins
Labor Member
1-12-65