

Award No. 16165
Docket No. CL-16233

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

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

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5983) that:

1. Carrier violated the rules of the Clerks' Agreement at Chicago, Illinois when it failed to work employe R. H. Remmers on February 22, 1965 as Counterman on Position 5323.

2. Carrier shall be required to compensate employe R. H. Remmers for eight (8) hours at the overtime rate of pay for Monday, February 22, 1965.

EMPLOYEES' STATEMENT OF FACTS: At Western Avenue, Chicago, Illinois three (3) Counterman Positions are maintained providing around-the-clock service on seven days per week.

On February 9, 1965 Employe R. H. Remmers, the regular occupant of Storehelper Position 5320 was instructed by the General Foreman, Carl Kraft, to take over Counterman Position 5323, which was vacant due to illness requiring hospitalization and a major operation of the regular occupant thereof, J. D. Schmidt.

On February 19, 1965, Employe Remmers was informed by General Foreman Carl Kraft that he (Remmers) would not work on Monday, February 22, 1965, a holiday.

The work of issuing material to the Diesel House employes, which is work regularly assigned to and performed by Countermen was performed on that holiday during the hours of assignment of Counterman Position 5323 by General Foreman Kraft and Assistant District Material Manager J. G. Waldman, Jr. as evidenced by the statements of P. Panzick, Ray Osburn, Paul Cady, machinists and E. H. Misek, electrician, copies of which are submitted as Employes' Exhibits A, B, C and D respectively.

Time slip claiming 8 hours' holiday pay and 8 hours' pay account not being permitted to perform the work of his assignment, or a total of 16

Under date of August 10, 1965, Acting General Chairman H. C. Hopper "appealed" the following claim to Mr. S. W. Amour, Assistant to Vice President:

"Claim of the System Committee of the Brotherhood that:

1. Carrier violated the rules of the Clerks' Agreement at Chicago, Illinois, when it failed to work employe R. H. Remmers on February 22, 1965 as Counterman on Position 5323.
2. Carrier shall be required to compensate employe R. H. Remmers for eight (8) hours at the overtime rate of pay for Monday, February 22, 1965."

A copy of Mr. Hopper's August 10, 1965 letter of "appeal" to Mr. Amour is attached hereto as Carrier's Exhibit I.

Also attached hereto as Carrier's Exhibits are copies of the following letters:

CARRIER'S EXHIBIT J - Letter written by Mr. Amour to Mr. Hopper under date of September 24, 1965.

CARRIER'S EXHIBIT K - Letter written by General Chairman H. V. Gilligan to Mr. Amour under date of January 10, 1966.

CARRIER'S EXHIBIT L - Letter written by Mr. Amour to Mr. Gilligan under date of March 3, 1966.

CARRIER'S EXHIBIT M - Letter written by Mr. Gilligan to Mr. Amour under date of March 8, 1966, with attachment.

CARRIER'S EXHIBIT N - Letter written by Mr. Amour to Mr. Gilligan under date of March 11, 1966.

The instant claim involves the work of " * * * issuing material * * * " at Western Avenue, Chicago, Illinois between the hours of 8:00 A.M. to 4:00 P.M. on February 22, 1965 which Local Chairman Zielen, in his "appeal" of the claim to Mr. Volkman under date of May 5, 1965 (Carrier's Exhibit F), alleges was performed " * * * by the Foreman and Assistant Foreman" and which Acting General Chairman Hopper, in his "appeal" of the claim to Mr. Amour under date of August 10, 1965 (Carrier's Exhibit I), alleges was performed " * * * by General Foreman Kraft and Assistant District Material Manager, J. C. Waldman, Jr.," but which, in fact, was not performed by either a Foreman, Assistant Foreman, General Foreman Kraft or Assistant District Material Manager Waldman as the Carrier will conclusively establish in its "Position."

(Exhibits not reproduced.)

OPINION OF BOARD: This claim presents the basic issue of whether Carrier, after "blanking" a holiday shift, used personnel not covered by the Agreement to perform the work which would ordinarily have been performed by the incumbent of the position involved, Claimant Remmers. If Carrier had taken this course of action, the Claim should be sustained. However, the facts in this regard are very much in dispute. The record shows that the Brotherhood submitted four signed statements that two specifically named managerial

employees performed the work on the shift in question; on the other hand, the Carrier submitted signed and notarized statements executed by the two men executed that neither of them performed the work in question. Also, Carrier submitted the sworn statement of L. G. Cronin, District Material Manager, that he was at the place involved, during the time period involved, and on the date involved, and that neither of the persons accused performed work on the blanked position; and that he did not perform any of the work of the blanked position.

The Brotherhood's position is predicated on the allegation that the blanked position was worked and that specified unauthorized personnel did the work belonging to the position. But, each and all of the persons named executed verified written denials that the allegations made in the statements were correct.

We are, then, confronted with evidence highly in conflict. The written statements of those concerned are diametrically opposite and cannot be reconciled by the use of any appellate tools available to this Board. The statements presented by the employees were signed more than ten months after the event in question; and the notarized statements signed by the Carrier personnel involved were signed approximately twelve months thereafter. No person who signed any of these statements was subjected to cross-examination.

In a situation such as this, the Board is not required to conclude that any person involved was dishonest or untruthful. Since the evidence before us is so directly in conflict, an attempt on our part to reconcile it, or weigh it, is manifestly unjustified. This Claim should therefore be denied for the reason that the Brotherhood was unable to support its claim with evidence sufficient to meet the requirements of a reasonable burden of proof test.

Having decided this case on the basis above shown, it is not necessary to discuss the intricate procedural issues presented by and in behalf of the parties.

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 Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

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 March 1968.

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