NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21452
THIRD DIVISION Docket Number CL-21250

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

(Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7854, that:

(a) Carrier violated the Rules Agreement effective February 1, 1968, particularly Rule 3-C-2 (a) (1), Scope Rule and the Extra List Agreement by assigning and permitting train and engine crews to prepare time cards, verifying the reporting and mark off times of crews, also assigning clerical work to Group 2 employes. These duties were previously performed by Crew Dispatcher Relief #9 Shire Oaks Terminal, Pennsylvania, which was transferred to West Brownsville as a Flexowriter position.

(b) J. J. Dobosh be allowed eight (8) hours at the appropriate pro rata rate of pay for October 12, 1971 and all consecutive dates until violation is corrected.

OPINION OF BOARD: This dispute is another in the series of cases arising from Carrier's changing patterns of work at Shire Oaks, Pennsylvania and alleged violations of the Agreement, particularly Rule 3-C-2. Further, this dispute, in principle, has been the subject of well over 100 Awards of this Division and Public Law Boards, a number of them involving this Carrier. All previous awards on this subject have been submitted by the parties and have been reviewed by this Board.

Claimant was the incumbent of Relief Crew Dispatcher Position #9 at Shire Oaks and was transferred to West Brownsville effective October 12, 1971. In Carrier's letter to the Organization's General Chairman, dated September 1, 1971, it was indicated, inter alia, that:

> "After the relief position and incumbent are moved to West Brownsville, this position will be abolished and re-established to include only positions at West Brownsville."

In fact the position was abolished and readvertised simultaneously on October 12th and Claimant was awarded the new position at West Brownsville

which had somewhat different functions than his old position at Shire Oaks. It is also noted that Group 1 Clerical positions remained at Shire Oaks until the final position was abolished effective November 22, 1971. It is alleged that residual work from Claimant's position at Shire Oaks was left to be performed by train crew personnel and a Class 2 Extra List employe who continued to work at Shire Oaks.

Rule 3-C-2 provides:

"RULE 3-C-2 -- ASSIGNMENT OF WORK

(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 four 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.

(3) Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements, or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, may be performed by employes of such other craft or class.

(4) Performance of work by employes other than those covered by this Agreement in accordance with paragraphs (2) and (3) of this rule (3-C-2) will not constitute a violation of any provision of this Agreement.

(b) Where the work of an abolished position is assigned to employes coming under the provisions of this Agreement, such work, when it is practicable to do so, will be assigned to a position or positions with rates equal to or in excess of the position abolished.

(c) In the event the work of an abolished position is assigned to a Group 1 position or positions, the rate of which is less than the rate of the position abolished:

"(1) An immediate requestionnaire study may be made of the position or positions to which such work is assigned. The rate or rates determined by such study will be made effective as of the date the work is assigned to the position or positions studied, with the understanding that this will not modify or in any way affect the established practice of applying rates determined by questionnaire or requestionnaire study effective as of the date covered by such studies, except when the study is made under the circumstances specified herein.

(2) Where agreement covering the questionnaire method of determining rates of pay for Group 1 employes is not in effect a study may be made of the position or positions to which the work of the abolished position is assigned for the purpose of determining the proper rate of such position or positions, based on the comparability of the assigned duties thereof to the duties of other established positions in the same seniority district and the application of the rate or rates established on the basis of such study will be effective as of the date the work is assigned to the position or positions involved.

(d) In the event the work of an abolished position is assigned to a Group 2 position, the rate of which is less than the rate of the position abolished, a study may be made of the position to which the work of the abolished position is assigned for the purpose of determining the proper rate of such position. The application of the rate established on the basis of such study will be effective as of the date the work is assigned to the position."

Petitioner, in summarizing its contentions in its submission to this Board, stated that the evidence indicated a violation of the Agreement in the following respects:

"(a) Carrier's failure to bulletin the 'new positions' to which Claimant Dobosh and another Crew Dispatcher transferred to West Brownsville, allegedly 'with his work' were assigned,

(b) Carrier's failure to re-bulletin the positions to which the transferred Crew Dispatcher work was assigned at West Brownville,

(c) Carrier's failure to assign the work of the abolished and transferred Crew Dispatcher positions which was left at Shire Oaks to the Group 1 positions which remained at that location as of October 12, 1971,

"(d) Carrier's action in assigning part of the 'left-over' work at Shire Oaks to employees of other crafts (conductors and engineers) and balance to the incumbent of a Group 2 extra list assignment, and

(e) Carrier's action in awarding what amounted to a regularly assigned position, created by improperly combining 'left-over' Group 1 work with Group 2 work to an employee assigned to the Group 2 extra list without the required bulletining of that position."

Carrier argues, as its first basis for denying the Claim from its inception, that Rule 3-C-2 has no application on its face since this factual situation involved the transfer of Claimant to West Brownsville and subsequently the position's readvertisement: thus the position was not abolished and the rule is not applicable. We do not concur. The abolishment of the position on the effective date of transfer and its simultaneous readvertisement may clearly be considered as constructive abolishment of the position. This logic is enhanced by the fact that Carrier indicated its intent to use this procedure two months prior to the fact. We have no reason to suspect any subterfuge was intended; the process must be considered to constitute constructive abolishment of the position for the purposes of Rule 3-C-2.

First, in dealing with the alleged assignment of residual work to a Group 2 employe, it must be noted that the identical factual basis for this allegation was presented to this Board in the disputes represented in Awards 21324 and 21325. It is noted that no basis has been presented in this case to support the conclusion that Carrier failed to properly bulletin a new Group 2 position for the work in question and further, as found in the two prior disputes, Petitioner has failed to produce an evidentiary basis for its allegations.

We fail to understand Petitioner's arguments with respect to the alleged failure to re-bulletin the positions to which the employes were moved at West Brownsville. The Carrier points out that the positions were indeed rebulletined (as indicated above) and there does not appear to be any basis for this contention.

We come then to the question of the work which was relegated to the train crews after October 12th. First, it is contended by Carrier, without rebuttal, that the work of approving time cards was never the function of the Crew Dispatchers (or Relief Dispatchers). It is admitted that the work of checking the cards and subsequently verifying the reporting and release times shown on train and engine service time cards had been performed by Crew Dispatchers prior to the changes. Carrier asserts that when the positions were abolished, it discontinued the practice of

"checking" the time cards which had previously been performed by Crew Dispatchers, as well as the conductors and engineers. There can be no dispute of the right of Carrier to change its procedures in this respect, and merely have the engineers and conductors who had primary responsibility for the cards, perform this function alone.

There is no question but that the verifying of the reporting and release times shown on the time cards, by signing the cards in the designated spaces, remained to be performed after October 12th. According to the evidence presented by the Organization, approximately ten crews per day, on average, reported to work and marked off from work at this location (Shire Oaks) in the two years following the changes in October 1971. The Carrier stated that the work involved could only amount to a few seconds for each function (ninety six seconds in total). We fail to understand this unsupported argument. Perhaps it takes but a few seconds to sign one's name but more than signing is involved in verifying times if it is a needed and legitimate function. We must assume that it takes a minimum of five minutes for each crew each day, having nothing to go on but argument, or a total of at most an hour a day of activity (for all shifts).

Should this work, little as it is, have been assigned to train crews on October 12th? We think not. On that date there were Class 1 positions extant at Shire Oaks and it appears that the clear language of Rule 3-C-2 controls: the work should have been assigned to one or more of those positions in accordance with Rule 3-C-2(a)1. After November 22, when no Class 1 positions remained at the location, the provisions of Paragraph 2 prevailed and the work could at that time have been assigned to train crew supervisory personnel.

Even though the work involved in this matter is very minor in every respect, the principle appears to be of great concern to the parties as evidenced by their substantial briefs and citations. Hence, in support of our conclusion, a few comments are in order. In our judgment, with substantial authority to support the conclusion: 1. The Scope Rule of this Agreement is a general one which does not reserve work, per se, to any covered employes. 2. Rule 3-C-2 is a special rule, an exception to the Scope Rule, which provides for a detailed procedure in assignment of work when a position is abolished. While we do not agree with Petitioner that Rule 3-C-2 is a "preservation of work" rule (but rather merely an "Assignment of Work" as its caption indicates), we do not believe that its implementation is dependent on the "exclusivity" doctrine. We view with favor the reasoning in Award 20535 which found that there is no conflict in the exclusivity theory as applied to general scope rules and rules such as 3-C-2. We support that award in its statement:

"While the 'exclusivity' doctrine may well be material to certain types of disputes, nonetheless, the various Awards which have interpreted rules dealing with abolishment of a position (and subsequent assignment of the work) have read the agreement language in specific terms and have applied it to the facts of each given case without regard to the restrictions suggested by Carrier herein...."

It is apparent that Rule 3-C-2 was negotiated and placed in the Agreement by the parties in good faith. It would be illogical and redundant to have done so if its implementation were dependent upon the covered employes having the exclusive right to the work in the first instance. At the same time, as indicated in Award 21324, we do not find that this Rule grants to covered employes any exclusive right to work which was not previously exclusively theirs.

The Board finds that Carrier violated the Agreement in that, after the abolishment of Claimant's position,it violated Rule 3-C-2(a)1 in not assigning the residual work (verification of train crew time cards) to remaining Class 1 Clerical positions remaining at Shire Oaks until November 22, 1971. With respect to the reparations required for the breach, without attempting to enunciate definitive general rules, we believe each case must be evaluated on its own merits and in view of the peculiar circumstance of the particular violation. In this case, with the paucity of hard facts, we can only assess a nominal sum to account for the work misassigned; we conclude that one hour per day pro rata shall be awarded Claimant for the period ending November 22, 1971, which represents our assessment of the time involved for the work in question.

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 violated.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1977.

CARRIER MEMBERS' DISSENT AND CONCURRENCE
WITH AWARD 21452, DOCKET CL-21250
(Referee Lieberman)

We concur with the Majority that Claimant's argument dealing with an alleged violation of Rule 2-A-1, should be rejected because the facts show Relief Position #9 was re-advertised. Secondly, we agree that the re-assignment of residual work from a Group 1 position to a Group 2 position was entirely proper. We also agree with the Majority's conclusion that Rule 3-C-2 is not a preservation of work rule as the Organization has been insisting for years. Finally, we agree with the Majority's holding wherein reliance is placed upon Award 21324, and for that reason "we do not find that this Rule grants to covered employes any exclusive right to work which was not previously exclusively theirs." (Emphasis by Majority)

Having said all of this, one might wonder, as we do, how the claim could have been sustained, particularly in view of the fact the same identical contention was made in Award 21324 regarding the verification of time cards at this local point. What is more bewildering is the admitted fact that Relief Position #9 in this case, filled the position which was involved in Award 21324 on Wednesday each week. In brief, the claim was denied for the regular incumbent G-342 in Award 21324, and then sustained for the Relief Position #9 in Award 21452. Dealing with the precise issue in this case, the Majority in Award 21324, held:

"Contrary to Petitioner's position, the question of exclusivity is relevant to this dispute, particularly since it was raised by Petitioner. It suffices to observe that Petitioner made no attempt to establish systemwide exclusivity with respect to the work in question (i.e. verifying time cards) but asserted point exclusivity. This we cannot accept based on long established principle.

"The issue herein has surfaced on this property under these same Rules on many previous occasions and there are a host of awards relating to the problem. Under the preponderent opinion expressed by this Board Rule 3-C-2 was intended to preserve work which accrued to the employes covered by the Agreement but did not purport to grant work to the Organization's which had not been previously the exclusive work of clerks (see Awards 11963; 13159, 13921 and many others). This principle should be considered stare decisis. Since Petitioner has not established the exclusive right to the work performed by the train crew personnel and the remaining work performed by the Class 2 employe is minimal and permitted by the Agreement, the Claim must therefore be denied."

Had the Board been so minded, it might have also referred to Award 12219 (Dolnick) and Award 12479 (West), which also dealt with the question considered in Awards 21324, 21325 and 21452.

The Referees who have considered this problem have repeatedly asked-what is the purpose of Rule 3-C-2 if, as Carrier contends, it applies only to work which the clerks have the exclusive right to perform, a matter clearly subject to the general Scope rule? The answer is obvious. It provides for the assignment of work which the clerks have an exclusive right to perform in a <u>specified</u> and <u>detailed</u> manner following the abolishment of a position, a

subject not covered by the Scope rule. First, it must be assigned to clerks at the location where the work is to be performed. In the event no clerks remain at the location where the work is to be performed, the work, if less than four hours, may be assigned to yardmasters, agents, etc., if it is incident to their duties. Thus, the Referees have come to realize that Rule 3-C-2 does perform a separate and independent function from that of the Scope, but, at all times subordinate to the Scope rule.

As often stated by our juridical brothers, a stream rises no higher than its source. The source of work to a craft in every railroad contract is the Scope rule. The application of other rules of the agreement including those pertaining to that most treasured right bestowed by contract, the investiture of seniority, is subordinate to the Scope rule. See Awards 21091 (Lieberman), 20417 (Lieberman), 19032 (O'Brien), and many others. Conversely, the Organization must first show a violation of the Scope rule where they are claiming the right to perform work against those outside the agreement, before other rules become relevant. This was clearly stated in Award 12238 (O'Gallagher), which involved these same parties, where it was held:

> "In order for the Claimant to prevail he must show that the Scope Rule of the Agreement confers upon a Group 2 employe the exclusive right to perform the work described. We find, from the record, the Claimant has failed to prove the allegation upon

"which his claim is based for the reason that the Scope Rule relied upon is general in character, and following the doctrine laid down in numerous awards of the Division, we must conclude that the Scope Rule herein cited was not violated when Class 1 clerical employes and other employes not covered by the agreement performed the service complained of.

"Absent a violation of the Scope Rule, it follows there is no violation of Rules 3-B-1 or 3-D-1."

See also Awards 17944 (McGovern) and 18243 (Devine). The Organization recognized their obligation in this respect, because they grounded their claim on a violation of the Scope rule as well as Rule 3-C-2 in this case.

Other errors in Award 21452 are equally manifest. In Award 21324 and others by this Referee, he embraced the doctrine of stare decisis, yet in this case it is ignored on identical facts set forth in Award 21324, where the matter was held to be controlled by that doctrine.

The Board also erred in construing an admitted transfer and re-advertisement of a position as a "constructive abolishment." This was a new argument, not found in the record and should have been summarily rejected, again on the basis of many of this Referee's decisions. See Awards 20765 and 19746. Moreover, a similar argument had previously been rejected in prior Awards 12108, 12420, 12809, 12837, 12902, 13061, 13273 and 13380, involving the same parties. In Award 12420 (Coburn), we held:

"Petitioner says that Carrier circumvented the true meaning and intent of the foregoing rule by transferring six hours of the work of positions FL-24-F and B-32-G to three other positions at other locations and then assigning seven hours of the work of the abolished position (FL-5-F) to positions FL-24-F and B-32-G. This procedure, argues the Petitioner, was used by the Carrier to accomplish indirectly what it was not permitted to do directly under the rule, relying on Award 5560 (same parties).

"Carrier replies by citing the language of Rule 3-C-2 (supra) which, it says, applies to the reassignment of the remaining duties of an abolished position, but places no restriction whatever on the reassignment of duties of positions that are not abolished.

"The Board agrees with the position of the Carrier. The rule speaks in terms of the work of abolished positions only; it is no bar to the Carrier's exercise of its clear right to apportion or assign the work of existing clerical positions. Whatever may have been its reasons for doing so here, there was no violation of the Agreement and that is all this Board may properly be concerned with. (Cf. 12108)." (Emphasis supplied)

By inserting the word "constructive" into the contract where it does not exist, the Referee has violated principles long established by the Board which he recognized in Award 21182, where it was held:

"We must conclude that Petitioner has not demonstrated a violation of any Agreement Rules in this dispute and there is no probative evidence of a controlling practice. Since it is axiomatic that this Board is without authority to write or expand rules, the Claim must be denied."

See Awards 21221, 20707, 20013, 19894 and 19764, which he authored.

The Board also erred when it said:

"Rule 3-C-2 is a special rule, an exception to the Scope rule . . ."

The plain fact is Rule 3-C-2 is not an exception to the Scope rule as the Organization has been arguing - arguments which we have repeatedly rejected. It is listed only in the classification of Group 1 employes and appears there only in recognition of the special provision of Rule 3-C-2 (a) (3), which provides:

> "Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements, or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, may be performed by employes of such other craft or class."

In short, Rule 3-C-2 is not an exception to the Scope rule as Petitioner has been arguing unsuccessfully since Award 11963, but rather, it is an exception to the description of a clerical employe where the clerical work is "incident to and directly attached to the primary duties of another craft or class." Thus, where an employe of another craft is found performing the work described as that of a Group 1 employe, but it is incident to and directly attached to that craft, it is a position that is excluded from coverage as a Group 1 employe.

The Board committed serious error when it placed reliance upon an award from another Carrier and held:

> "We view with favor the reasoning in Award 20535 which found that there is no conflict in the exclusivity theory as applied to general scope rules and rules such as 3-C-2." (Emphasis supplied)

The question the reader might ask is how this statement could be made in the light of this Referee's finding in Award 21324 several months earlier, or for that matter, how the awards from this property cited earlier could be ignored, simply because the Referee who handled Award 20535 may have been ignorant of those decisions when he said:

> "This Board does not find conflict in the Awards cited by the opposing parties, but in fact finds that they may be read in harmony. While the 'exclusivity' doctrine may well be material to certain types of disputes, nonetheless, the various Awards which have interpreted rules dealing with abolishment of a position (and subsequent assignment of the work) have read the agreement language in specific terms and have applied it to the facts of each given case without regard to the restrictions suggested by Carrier herein. No contrary Awards have been brought to our attention."
> (Emphasis supplied)

In the case covered by Award 21452, the Referee had the benefit of the prior precedent awards from this property, the last being his own Award 21324.

Finally, the Board erred in assessing any penalty against the Carrier after conceding there was a "paucity of hard facts" in support of such assessment. The Board has no right to assess a penalty unless it is directly and proximately related to the losses incurred by Petitioner. No such losses were proven in this case.

Carrier Members' Dissent and
Concurrence with Award 21452

We can only hope the Majority will follow the admonition of Justice Jackson of the United States Supreme Court, who stated the principle somewhat tersely in U. S. v. Bryan (339 U.S. 323):

> "Of course, it is embarrassing to confess a blunder; it may prove more embarrassing to adhere to it."

or Justice Storey, who stated:

> "My own error, however, can furnish no ground for its being adopted by this Court * * *"

For the reasons stated above, among others, we dissent.

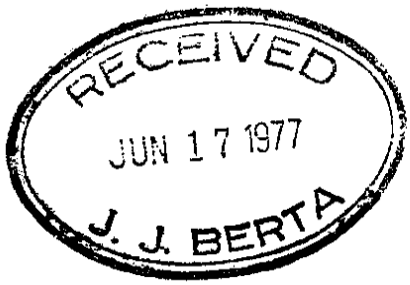
W. F. Huker

P. C. Carter

J. E. Mason

G. L. Naylor

G. M. Youhn



April 13, 1977

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT AND CONCURRENCE
WITH AWARD 21452 (Docket CL-21250)
(Referee Lieberman)

Carrier Members' Dissent and Concurrence is, to say the least, an exercise in dazzling dialectic rhetoric. It is consistently inconsistent and is pure sophism. To write, "In short, Rule 3-C-2 is not an exception to the Scope rule," and expect such a statement to be accepted as valid is beyond the realm of reality when the language of the rule itself reading, "when used in the performance of work within the scope of this Agreement, except as provided in Rule 3-C-2," contains the exception Carrier Members argue, in short, is not an exception. One may question the purpose of "except" as used in the Scope Rule if it does not provide an exception. This term has to have meaning; it is not surplus; it is not redundant; nor is it useless. To write that "Rule 3-C-2 is not an exception to the Scope rule" when the Scope Rule positively states "except as provided in Rule 3-C-2" is fatal fallacy.

Rule 3-C-2 and similar or identical rules from other properties have met the test of nearly two hundred awards of the National Railroad Adjustment Board, Special Boards of Adjustment, and Public Law Boards during the past thirty years. In the majority of these awards, involving

about ten different agreements authored by over fifty different referees, the overwhelming weight of authority held that the organization does not have to prove that the work of the abolished position has been performed exclusively by employes covered by the Clerks' Agreement to have the remaining work distributed and assigned as provided in the rule.

In Award 3825 (Swaim), adopted March 23, 1948, we stated:

> "The Scope Rule of this Agreement covers all clerical work, as there defined, 'except as provided in Rule 3-C-2'.
>
> "Rule 3-C-2 clearly only provides that employes not covered by the Agreement may perform clerical work incident to their positions when it is work previously assigned to a clerical position which has been abolished.
>
> "While there have been some awards of this Board holding that the performance of some clerical duties by others than Clerks, where such duties were incidental to the positions of the persons performing them, did not constitute a violation of the Clerks' Agreement, such Awards were based on general Scope Rules which contained no exceptions. Here the Scope Rule has the one expressed exception - as to 'work previously assigned' to a position which has been abolished.
>
> "One expressed exception to a provision in a contract negatives the intention of the parties that there should be any other exceptions implied. This rule of construction was recognized by this Board in Award No. 2009." (Underscoring ours.)

See also Award 3826 (Swaim).

In Award 3870 (Douglas), adopted April 19, 1948, we stated:

> "Carrier argues that it was authorized to assign clerical work of the abolished clerks' 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 sub-paragraph (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 clerk's positions at such location still existing. And under sub-paragraph (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." (Underscoring ours.)

The dissent to Award 3870 filed by the Carrier Members shows by its very language that the "exclusivity" test was rejected by the Board.

In Award 3877 (Yeager), adopted without dissent nine days after 3870, we held:

> "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 which 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 clerk's 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." (Underscoring ours.)

In Award 4043 (Fox), adopted August 10, 1948, we held:

"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." (Underscoring ours.)

In Award 4044 (Fox) adopted the same day, we held:

"This dispute must be settled on the terms of the Rule 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 plain 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." (Underscoring ours.)

Award 4045 (Fox), also adopted the same day, held:

"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 provision, 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." (Underscoring ours.)

In Award 4046 (Fox), also adopted the same day, we held:

"Subsequently the usher's position on the southbound platform was abolished, and the work of the abolished position assigned to an assistant station master, which work, the Carrier maintains, was incident and attached to his regular duties, and which he could perform under the provisions of sub-section (2) of Rule 3-C-2(a) of the Clerks' Agreement. However, the Carrier overlooks another provision of the same rule, sub-section (1), which provides that

> "where, as in this case, other positions, under the Clerks' Agreement, which could do the work of the abolished position or positions, existed at the location where such work was to be performed, such work should be assigned to such position or positions, clearly indicating that where such position or positions existed, the employes named in sub-section (2), aforesaid, were not entitled to perform such work. See Awards 4043, 4044, and 4045 of this Division, this day made."

Carrier Members did not dissent to Awards 4043, 4044, 4045, and 4046.

See, also, Awards 3871 (Douglas), 4140 (Swaim), 4291 (Rader), 4448 (Wenke), 4618 (Carmody), 4639 (Carmody), 4664 (Connell), 4904 (Begley), 5591 (Carter), 5559 (Carter), 5560 (Carter), 6024 (Parker), and 9678 (Elkouri).

In Award 12901 (Coburn), adopted September 17, 1964, we held:

> "From the foregoing facts, it appears this claim is bottomed on the premise that the Scope Rule of the Agreement, and, more particularly, Rule 3-C-2(a)(1) was violated. Rule 3-C-2 is entitled 'Assignment of Work.' It stipulates how the remaining work of an abolished clerical position shall be performed and by whom. Its language is clear, precise, unambiguous, and mandatory. It says, inter alia, that the work 'previously assigned' to an abolished position which 'remains to be performed' WILL BE ASSIGNED, under subparagraph (1), to another clerical position or positions remaining in existence 'at the location where the work of the abolished position is to be performed. . . .'
>
> "The work of the two positions abolished in this case was 'preparation of classification sheets and chalking cars.' The classification work was assigned to those clerical positions remaining at the location but, says the Carrier, the work of chalking cars by clerks disappeared upon the abolishment of the positions. The employes deny the disappearance of such work and allege it was assigned to others not covered by the Clerks' Agreement, namely, Brakemen and Conductors.

"Thus, the dispositive issue then turns on a question of fact. If the work of chalking cars remained to be performed but was done by others not covered by the Agreement, then clearly Rule 3-C-2(a)(1) was violated. That being the case, the Board finds no necessity for exploring at length the much debated issue of proof of an exclusive right to the work by clerks under what has been characterized as a general, non-specific Scope Rule. There is nothing general or ambiguous in the language of Rule 3-C-2 applied to the facts of record here. The work was assigned by bulletin to the clerks and was performed by them. If it remained to be performed after abolishment of the clerical positions it had to be assigned to the remaining clerks' jobs at the location under Rule 3-C-2(a)(1). There was no showing in the record that at the time the chalking of cars was being performed by clerks, others not belonging to that craft were performing the same work. Nor is this a case where, as in Board Award 8331 and others, the clerks are claiming, as their own, work which had been performed and was being performed by employes holding no rights under the Clerks' Agreement. The sole question here is whether the work remained to be performed.

"The Board is of the opinion that the findings in Award 4448 (Referee Wenke) involving these same parties and a similar issue are in point and persuasive. There it was said, among other things, '...the Agreement is applicable to certain character of work and not merely to the method of performing it...' and '...the Carrier could not properly remove it therefrom by merely changing the method of its performance...' Here the character of the work was informational, i.e., to inform the trainmen switching cars on the hump of where to make their cuts and the track destinations of the cars. The clerks performed this work by chalking the required information on the cars; the trainmen chalked it on a slate. The character of the work and its purpose were the same. It remained to be done after abolishment of the clerical positions. It was done by other than clerks. The only change was one of method of performance." (Underscoring ours.

In Award 12930 (Coburn), also adopted September 17, 1964, we held:

"It is too well established to require citation of authority that work once placed under the coverage of a valid and effective agreement may not be arbitrarily or unilaterally removed therefrom. Here the record supports the contention

"that the disputed work was placed under the coverage of the effective Agreement and performed by Clerks until November 6, 1959, when it was removed therefrom by assignment to employes of another class. Accordingly, the Agreement was violated."

In Award 13478 (Kornblum), adopted April 16, 1965, we held:

"It is plain that the work comprehended by Rule 3-C-2(a) does not depend upon the operation of any 'exclusivity theory', i.e. proof that the work involved, either by past practice or Agreement, belonged to and could be performed solely and only by employes covered by the Clerical Rules Agreement. See Award 12903 (Coburn). It is enough that it be proved that the work which remains from the abolished position was 'previously assigned' to such positions. See Awards 12901 (Coburn), 4045 (Fox)." (Underscoring ours.)

In Award 13480 (Kornblum), also adopted on April 16, 1965, we held:

"The answer to this portion of the Petitioner's claim depends upon which one of the two antithetical interpretations of Rule 3-C-2(a) the Board follows in this case. Under the one it must be shown, in all events, that the remaining work in dispute belongs exclusively to the Clerks either in terms of their Agreement or by tradition, custom and practice, e.g. Awards 12479 (West), 11963 (Christian), 11107 (McGrath), 10455 (Wilson). In the other, the application of the Rule does not depend upon any 'exclusivity theory', but rather on a showing that the remaining work, as the Rule expressly provides was 'previously assigned' to the abolished position, e. g. Awards 12901, 12903 (Coburn), 7287 (Rader), 4043, 4044, 4045 (Fox), 3870 (Douglas).

"It would certainly seem, especially in the context of the facts of this case, that the latter interpretation of Rule 3-C-2(a) is the sounder one. Any other construction would make, for the most part, the language of sub-paragraphs (1) and (2) sheer surplusage. For example, under sub-paragraph (2) any issue as to the amount of work remaining from an abolished clerical position and assigned to a supervisory employe would be entirely extraneous if, in the first place, it could not be shown that the work belonged exclusively to the Clerks. Moreover, the fact that there was a remaining clerical employe under sub-paragraph (1) would be utterly meaningless if it could not likewise be shown that such work was in the exclusive domain of the Clerks' Agreement." (Underscoring ours.)

All of the above-cited awards involved the parties to this dispute. For similar awards on other carriers having similar rules, see Awards 4445 (Wenke), 5117 (Wenke), 5436 (Parker), 6527 (Rader), 6528 (Rader), 6529 (Rader), 6530 (Rader), 7221 (Smith), 7222 (Smith), 7285 (Rader), 7286 (Rader), 10314 (Webster), 10638 (LaBelle), 11674 (Rinehart), 13125 (Dorsey), 13807 (Kornblum), 15140 (House), 17621 (Dugan), and 17758 (Ellis).

In Award 19320 (Ritter), adopted June 30, 1972, we held:

> "This claim concerns itself with the physical track check made in preparation for an outbound train movement, and obtaining the car light-weights to be used in billing. This work was performed by Yard Clerks at the Cumbo site and was removed from the Yard Clerk positions where the site of the positions was changed from one point within Martinsburg Yard switching limits to another point within these same limits, and the site of some of the work performance to a third point within the same switching limits. Special Board of Adjustment No. 192 in its Award in Docket No. 91 interpreted the Scope Rule involved in this case. This award is found to be controlling in this instance. This Award held that once work is placed under the Clerks' Agreement, it cannot be removed from and given to other employes except as provided in Rule 1(c), that Rule 1(c)4 does not stand alone, but is interdependent with 1(c), 1, 2 and 3. This Award also held that Rule 1(c) is a limitation on the so-called 'Ebb and Flow' Doctrine. It applies only in situations where a position covered by the Clerks' Agreement is abolished. This Award held that under that Rule when work is assigned to a given position under the Clerks' Agreement and that position is abolished, the work must be assigned in the first instance to a position or positions covered by the Agreement, if one existed at the location. This is true even if the work on the abolished position is incident to or directly attached to the primary duties of another craft or class. This is not to say that work incident to and directly attached to the primary duties of another craft as set out in Paragraph 4 of Rule 1(c) may not be performed by employes other than

> "the Clerks, but simply that once such work has been assigned to a position covered by the Agreement at a given location, it cannot 'flow back' to the class or craft to which the work is incident, if the clerical position is abolished and another position or positions covered by the Agreement exists at the location where work of the abolished position is to be performed. Therefore, this claim will be sustained." (Underscoring ours.

In Award 19865 (Dorsey), adopted July 27, 1973, we held:

> "There being no evidence adduced that the Agent at Wharton had performed billing work during the existence of the Clerk-Typist position at that point, we find that the facts of record and our many Awards interpreting and applying identical Scope Rules support Clerks' position." (Underscoring ours.)

In their Dissent and Concurrence the Carrier Members, in partially quoting Award 20535 (Sickles) cited in Award 21452, suggest that Referee Sickles was ignorant of certain opposing awards; this is another example of their fallaciousness. They pick up one sentence from an award and ignore all the others even though those not cited cast the one sentence in a light altogether different from the outrageously inconsistent conclusion suggested. Testimony before the Washington Job Protection Agreement Section 13 Committee comes to mind; Mr. George M. Harrison was chastizing technicians about turning a trick phrase:

> "....You bargain in good faith for men and women, human beings. You are trying to do something to raise the level, the standard of life and living. You are not trying to cheat them out of something by some catch phrase that you concoct out of your ingenuity. It reminds me a good deal of what Carl Gray said when we wrote our committee of six report. He said there will always be a misunderstanding. He said you can even go back to the advent of Christianity. The Bible says Noah danced before the Ark. One man said I think he stood physically before the Ark and danced. The other man said I think Noah danced first in turn and the Ark danced next in turn."

There can and will be legitimate misinterpretation and legitimate misunderstanding, but this cannot extend to the absurd, nor should a catch phrase from an agreement or an award be twisted by ingenious editing to distort the intent of the drafter of the agreement or the author of an award. Referee Sickles was not ignorant of the awards improperly interpreting rules such as 3-C-2. This is manifest by the language of his Award 20535:

> "The Organization counters by stating that the Rule adopted on May 1, 1970 (18(f)) replaced the 'general' Scope Rule between these parties. Further, Special Boards and this Board have interpreted rules similar to the ones presented here and have uniformly held that it is not necessary to show 'exclusive' performance, etc., but merely that the work of the abolished position has been removed and given to other employees (with certain exceptions not here applicable). We have reviewed the cited Awards, and they appear to support Claimant's position. For example, Awards 6527, 6528, 6529, 11674, 13125, 13478, 15140 and 19320 (among others) noted 'exclusivity' arguments and rejected same. It is interesting to note that the Referee relied upon at Page 17 of Carrier's Submission (Dorsey) cited above, also authored Award 13125, more than 16 months after Award 11643. Citing Agreement language similar to Rule 18(f), Award 13125 noted:
>
> > 'We do not agree that the clerks must prove, in this case, that the work of the abolished position has been performed, exclusively, by employes covered by the Clerks' Agreement.'
>
> "This Board does not find conflict in the Awards cited by the opposing parties, but in fact finds that they may be read in harmony. While the 'exclusivity' doctrine may well be material to certain types of disputes, nonetheless, the various Awards which have interpreted rules dealing with abolishment of a position (and subsequent assignment of the work) have read the agreement language in specific terms and have applied it to the facts of each given case without regard to the restrictions suggested by Carrier herein. No contrary Awards have been brought to our attention.

"Further, Carrier relies upon Rule 18(f)(3), cited above, as authority for performance of the work by employees not covered by the Agreement.

"It should be noted that Carrier did not raise that defense while the matter was being considered on the property. In any event, the Board does not agree that Rule 18(f)(3) is controlling. Rather, we feel that a reading of the entire rule requires that the provisions of Rule 18(f)(1) be satisfied first. Note that 18(f) states that remaining work is assigned in accordance with the following:

> '(1) To another position...covered by this agreement when such other position...remain...
>
> '(2) In the event no position...exists...then it may be performed by an Agent, Yardmaster, Foreman...
>
> '(3) Performance of work by employes other than those covered by this Agreement in accordance with Paragraphs (1) and (2) of this Section (f) will not constitute a violation of any provision of this Agreement.' (underscoring supplied)

"In this regard, other Awards of this Board have held that the basic principle of rules such as 18(f) is to assure that work of a given position is assigned to the entitled employees and that they are interdependent provisions which preclude utilization of subsequent sections unless no positions covered by the Agreement remain in existence at the location in question. See, for example, Awards 3871, 3906 and 4043.

"The Board finds that Carrier violated the Agreement when, subsequent to abolishment of the position, certain work was assigned to employees not covered by the scope of the Agreement."

In Award 20568 (Edgett), adopted December 30, 1974, we held:

> "The record, fairly read, shows that work which had been performed by the abolished positions is now being performed by the Agent. It is not necessary for the Organization to show that such work is exclusively performed by clerks. It is enough to show that work which had been performed by a clerical position, and which remained after the abolishment, was not assigned as provided by the Rule." (Underscoring ours.)

It can only be concluded from a fair reading of the entire record and the myriad awards dealing with this subject that Award 21452 is a correct decision.

Carrier Members' Dissent and Concurrence also faults an alleged failure to adhere to the doctrine of stare decisis. Obviously, the Carrier Members who argued before Referee Christian in Award 11963 did not fault him for failure to follow no less than twenty precedent awards on the same rule on the same property authored by eleven different referees. Those Carrier Members signing the Dissent and Concurrence under review here presented a case to Referee Lieberman that resulted in Award 21378 (January 28, 1977). On every prior occasion in which the issue there involved had been adjudicated before the Adjustment Board and Public Law Boards, the Organization had prevailed, yet the Carrier Members did not suggest that the principle of stare decisis controlled. Instead, arguments were offered such as, "It is apparent the Majority in Award 21378, unlike Award 18446, were convinced the parties meant what they said in Section V and Rule 9-A-1, and gave meaning and intent to that language."

Without suggesting that Award 21452 does not follow the principle of stare decisis because it correctly weighs conflicting awards and rejects a short line of maverick

decisions that are obviously in palpable error, it is suggested that the principle of stare decisis cannot be invoked willy nilly by Carrier Members only when it suits their fancy.

The Dissent and Concurrence expresses concern over the finding of a constructive abolishment. All of the nation's carriers have been on notice since our early Award 198 (Spencer) that this Board will not permit a carrier to do indirectly that which the agreement prohibits it doing directly. Moreover, the Railway Labor Act requires reasonable effort be exerted to maintain agreements. Constructive abolishments, paper abolishments, or nominal abolishments cannot be used to avoid the terms of an agreement. In our Award 15699 (Dorsey) we held:

> "Petitioner charges Carrier with a 'paper abolishment' of the Maintenance Gangs' positions to accomplish two purposes: (1) elimination of the Cook positions; and (2) having Maintenance Gang work performed by Section Laborers at a lower rate of pay. This it contends was in violation of the spirit of the Agreement.
>
> "Carrier's defenses are: (1) it is its prerogative to increase or decrease forces so long as accomplished in compliance with prescribed Rules; (2) there is no Rule which requires that a Maintenance Gang or laborers on a Section shall consist of a specified number of men; (3) Maintenance Gangs and Section Laborers perform the same class of work and enjoy common seniority; and (4) even though the Section Laborers were doing Maintenance Gang work, as alleged by Petitioner, paragraphs (3) and (6) of the claim must be denied because less than six (6) men were 'occupying the outfit.'
>
> "From our study of the record we find: (1) there are no Rules of the Agreement that specifically impair Carrier's management prerogative to determine the consist of employes assigned to Section Laborers or Maintenance Gang forces; (2) the Section Laborers and Maintenance Gang employes do not perform the same work; (3) the

"actions of Carrier were primarily a scheme to abolish the Cook positions. Anticipating that this Board might make such findings, Carrier argues that we can find no violation of the Agreement unless we can find a violation of a particularized prescribed Rule. A like argument was rejected in Gunther v. San Diego, Arizona E. R. Co., 382 U.S. 257 (1965); see, also, Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157 (1966), where the Court said:

> '. . . A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. John Wiley & Sons v. Livingston, 375 U.S. 543, 559; cf. Steele v. Louisville & N. R. Co., 323 U.S. 192. '....(I)t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate....The collective agreement covers the whole employment relationship. It calls into being a new common-law - the common-law of a particular industry or a particular plant.' United Steelworkers of America v. Warrier & Gulf Nav. Co., 363 U.S. 574, 578-579.'

"We reject it here. But, it should be rejected only in those cases in which we are convinced that a party has evaded the spirit of the Agreement in such a manner as to be repulsive to the mandate of Title I, Section 2, First, of the Railway Labor Act that 'Carriers, their officers, agents, and employes . . . exert every reasonable effort to maintain agreements . . .' We find such to be the case herein.

"Petitioner's prayer for compensation for Claimants is a recitation of the make whole principle - that is, that Claimants be paid for loss of earnings, if any, resulting from the violation. This we shall award. We find Carrier's defense as to paragraphs (3) and (6) of the Claim to be without merit. Claimants are entitled to be made whole for any loss of earnings flowing from the violation. Carrier may not create factual circumstances in violation of the Agreement and then premise an argument on those facts. Such is sophistry."

Carrier Members also suggest that the NRAB "has no right to assess a penalty unless it is directly and proximately

related to the losses incurred by Petitioner." Carrier Members' blind tenacity in continuing to pursue an issue that has been resolved thousands - yes, literally thousands - of times by all Divisions of the Adjustment Board, Public Law Boards, Special Boards of Adjustment, Presidential Emergency Boards and Federal Courts seems to be sophomoric. One would have to believe in magic to expect more than a rare acceptance of such damages arguments by an ill-informed and mentally itinerant referee. Such cases, two perhaps in the past two years, by first-assignment referees, do not overcome the inexhaustible authority on awarding damages and are never followed by competent and experienced referees. The Presidential Emergency Board created on February 8, 1937 (Chairman Devany) wrote:

> "The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation."

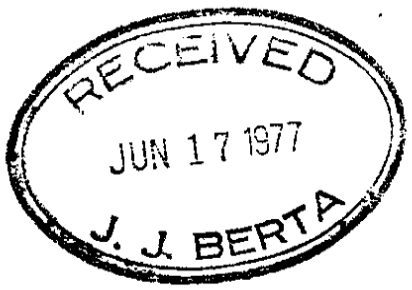
It seems odd that forty years later we must still waste time arguing an issue that has been put to rest by no less authority than a Presidential Emergency Board.

Carrier Members conclude their Dissent and Concurrence with the suggestion that the Majority follow an admonition of Justice Jackson. This admonition is as wide as it is broad and applies to Carrier Members as well as Labor Members when

they form the Majority. In Award 21452 it is apparent the Majority did follow Justice Jackson's admonition when compared to Awards 21324 and 21325. Particularly apropos here is Fourth Division Award 3131 (O'Brien) wherein the Board concluded it had erred in an earlier award where the issues were not clearly joined, and said:

> "Finally, it should be observed that the findings herein appear to conflict with the statement of this Referee in Fourth Division Award No. 3033 relative to the introduction of written statements. We concede that our present findings do, in fact, conflict with our statement in Award No. 3033 and we hereby reject that statement. The issue was not adequately joined in Award No. 3033 and when it was thoroughly argued in the present claim we realized the fallacy of our position in Award No. 3033."

Award 21452 is sound, follows the established precedent of this Board and, importantly, gives a correct meaning and intent to the rules of the agreement.



J. C. FLETCHER
Labor Member