Award No. 14319
Docket No. SG-14363

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

**ATLANTA AND WEST POINT RAILROAD—
THE WESTERN RAILWAY OF ALABAMA**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Atlanta and West Point Railroad Company — The Western Railway of Alabama that:

(a) The Carrier violated the current Signalmen's Agreement, as amended, particularly Rule 29, when it failed to maintain the proper ratio of Signalmen and Assistant Signalmen on the signal gang commencing on or about July 15, 1961.

(b) The Carrier be required to compensate D. Philyaw the difference between his Assistant Signalman rate of pay and the Signalman rate of pay from July 15, 1961, until this violation is corrected.

EMPLOYES' STATEMENT OF FACTS: This dispute arose as a result of the Carrier issuing Bulletin No. 104 under date of July 15, 1961, which in effect abolished a signalman position in the Signal Gang. The Brotherhood contends that this unilateral action on the part of the Carrier was in direct violation of Rule 29 and resulted in a ratio of Assistants to Signalmen which was greater than that comprehended by the rule, which provides that in gangs the number of assistants shall not be greater than one Assistant to three (3) Signalmen.

Inasmuch as the abolishment of that position changed the ratio of Assistant Signalmen to Signalmen in the gang in a manner which was in violation of the current Signalmen's Agreement, Local Chairman G. F. Harper called this fact to the attention of Mr. R. C. Neville, Supervisor T. T. & S., in a letter dated July 29, 1961, which is Brotherhood's Exhibit No. 1.

Supervisor Neville responded in a letter dated August 14, 1961, which is Brotherhood's Exhibit No. 2. In that letter he stated the gang was composed of one (1) Foreman, two (2) Signalmen with less than two years' experience and one (1) Assistant Signalman with seventeen months' experience, and that he did not propose any increase in the gang unless he could employ a qualified Signalman.

Insofar as Mr. Neville's answer was not satisfactory and he would not take the necessary action to discontinue the apparent violation of Rule 29,

able to secure one. The gang was worked with two signalmen and one asistant, and claim was filed for signalman's rate of pay for the assistant, even though he only had seventeen months experience and was far from being qualified for the job. The organization contended that the question of qualifications did not enter into the picture — that the rule called for three signalmen on the gang and as the man was available, he should be upgraded. The claim was declined at all levels on the property, on the grounds claimant was not qualified.

OPINION OF BOARD: Claimant was the Assistant Signalman in a gang composed of a foreman, three signalmen and one assistant. A vacancy occurred at another headquarters for a signal maintainer which was awarded on bid to the senior signalman of the instant gang. Thereafter, the gang was worked with two signalmen and one assistant.

The Organization filed the instant claim on behalf of the assistant alleging that the Carrier was in violation of Rule 29, for failure to maintain the proper ratio between the assistant and the signalmen. The Rule in issue provides as follows:

"RULE 29

(a) The number of Assistants shall be consistent with the requirements of the service and the apparatus to be installed and maintained. Not more than one Assistant will be allowed each Maintainer. In gangs, the number of Assistants shall not be greater than one Assistant to each three (3) Signalmen employed; however, when the number of Signalmen necessary are not available, the ratio of Assistants employed in the gang may be temporarily changed by agreement between the Supervisor of Signals and the General Chairman.

(b) It is the intent of the rule that, if possible, employes will receive their training on this railroad and will be promoted to higher rated positions rather than employing new employes for such positions."

By way of confession and avoidance, the Carrier concedes that a technical infraction of the Rule was committed, but resists any assessment of damages against it. In declining to compensate the Claimant for the relief requested in claim (b), the Carrier advances two defenses for such denial. The first was based on the Claimant's inexperience and the second, the unavailability of any experienced signalman. It even requested the Organization to refer an experienced signalman for employment on the gang.

In view of the Carrier's admission that the gang was worked in violation of the Rule, the only question which remains to be considered by this Board, is the determination whether damages should be assessed for such violation.

The Organization argues that the latter portion of Rule 29 (a) was intended to cope with the very situation that occurred in the instant dispute. Had the Carrier desired to remedy the matter, all that was required in order to comply with Rule 29 (a), was to enter into a temporary arrangement with the General Chairman. Instead, it declined to pursue that method, but continued to arbitrarily work the gang with knowledge of the violation.

We are mindful of the fact that this Board, as well as our courts, abhor a penalty. In the absence of a penalty provision in the effective agreement between the parties, we may not impose one. However, the assessment of

compensatory damages is proper, provided the facts warrant such payment. We recognize that under certain circumstances, failure by a Carrier to promote a qualified employe is compensable, i.e., the employe is entitled to be paid the difference between what he earned and what he would have earned had he been awarded the promotion.

However, this begs the question in issue. Was the Claimant qualified for the promotion? The record indicates that the Claimant had no previous experience in signal work when hired; and, at time of filing the claim, he only had acquired seventeen months experience. The Organization does not seriously argue that the Claimant had sufficient experience to qualify for promotion to signalman. It is, therefore, the opinion of this Board, that payment of claim (b), under the circumstances evidenced here, namely, lack of experience and the absence of a specific provision requiring such payment, would be tantamount to inserting a penalty provision in the Agreement.

This Board, beyond question, does not view lightly those infractions which result in Rule violations. We assume, that the Rules were negotiated in good faith by the parties, and, thereafter, incorporated into an Agreement in order that peace and stability would be promoted in the industry, as intended by the framers of the Railway Labor Act. However, in the absence of explicit language permitting us to assess a penalty for a violation of this nature, we are relegated to censuring the transgressor, without the ability to impose sanctions.

It is, therefore, our determination that the Carrier violated Rule 29 (a), but that no payment is forthcoming under Claim (b).

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 to the extent indicated per Opinion and Findings.

AWARD

Claim (a) sustained.

Claim (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of April 1966.

Dissent to Award 14319, Docket SG-14363

The Majority, consisting of the Referee and the Carrier Members, correctly found that the Carrier violated the Agreement. However, the diligence and means of the Majority in excusing the Carrier's wilful disregard of a clear and practicable provision of the Agreement is inexcusable.

Particularly distasteful is the Majority's allegation that this Board abhors a penalty since the allegation disregards the preponderate evidence before it showing that this Board has and does assess a penalty when that is necessary to uphold the sanctity of an agreement.

Equally distasteful is the manner in which the Majority dealt with Claimant's alleged lack of experience in that the parties agreed upon a procedure to be followed "when the number of signalmen necessary are not available" but which the Carrier elected to ignore.

Experience has shown that if rules are to be effective there must be penalties imposed for the violation thereof. Award 4539. The Majority was doubly remiss in failing to apply the principle to this wilful violation.

/s/ G. Orndorff
G. Orndorff
Labor Member

CARRIER MEMBERS' ANSWER TO DISSENT TO AWARD 14319, DOCKET SG-14363

The dissent does not detract from the soundness of Award 14319. The Labor Member presented his argument and submitted what precedent he could, including Award 4539, to support his view that a penalty should have been assessed. However, our more recent and well-reasoned Awards adhere to the basic principle that penalty provisions of an Agreement must be strictly construed and that this Board will not impose a penalty where the specific provisions of an Agreement do not so provide. See also **BRT v. D&RGW**, 338 F.2nd, 407 cert. den., 85 S. Ct. 1330.

Award 14319 is in accordance with the law, follows sound precedent of the Board, and is not in error.

/s/ P. C. Carter

/s/ R. E. Black

/s/ D. S. Dugan

/s/ T. F. Strunck

/s/ G. C. White

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