Award No. 15624
Docket No. SG-15079

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the Brotherhood of Railroad Signalmen on the Southern Railway Company et al. that:

(a) Carrier violated the plain and unquestionable provisions of the Signalmen's Agreement when it arranged and/or permitted a contractor and his forces, or other persons not covered and who hold no rights under the Agreement, to perform recognized signal work.

(b) Messrs. P. G. Lotshaw and J. L. Holsenback, Jr., be compensated at their respective rates of pay for all man-hours of work performed by the contractor and his forces, or other persons not covered and who held no rights under the Signalmen's Agreement — which signal work was performed on May 10, 1963, in violation of the Agreement. [Carrier's File: SG-19084]

EMPLOYES' STATEMENT OF FACTS: This dispute, like numerous others from this property which have either been decided by this Division previously or are awaiting adjudication, involves signal work which Carrier contracted out to persons not covered by the Signalmen's Agreement. Carrier used two (2) foremen and five (5) men, who are not covered by the Signalmen's Agreement, but who were employed, instead, by the Gregory Electric Company, Columbia, South Carolina, on May 10, 1963, for a period of two (2) hours and twenty-five (25) minutes to perform recognized signal work in connection with raising the signal transmission line on the Columbia Division at Bell Line Boulevard, Mile Post R-104.8, in order to provide overhead clearance necessitated by a new federal highway being constructed there. The contracting company's force set a 50 foot pole in the line and removed a shorter, existing one.

The disputed work here was similar to that involved in another case between this Carrier and our Organization which has been settled by the Third Division. It is identified as Docket SG-10707, and Award 11733 disposed of it. Even though the work involved in both cases was similar, Carrier assigned it differently in each. A larger portion of the signal work was contracted out in the former case than in the present one. Signalmen did not dig the holes

the construction of the highway crossing with drainage facilities, the installation of crossing signals at the new location, and the removal of the highway crossing and crossing signals where the abandoned section of Beltline Boulevard crossed Carrier's tracks was for the account of, and for the benefit of, the State of South Carolina, the South Carolina State Highway Department entered into an agreement with Carrier under which it agreed to bear the entire expense of the installation. The referred to agreement further provided that the South Carolina State Highway Department would construct with its own forces or by other means the paved crossing where the new highway crossed Carrier's tracks, complete with drainage facilities, and remove the old crossing where the abandoned section of Beltline Boulevard crossed Carrier's tracks. All generally recognized signal work in connection with the installation of electrically operated highway crossing protective devices at the crossing of Carrier's tracks by the new highway and removal of the electrically operated highway crossing protective devices at the crossing of Carrier's track by the abandoned section of Beltline Boulevard was performed by Carrier's signal employes.

On or about May 10, 1963, the South Carolina State Highway Department made an urgent request upon the Carrier to remove an electrical transmission line pole which was located in the middle of the right of way of the highway to be constructed, stating that the pole would have to be removed in order that grading of the highway could proceed. It was necessary that a 35 foot electrical transmission line pole be removed from the middle of the highway right of way and that a 50 foot pole be installed in a different location.

Messrs. J. L. Holsenback and P. G. Lotshaw, here claimants, dug the hole for the new 50 foot electrical transmission line pole at the new location. The largest truck in service on the Columbia Division was a one-ton Jeep pickup truck. There was no truck with an "A" frame and hoist in service on the division. With no equipment available capable of safely handling the new 50 foot pole, Carrier contracted with Gregory Electric Company, Columbia, S. C., for a suitable truck with "A" frame and hoist to lift the 50 foot pole and place it in the hole dug by Messrs. Holsenback and Lotshaw and to remove the 35 foot pole from the hole which was located in the middle of the highway right of way. Messrs. Holsenback and Lotshaw performed all work in connection with transferring of the transmission line from the old pole to the new 50 foot pole.

Claim before the Board involves use of the truck with "A" frame and hoist furnished by Gregory Electric Company which was used during the period 8 A. M. to 10 A. M. on May 10, 1963. Despite the fact that Messrs. Holsenback and Lotshaw stood by and watched while the truck with "A" frame and hoist was being used to handle the poles in question on the date involved, claim before the Board demands that they be paid for the second time (i.e., double time) for merely watching. There is clearly no basis for the claim and demand presented.

OPINION OF BOARD: This is another in a long series of cases, where the Carrier has engaged the services of an independent contractor to do certain work, which the Organization alleges is a violation of the existing contract of the parties.

In 1963 a new four lane highway was under construction by the State of South Carolina, as a result of which Carrier was required to construct a

paved highway crossing where the new highway crossed its tracks. Carrier entered into an agreement with the State Highway Department which provided that the State would construct with its own forces or by other means the paved crossing where the new highway crossed Carrier's tracks, and remove the old crossing. All signal work in connection with the installation of electrically operated highway crossing protective devices at the crossing of Carrier's tracks by the new highway and removal of the electrically operated highway crossing protective devices at the old crossing of Carrier's tracks, was performed by the Carrier's signal employes.

While this work was in process, the State Highway Department requested the Carrier to remove an electrical transmission line pole which was located in the middle of the right-of-way of the highway to be constructed, stating that the pole would have to be removed in order that the grading of the highway could proceed. A 35 foot electrical transmission line pole had to be removed from the middle of the highway right-of-way and a 50 foot pole installed in a different location.

The Claimants in the instant case actually dug the hole for the new 50 foot electrical pole at the new location. The hoisting, lifting and placing of this pole in the hole and the removal of the 35 foot pole from the old hole, is the subject of the instant dispute.

The Carrier contends that the largest truck in service on this particular Division was a one ton jeep pick-up truck, that there was no truck with an "A" frame and hoist in service on the Division, and that with no available equipment capable of safely handling the new 50 foot pole, it was necessary to enter into a contract with the Gregory Electric Company so that a suitable truck with an "A" frame and hoist could be utilized to place the 50 foot pole in the new hole and remove the 35 foot pole from the old hole. The Claimants performed all work in connection with transferring of the transmission line from the old pole to the new pole.

The Organization avers that the contracting of the work in question was violative of the Scope Rule and other related rules. The applicable portions of the revised Scope Rule are quoted below:

> "WHEREAS, the parties hereto have agreed to change the Scope Rule of the effective Signalmen's Agreement.
>
> NOW, THEREFORE, AGREED THAT:
>
> The Scope Rule of the current Signalmen's Agreement is revised to read:
>
> SCOPE. RULE 1
>
> (Revised — effective October 23, 1953)
>
> This agreement covers the rules, rates of pay, hours of service and working conditions of employes hereinafter enumerated in Article II — Classification.
>
> Signal work shall include the construction, installation, maintenance and repair of signals, either in signal shops, signal storerooms or in the field; signal work on generally recognized signal systems,

wayside train stop and wayside train control equipment; generally recognized signal work on interlocking plants, automatic or manual electrically operated highway crossing protective devices and their appurtenances, car retarder systems, buffer type spring switch operating mechanisms, as well as all other work generally recognized as signal work.

Nothing in this Scope Rule 1 or any other provision of this agreement shall be construed to bar the Carrier from continuing to assign to Electrical Workers on Lines East work of the character heretofore performed by employes in the so-called IBofEW line gang on Lines East, and such practice may be continued without being an infringement on the rights of employes subject to this agreement; it being agreed that the Electrical Workers in the so-called IBofEW line gang on Lines East, as well as employes covered by this agreement, have been performing both low and high tension line work.

It having been the past practice, this Scope Rule shall not prohibit the contracting of larger installations in connection with new work nor the contracting of smaller installations if required under provisions of State or Federal law or regulations, and in the event of such contract this Scope Rule 1 is not applicable. It is not the intent by this provision to permit the contracting of small jobs of construction done by the Carrier for its own account.

This agreement effective October 23, 1953, terminates and takes precedence over the Scope Rule made effective December 1, 1952, by the Assistant Vice President's letter of November 18, 1952, to the General Chairman, and shall remain in effect until changed as provided by the Railway Labor Act."

The Organization, based on the above revised Scope Rule directs our attention to, and relies upon the decisions rendered in Awards 9749 (McMahon) and 11733 (Stark) involving the same basic issues and the same parties as in the instant dispute. The former involved the lifting and setting in place of some signal equipment, work which the Board held that even though the actual work "may be classified as common labor not requiring the skill of a Signal Maintainer, it was work incidental to the performance of work required by the Signalmen's craft and under the Scope Rule was work which the Carrier was prohibited from contracting out." The latter award involved the removal of three poles and subsequent replacing of them with longer poles. This work, due to the non-availability of the appropriate personnel, was given to an outside Contractor, who delivered the poles to the work site, provided the necessary machinery and equipment for drilling three holes and setting the new poles in place, as well as providing the operators to perform this work. The Board in this case held that the Carrier had in fact violated the revised Scope Rule and accordingly sustained the Claim.

The Carrier refused to comply with Award 11733, in consequence of which the Brotherhood instituted enforcement proceedings in the District Court under Section 3, First (p) of the Railway Labor Act, 45 U. S. C. A. §153, First (p) (1954). The District Court agreed that the Railroad violated the Contract, but refused to enforce the awards of damages as determined by the Board, and limited the amount to nominal damages of $1.00, basing its decision on the fact that, since the employes designated by the Brotherhood to receive

the monetary awards had been fully employed at the time the disputed work was performed, they were not entitled to any money for lost work. The Brotherhood then entered an appeal to the United States Court of Appeals for the Fourth Circuit contending that the monetary awards should have been enforced in full. Twelve days after the District Court entered its judgment in this case, certain amendments became effective to the Railway Labor Act "restating and further restricting the scope of judicial review of Board awards."

> "Section 3, First (p) of the Act, 45 U. S. C. A. §153, First (p) (1954), which prior to amendment read in pertinent part that a Board order 'shall be prima facie evidence of the facts therein stated,' was amended to read that 'the findings and order of the . . . Board shall be conclusive on the parties.'"
>
> "Section 3, First (m) of the Act, 45 U. S. C. A. §153, First (m) (1954), which prior to amendment read in pertinent part that 'awards shall be final and binding on both parties to the dispute, except as far as they shall contain a money award.' was amended by deletion of the words 'except as far as they contain a money award.'"

The only other amendment relevant to the present appeals was the addition to §3, First (p) of a proviso that Board orders

> "may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confiine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

The Brotherhood urged the applicability of the above cited amendments to the pending appeals, but the Fourth Circuit decided to ignore these amendments and remanded the case to the Board, vacating the District Court decision based on other grounds. The Fourth Circuit decision in part is quoted below. (Award 11733 was one of four cases appealed to the Fourth Circuit. Appeal No. 10799 referred to herein is Award 11733.)

> "On their face, the present appeals raise solely a legal question as to the scope of judicial review of Board awards. However, we must first consider the possible effect of the Supreme Court's recent decision in Transportation-Communication Employees Union v. Union Pacific R. R., 385 U. S. 157 (1966), which imposes on the Board the obligation fully to settle jurisdictional disputes in a single proceeding.
>
> * * * * *
>
> In Transportation-Communication, the railroad installed IBM machines to perform dual functions previously assigned separately to clerks and to telegraphers. Operation of the machines was assigned to the clerks, and the telegraphers' union protested, claiming the jobs for its members. The dispute eventually reached the Board. Although the clerks' union was notified of the pendency of the case, it declined to participate, indicating an intention to institute separate proceedings if the jobs of any of its members should be threatened. The Board determined that the telegraphers were entitled to operate the

machines under their contract and awarded compensation to telegraphers idled by assignment of the jobs to clerks. It did not consider whether a reasonable construction of the railroad's contract with the clerks' union would support assignment of the jobs to its members. The District Court denied enforcement of the award on the ground that the clerks' union was an indispensable party and the Court of Appeals for the Tenth Circuit, and in turn the Supreme Court, affirmed. The Court reasoned that the Board's failure to bring before it all parties to the dispute amounted to an abdication of its statutory responsibility to settle the 'entire dispute.' It remanded the case to the Board with directions that the clerks' union once again be given the opportunity to participate

> 'and, whether or not the clerks' union accepts this opportunity, to resolve this entire dispute upon consideration not only of the contract between the railroad and the telegraphers, but "in light of * * * [contracts] between the railroad" and any other union "involved" in the overall dispute, and upon consideration of "evidence as to usage, practice and custom" pertinent to all these agreements.' 385 U. S. at 165-166. (Citation omitted.)

* * * * *

The record before us, containing only scant reference to the existence of a competing union and referring not at all to its contract fails to provide an adequate basis for resolution of the 'entire dispute.' This court cannot with confidence perform its limited reviewing function when it does not clearly appear in the record whether the Board considered the Contract of the competing union. The Supreme Court in Transportation–Communication has made known its view **that that union's failure to complain will not be deemed sufficient reason for disregarding its contract.** (Emphasis ours.)

We do not, however, intimate that on remand the Board's decision must be other than it was. We hold only that until the record discloses whether the Board has taken into account the competing union's contract, it cannot be said that the mandate of Transportation–Communication has been complied with.

We are further of the opinion that appeal No. 10799 also is governed by the rule of Transportation–Communication. As noted above, work of the type contracted out was negotiated into the agreements of both Brotherhood and IBEW, but, because of the latter's failure to complain, the Board expressly refrained from deciding whether, in a dispute between the two unions, IBEW would be entitled to the work. The Board stated that:

> 'These arguments[of Southern that it had not violated Brotherhood's agreement because work of the type contracted out did not belong exclusively to Brotherhood] in our estimation, would have more validity if Management had actually assigned the task in question to Carrier — employed Electricians rather than to outsiders. Assuming that, pursuant to the two applicable agreements and past practice, the work

had been given to Electricians, there might well be grounds for arguing that the Signalmen's Agreement had not been abridged. But this is not the situation confronting us. Here, the work was not given to employes of either group who might have laid claim to it. While no complaint was filed by the Electricians, the Signalmen did protest. There is good reason, therefore, to uphold their claim.'

This language indicates that the Board, itself recognized an uncertainty as to which union could assert a right to perform the disputed work or whether, by virtue of the collective agreements and past practice, Southern could unilaterally assign the work to either union, but not to an outsider. It is, of course, possible that on account of a contractual limitations period, IBEW's failure to complain precludes it from now asserting a claim to the work. This, however, can be determined only on remand.

* * * * *

We do not read Transportation–Communication as limited to instances where a totally new job is created that combines the function of two existing, independent jobs — a development unforeseen when the collective agreements were negotiated. The aim of that decision is to avoid the dilemma which Justice Black points out may arise when an adjudication is made affecting a party not present and whose rights are not considered. The dilemma is not avoided — indeed, the risk of its arising is heightened — when, as in appeal No. 10799, the disputed work is negotiated into the contracts of two competing unions. Similarly, it seems to make little difference whether the job is characterized as 'new' or 'old' or whether it entails continuing work **or only the performance of an isolated task.** (Emphasis ours.)

While the unusual facts of Transportation–Communication on their face suggest that both telegraphers and clerks had a possible claim to be paid for operation of the machines, on the state of the records before us we cannot say that either of the instant appeals presents a qualitatively different set of circumstances militating against the application of Transportation–Communication.

* * * * *

Since the cases must be remanded to the Board, we are not in position to foresee whether the ultimate awards will be in Brotherhood's favor. If, however, after full consideration of all relevant materials, as required by this opinion, Brotherhood prevails and the matter again comes before the District Court for enforcement, we are of the opinion that the monetary portions of the awards, as well as the Board's determination on the merits, must be enforced."

We have read very carefully the decision of the Supreme Court in the Transportation-Communication case, upon which the Fourth Circuit Court of Appeals principally based its decision in remanding Award 11733 to the Board. We can understand the Supreme Court's concern where, as in that case, there was a possible elimination of "permanent jobs," and its consequent desire to defer to the expertise of the Adjustment Board in resolving expeditiously a possible

jurisdictional dispute between two competing unions involving "permanent jobs." We do not necessarily agree with the Fourth Circuit Court of Appeals decision, wherein, it appears to us to be expanding on the language of the Supreme Court by in effect requiring a third party notice be given to another union where the performance of an isolated task is involved. This is precisely what we are confronted with in the instant case and this is what the Fourth Circuit was confronted with in Award 11733.

Faced with the Fourth Circuit's decision and its interpretation of the Transportation–Communication case, we could refer this case back to the Third Division with instructions to file a third party notice with the IBofEW. However, we can see no useful purpose being served by doing so, because the IBofEW is precluded by the August Agreement 1954 — from filing a claim. A sixty day contractual limitation is contained in that agreement, making it mandatory that a claim must be filed within 60 days from the date of the occurrence. The time limit in this case has expired as it has in Award 11733. The judgment of the District Court in that award, has now been vacated and has been remanded to this Board for further proceedings consistent with the opinion of the Fourth Circuit.

We are constrained to say that in our judgment the Fourth Circuit should have applied the amendments of the Railway Labor Act (quoted infra) to this case, as requested by the Brotherhood. It is clear that these amendments preclude the Courts from reviewing either the merits or money awards of this Board unless the case falls within the purview of the exceptions contained therein (quoted infra). It appears to us that by the language contained in its decision, the Fourth Circuit has in effect reviewed both the merits as well as the money allowance contained in that award, and thus effectively has rendered the amendments nugatory for the purposes of Award 11733. This appears to us to be contra to the clear, precise, and unambiguous language of the amendments.

However that may be, we take cognizance of the IBofEW contractual interest in this case and as stated previously, the contractual time period within which that union could have filed a claim, has long since expired. Insofar as that union is concerned, the issue is dead.

It is clear to us from a reading of the Scope Rule that neither the Signalmen nor the Electricians had an exclusive right to the work in question. It has been the practice of the Carrier over a prolonged period of time to assign the work in question to either the Signalmen or the Electricians at its discretion, and because of this practice, either craft would be prevented from contesting the assignment of such work to the other craft. The question that we are now confronted with is whether or not the Carrier violated the Agreement by unilaterally assigning this work to an independent contractor.

The Carrier, in the instant case, although not characterizing the request from the State Highway Department to remove and place the poles in question as an emergency, did in its brief term the request as "urgent." Furthermore, Carrier relies upon and advances the arguments of managerial prerogatives, exclusivity, burden of proof, practice based on numerous affidavits submitted on its behalf among others. We take cognizance of all the contentions propounded by Carrier, but must summarily reject them based upon the language contained in the revised Scope Rule.

The work in question did not consist of work in connection with "larger installations" nor work on "smaller installations . . . required under the provisions of State or Federal law or regulations," however it did consist of work falling within the purview of the language contained in the aforequoted Scope Rule "It is not the intent by this provision to permit the contracting of small jobs of construction done by the Carrier for its own account."

This was a small job and although the work involved was "urgent," we are not persuaded that it constituted a bona fide emergency. As was stated in Award 11733 "it seems evident that the chore performed on July 1 was covered by the Signalmen's Agreement, if not by specific detailed listing in Rule 1, then by the broader reference to 'construction, installation, maintenance and repair . . . in the field . . . as well as all other work generally recognized as signal work'." The work in question is similar to that discussed in Award 11733, and we therefore find that Carrier, by its action has in fact violated the Scope Rule.

The second part of the claim, the amount of damages to each of the Claimants must now be resolved. A review of the record indicates that both Claimants were working and on the payroll. This is readily admitted by both sides of this controversy. The question of punitive damages or penalties for contract violations has been discussed in many awards of this Board, some of which have permitted damages or penalties even though the contract was conspicuously devoid of a penalty provision and despite the fact that no actual losses were either alleged or shown; other awards have held that damages are limited to the Claimants' actual monetary loss and further that this Board is without authority to impose any sanction other than nominal damages. (Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co., 338 F. 2d-407, Cert. den. 85 S. Ct. 1330.)

The Fourth Circuit Court of Appeals in its decision of May 1, 1967, commenting on Award 11733 relative to the question of damages, stated:

> "The reasoning of the Supreme Court in Gunther v. San Diego & Arizona Eastern Ry., 382 U. S. 257 (1965), decided prior to the enactment of the recent amendments, furnishes the controlling guidelines. There the union sought enforcement of a Board award directing reinstatement with back pay of a discharged employe. The District Court and the Court of Appeals denied enforcement, relying on their own interpretation of the provisions of the collective bargaining agreement. Reversing, the Supreme Court held that 'Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board,' 382 U. S. at 263, and that 'it cannot be said that the Board's interpretation [of the collective bargaining agreement] was wholly baseless and completely without reason.' Id. at 261. Turning to the monetary portion of the award, the Court ruled that district courts 'may determine * * * how much time has been lost by reason of the wrongful removal * * * ' and compute 'the size of the * * * award.' Id. at 264.
>
> Courts have uniformly held that Gunther precludes judicial reexamination of the merits of a Board award. Thus, beyond question, it is not within our province, or that of the District Court, to reappraise the record and determine independently whether Southern violated its obligations under the collective bargaining agreement when it

denied Brotherhood members the opportunity to perform the work in question. Southern insists, however, that with respect to the monetary portions of the awards, the District Court acted not in conflict with **Gunther** in limiting Brotherhood to nominal damages on its findings that the records in both cases contain 'no evidence of any loss of time, work or pay' by any of the employes who were designated to receive compensation for the lost work. In accepting this contention of Southern, the District Court relied on the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings. The court reasoned that since Gunther permits judicial computation of the size of the monetary awards, it could exercise a discretion to allow Brotherhood nominal damages only where its members lost no time.

This approach, however, completely ignores the loss of opportunities for earnings resulting from the contracting out of work allocated by agreement to Brotherhood members — a deprivation amounting to a tangible loss of work and pay for which the Board is not precluded from granting compensation. Nothing in the record establishes the unavailability of signalmen to perform the work contracted out by the railroad. The vast number of factual possibilities which arise in the field of labor relations, and which must be considered by the Board in cases of this kind, clearly reflects the wisdom of the Gunther rule.

The practical effect of the District Court's refusal to enforce the monetary portions of the awards is to undermine and, in essence, reverse the Board's resolution of the merits of the controversies. The unequivocal holding of Gunther is that courts have no role to perform in determining whether the Act has been violated. The District Court partially recognized the force of this principle by enforcing the awards insofar as they held Southern to have breached the agreement. Yet, if, whenever no direct lay-off of a union's members is involved, the employer can unilaterally contract out work that has been allocated by agreement to the union, under no greater threat than liability for merely nominal damages, the collective agreement would soon become a worthless scrap of paper. It requires but slight insight into the realities of human behavior to realize that neither party would feel bound to abide by an agreement that will not be effectively enforced in the courts.

We cannot disregard the Supreme Court's animadversion expressed in Gunther against 'paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts * * *.' 382 U. S. at 261. Were we to approve the District Court's resort to common-law principles governing breach of contract damages, we would be derelict in our unquestionable duty fully to enforce the Board's determination on the merits. The Supreme Court, in another context, has only recently strongly reiterated that '[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it to be governed by the same old common-law concepts which control such private contracts.' Transportation–Communication, supra at 160-161.

We have dwelt at great length in parts I and II of this opinion on the impact of Transportation–Communication and the implications in Gunther for our obligation to defer to Board expertise. We have done so because in our view the Supreme Court's ruling that 'minor' disputes should be entirely resolved in a single Board proceeding stems, at least in part, from its insistence, emphasized in Gunther, that the Board is the final arbiter of such disputes. Being final, it may render decision only after thorough consideration of all relevant collective agreements and industry practices. Together, Gunther and Transportation–Communication reflect a single overarching theme — that final and binding awards are to be made by industry experts upon full information, subject to a minimum of judicial intervention."

In view of the language, quoted above, with reference to the damages question, it would appear that the Fourth Circuit of Appeals decision is in direct opposition to that expressed in the Tenth Circuit's case (Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co., 338 F 2d — 407 Cert. den. 85 S. Ct. 1330), mentioned earlier in this opinion.

The Claimants in this case received a full day's pay, and did not suffer any monetary loss. In fact, it is presumed that while the Independent Contractor was placing the poles in the hole, the Claimants were merely onlookers. It is difficult for us to see wherein they lost an opportunity for further earnings in this case. Further, we are constrained to say that the Fourth Circuit, although indisputably stating that we are not bound by common-low principles governing breach of contract damages, offers little assistance in guiding us toward resolving this knotty problem. The Tenth Circuit's decision (Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co., 338 F-2d-407 Cert. den. 85 S. Ct. 1330), wherein the Court held that damages are limited to the Claimants' actual monetary loss and that this Board is without authority to impose any sanction other than nominal damages, appears to us to be the better reasoned decision. Until such time as this issue is decided specifically by the Supreme Court, we will abide by the Tenth Circuit's case. We will for these reasons deny the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 in accordance with Opinion.

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 16th day of June 1967.

DISSENT TO AWARD NO. 15624, DOCKET SG-15079

Award No. 15624 was adopted by the Carrier Members voting with the Referee to form a Majority. It should, therefore, be forever clear that the work in dispute is covered by the Scope rule of the controlling agreement and reserved to the employes classified therein.

The error in Award No. 15624 lies primarily in the ultimate paragraph of the Majority's opinion which contains not only error in judgment but outright speculation. This later is evidenced by their statement that:

> "In fact it is **presumed** that while the Independent Contractor was placing the poles in the holes, the Claimants were merely onlookers." (Emphasis ours.)

Confining discussion to facts, it is a fact, as the Majority found, that the disputed work is reserved to the Carrier's employes as above. It is further a fact that the controlling agreement reserves the work it embraces to those employes twenty-four hours a day, seven days each week. It is still further a fact that the Majority has not found, nor was it shown, that the claimants could not have worked a greater number of hours than they did. With these facts in mind, the Majority's statement that "It is difficult for us to see wherein they lost an opportunity for further earnings in this case" is incredible. Our later Award No. 15689, Dorsey, is far better reasoned.

Award No. 15624 is in error; therefore, I dissent.

W. W. Altus
For Labor Members
7/7/67

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