Award No. 15689
Docket No. SG-15473

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated the current Signalmen's Agreement, as amended, when a contractor and his force were used to perform signal work at Gervais Street and Southern Railway crossing in the City of Columbia, South Carolina, where crossing gates were installed to replace and substitute for the older type of crossing signals, as follows:

(1) On November 13, 1963, from 7:30 A. M. to 4:30 P. M., a contractor with one machine operator assisted Mr. P. G. Lotshaw, Crossing Signal Maintainer, Columbia, South Carolina, by digging holes for installation of the crossing gates.

(2) On November 14, 1963, from 7:30 A.M. to 4:30 P. M., the same contractor with a machine operator and one laborer again assisted Mr. Lotshaw by completing the hole digging and setting the pre-cast crossing gate foundations.

(3) On December 4, 1963, for a period of eight (8) hours, the same contractor with his two-man force assisted Mr. Lotshaw and Mr. J. L. Holsenback, Jr., in removing the old signal cable from conduits under the street. They used an air hammer and tractor in the work.

(b) Mr. P. G. Lotshaw be compensated at his pro rata rate of pay for all time the contractor and his force were used in performing signal work on November 13 and 14, 1963 — a total of forty-eight (48) hours.

(c) Messrs. P. G. Lotshaw and J. L. Holsenback, Jr., be compensated at their respective pro rata rates of pay on a proportion-

ate basis for all time the contractor and his force were used to perform signal work on December 4, 1963 — a total of twenty-four (24) hours.

(d) This claim to continue so long as the agreement is violated by use of the contractor and his force, or other persons not entitled to perform the signal work at Gervais Street in Columbia, South Carolina, as indicated above. [Carrier's File: SG-19760]

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. On each of four (4) different days during the period from November 13, 1963, through January 13, 1964, a contractor and his force, numbering first two, then three men, not covered by the effective Signalmen's Agreement, were used by Carrier for periods of time totalling eighty-four (84) hours to perform certain parts of the signal work necessary and incident to the installation of highway crossing flashing lights with short arm gates to replace existing highway crossing flashing light signals at Gervais Street in Columbia, South Carolina.

The signal work which Carrier contracted out included digging and backfilling holes for foundations, setting foundations, and removal of old signal cable from conduits under the street. The equipment that was used included an air hammer and tractor equipped with a back-hoe. It made up the balance of signal work which Signal Department employes working under the Agreement were not permitted to perform on the project on which they were working at Gervais Street in Columbia, South Carolina.

As a result of the obvious violation of the Scope of the effective Signalmen's Agreement, claim was presented by General Chairman E. C. Melton on behalf of P. G. Lotshaw and J. L. Holsenback, Jr., to Signal and Electrical Superintendent J. M. Stanfill in a letter dated January 7, 1964 which we have reproduced and identified as Brotherhood's Exhibit No. 1, attached hereto. Subsequent pertinent correspondence relative to the handling of the case on the property has been reproduced and attached hereto; it is identified as Brotherhood's Exhibit Nos. 2 through 7.

Carrier contended, first, that the claim was invalid and barred under the provisions of Article V of the Chicago Agreement of August 21, 1954. It gave as its reasons that Mr. Melton had failed to specify the amounts claimed, and that he initiated a continuing claim without giving specific dates and hours. (As it developed, Carrier discontinued the violation after work totalling an additional twelve (12) hours was performed by the contractor and his force on January 13, and the continuing feature of the claim was cut off on that date.) Carrier's charge of technical error, therefore, is founded not on fact, but on fancy alone.

The disputed work herein involved is similar in many respects to that in another case between the same parties, which has been settled by the Third Division. That case was Docket SG-9324; Award 9749 disposed of it. Even though the work involved in both cases was similar, Carrier assigned it differently in each. A smaller portion of the signal work was contracted out in the former case than in the present one.

ators were utilized, the General Chairman was repeatedly advised during handling of the dispute on the property that a contractor did not perform any work, and that only two operators furnished by the contractor were utilized.

Claim, being without basis and unsupported by the agreement, was declined as it was handled through the usual channels on the property.

OPINION OF BOARD: Due to the widening of a street, Carrier was required to remove existing automatic electrically operated flashing light signals and to install new automatic electrically operated flashing light highway crossing protective devices. Claimants were assigned to do the signal work. Carrier contracted out work of breaking concrete, digging and lifting required on the project. Petitioner alleges that the contracting out violated the Scope Rule of Signalmen's Agreement. Carrier proffers the defenses that: (1) the work involved was not generally recognized signal work; (2) all generally recognized signal work was performed by Claimants; (3) the Claim should be denied on the basis of the Opinion and Findings in Award No. 6702 (1954).

The same parties, issue and Agreement were before us in Award Nos. 9749 (1960), 13236 (1960), 14121 (1966), 15062 (1966), 15497 (1967). In each of those cases we sustained the claims on the merits. We find those Awards not to be palpably wrong as to the merits; and, for reasons stated in them we hold that Carrier violated the Scope Rule in the instant case. However, in those cases the Awards are in conflict as to whether Claimants were entitled to compensation for breach of the Agreement during a period they were on duty and under pay. We, therefore, will reconsider this issue in the light of subsequent amendments of the Railway Labor Act and recent decisions of the courts.

In Award No. 10963 (1962), in which the present Referee participated, we held that: (1) this Board was without jurisdiction to impose a penalty; (2) the common law of damages for breach of contract applied; (3) damages were limited to actual proven loss of earnings. In Award No. 13236 (1965), involving the parties herein, we reached the same conclusions; and citing Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 338 F.2d 407 (C.A. 10, 1964), in which certiorari was later denied, 85 S. Ct. 1330, we awarded nominal damages.

On December 8, 1965, the Supreme Court decided Gunther v. San Diego & Arizona Eastern Railway Company, 382 U.S. 257, in which, citing the then existing Section 3 First (p) of the Act, 48 Stat. 1192, 45 U.S.C. Sec. 153 (p), it held: (1) an award of the Railway Adjustment Board is not subject to judicial review on the merits; but, "the District Court may determine . . . how much time has been lost by reason of the . . . [violation of the Agreement] . . . and any proper issues that can be raised with reference to the amount of money necessary to compensate for the time lost. . . . This would, of course, be relevant in determining the amount of money to be paid him [Claimant] in a law suit which can, as the statute provides, proceed on this separable issue 'in all respects as other civil suits' where damages must be determined."

Subsequent to the Gunther case, on June 20, 1966, Public Law 89-456, 80 Stat. 208, amending the Act, was enacted. It provided for severe re-

straints on the scope of judicial review of awards of the Railroad Adjustment Board, all of which is spelled out in Brotherhood of Railroad Trainmen, et al v. Denver and Rio Grande, etc., 370 F. 2d 866 (C.A. 10, 1966), cert. den. 87 S. Ct. 1315. In this second Denver and Rio Grande case, involving the same parties and issue as in the 1964 case, supra, the court held "the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of the damages, like the application of affirmative defenses, offers no jurisdictional question."

In the period between the Gunther case and the second Denver and Rio Grande case, the Supreme Court on December 5, 1966, handed down its Opinion in Transportation-Communication Employees Union v. Union Pacific Railroad Company, 385 U. S. 157, wherein it stated:

> ". . . 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** [cases cited]. It 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." (Emphasis ours.)

Shortly thereafter, the Fourth Circuit on May 1, 1967, decided Brotherhood of Railroad Signalmen of America v. Southern Railway Company. In that case the parties herein were parties therein. The same issues were raised relative to two of our Awards as in the instant case both as to the merits and damages — the record contained no evidence of any loss of time, work or pay by any of the employes who were designated in the Awards to receive compensation for the lost work. The court reversed the holding of the District Court that since Gunther permitted judicial computation of the size of monetary awards it could exercise a discretion to allow Claimants only nominal damages where they had lost no time. The court held that the District Court's approach:

> ". . . 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.
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> 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 layoff 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 involving 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."

In the light of the amendments of the Act and the judicial development of the law, cited above, we hold that when the Railroad Adjustment Board finds a violation of an agreement, it has jurisdiction to award compensation to Claimants during a period they were on duty and under pay.

In the record before us, there is a conflict as to the number of hours worked by contractor's employes. Carrier admits that those employes worked on the project: 13 hours on November 13 and 14, 1963; 8 hours on December 4, 1963; 4 hours on January 13, 1964. We will, therefore, sustain paragraph (b) of the Claim to the extent of 13 hours for Claimant Lotshaw; paragraph (c) of the Claim to the extent of 4 hours each for Claimants Lotshaw and Holsenback; paragraph (d) of the Claim to the extent of 4 hours for Claimant Lotshaw, all at their respective pro rata rate of pay.

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 Carrier violated the Agreement.

AWARD

Claim sustained with compensation to the extent set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15689, DOCKET SG-15473 (Referee John H. Dorsey)

Award 15689 is erroneous, not only on the merits, but also in this Referee's reconsideration of the question of whether claimants have a contract right under the terms of the controlling agreement, absent a penalty provision in such agreement, to be awarded punitive damages during periods claimants were on duty and under pay when the alleged agreement violation occurred.

MERITS

Carrier Members' Dissent to Award 13236 (Referee Dorsey) is incorporated by reference and made a part of this dissent.

The Opinion clearly shows that the referee did not consider the merits of this claim. Instead, he merely cited prior awards, including Award 9749 and his own Award 13236, disregarded the clear and unambiguous language of the scope rule of the signalmen's agreement here controlling and Carrier's unrefuted evidence of the established and recognized practice thereunder which this Board recognized when making Award 6702, as well as other evidence supporting its consistent position that neither machines, such as air hammers, an air compressor, backhoe, dump truck, etc. (used in the breaking open, cutting through and removing of material from trenches, backfilling them, cutting through concrete sidewalks and paved highway, excavating foundation holes in the earth and refilling them, lifting heavy pieces of highway crossing protective devices, renewing sidewalks and paving, and hauling away and disposing of excess dirt, rubble, etc.), nor their operators performed "generally recognized signal work on * * * electrically operated highway crossing protective devices and their appurtenances" within the intent and meaning of this language as used in the scope rule of the signalmen's agreement when used to do work of the type described.

In Award 6702, involving these same parties, the Board ruled that section laborers manually assisting signal forces in digging pole holes and filling in around the poles after the poles had been set therein in connection with the relocation of a pole line violated the signalmen's agreement. However, in making that award, the Board recognized the practice and principle that when a machine is needed and used in circumstances such as here involved use of such machine operated by other than a signal employe does not constitute performance by the machine or its operator of work embraced in the scope of the signalmen's agreement or violate such agreement.

In the dispute decided by Award 9749 (the use of a truck-mounted mechanically operated hoist to lift into place an assembled, heavy highway crossing protective device requiring approximately 40 minutes at a time when the four claimant signal employes were on duty working at the site but could not manually lift the assembled highway crossing protective device), the Board disregarded the ruling made by it in Award 6702.

In the dispute involved in Award 13236, petitioner alleged that cutting through highway pavement, excavating a trench across the highway where the pavement had been cut, excavating foundation holes, backfilling and lifting by a contractor's machines violated the signalmen's agreement. We quote the following from Carrier Members' dissent to Award 13236:

"By the language 'generally recognized signal work', the rule recognizes that employes of the signalmen's class or craft do not have a contract right to perform all work on, or in connection with, the installation of automatic electrically operated highway crossing protective devices and their appurtenances. To determine whether the work here complained of was 'generally recognized signal work', we must look to tradition, custom and practice on the Carrier involved to determine whether the complainant employes have, to the exclusion of all others, performed the work in dispute, and Awards are legion in number holding that the burden of proving such exclusive historical and customary practice is upon claimants. In this docket there was no such proof by the claimants. On the other hand, there was conclusive proof by the Carrier that work of the nature here involved has not, through tradition, custom and practice been performed by signal employes and, therefore, was not 'generally recognized signal work' reserved to employes covered by the Agreement.

The Referee recognizes the exclusivity doctrine, but is confused as to its proper application. It is axiomatic that if the work complained of is not reserved exclusively to claimants, then it is not a violation of the Agreement for it to be performed by other than claimants, regardless of who may perform it. The conclusion that the exclusivity doctrine does not have application to work contracted is contrary to logic and to the basic principle enunciated by this Division in Awards too numerous to require citation."

Logic and sound reasoning dictate that claimant signal employes could not with hand tools have performed the work involved. In fact, the petitioner did not allege that they could have done so. They definitely were not qualified to operate the machines of the contractor. These facts the petitioner conceded because it did not argue otherwise. The evidence of record in this case showed clearly and conclusively that neither the referred-to machines nor their operators performed "generally recognized signal work on * * * electrically operated highway crossing protective devices and their appurtenances" within the intent and meaning of this language as used in the scope rule of the signalmen's agreement.

This Board is without authority to change the terms of an agreement by interpretation or otherwise.

PUNITIVE DAMAGES

A sampling of the Referee's prior awards discloses the subject award to be but another chapter in his vacillation on the question of damages where the claimants suffered no wage loss, they having been on duty and under pay at the time the disputed work was performed, and the agreement contains no penalty provision.

In Award 10963, the Referee held:

"Petitioner did not introduce any evidence that MofW employes suffered any loss flowing from Carrier's contract violation. It argues that the mere violation entitles it to the relief prayed for. This gives rise to the question as to whether the Board has jurisdiction to make such a monetary award.

The dispute in this case grows 'out of the interpretation or application of Agreements concerning rates of pay, rules, or working conditions' (RLA Sec. 3 (i)). It thus is analogous to a civil action in law ex contractu.

The parties have cited numerous Awards which have been studied. It does not appear that any of them has squarely decided the issue as to whether the Board has jurisdiction to grant a money Award beyond making whole Employes for actual losses suffered attributable to a contract violation.

The RLA is a unique statute, which the Congress in its wisdom deemed necessary to the protection of the public interest 'to avoid any interruption to commerce or to the operation of any Carrier growing out of any dispute between the Carrier and the Employes thereof' (RLA Sec. 2, First). To effectuate the policy, the Act creates the National Railroad Adjustment Board as a quasi-judicial agency and vests it with certain delegated authority (RLA Sec. 3). For the Board to exceed such authority would be ultra vires; it is not free to dispense its own brand of justice.

In the field of labor legislation the National Labor Relations Act, as amended, herein referred to as NLRA, is most nearly comparable to RLA. The course of decisions in the Supreme Court in NLRB v. Jones & Laughlin Steel Corporation, 301 U. S. 1; NLRB v. Mackay Radio & Telegraph, 304 U. S. 333; and Phelps Dodge Corporation v. NLRB, 313 U. S. 177, makes clear that statutory quasi-judicial agencies cannot impose penalties, punitive in nature, unless such power is expressly conferred. Cf. Stewart & Bro. v. Bowles, 322 U. S. 398, wherein the Court states that 'persons will not be subjected [to penalties] unless the statute plainly imposes them . . . it is for Congress to prescribe the penalties for the laws which it writes.'

The National Labor Relations Board has far broader authority in the administration and enforcement of NLRA than the National Railroad Adjustment Board has under the RLA. Yet, the courts have consistently held that: (1) the statute is equitable in nature; (2) the Board may not prescribe a remedy imposing a penalty; and (3) back pay may be ordered only in the amount which will make an Employe whole for any net loss in wages incurred as a result of his Employer's commission of an unfair labor practice.

A reading of RLA discloses no provision which vests the National Railroad Adjustment Board with the power to impose a penalty for violation of a collective bargaining contract. Indeed, the reading establishes the contrary; for when the Congress chose to provide for penalties it did so expressly, named the forum, and preserved Constitutional rights (RLA Sec. 2, Tenth).

The jurisdiction of the National Railroad Adjustment Board, insofar as here material, is limited to the interpretation or application of Agreements entered into by the parties through the process of collective bargaining. The Board may not add to or subtract from the terms of such an Agreement. The words 'interpreta-

tion or application of agreements' are persuasively convincing that the law of contracts governs the Board's adjudication of a dispute. The law of contracts limits a monetary Award to proven damages actually incurred due to violation of the contract by one of the parties thereto. This is not to say that the contract by its terms may not provide for the payment of penalties upon the occurrence of specified contingencies; but, the contract now before us contains no such provision.

Having determined that the National Railroad Adjustment Board may not impose a penalty, unless expressly provided for in a collective bargaining contract, we now come to analyzing Petitioner's prayer for a monetary Award as set forth in Parts (2) and (3) of its Claim. These parts set forth a formula for computing a monetary Award without regard to actual net losses, if any there be. The fulcrum is resolution of the issue as to whether such an Award would be a penalty.

In contract law a party claiming violation of a contract and seeking damages must prove: (1) the violation; and (2) the amount of the damages incurred. A finding of a violation does not of itself entitle an aggrieved party to monetary damages.

In the instant case Petitioner has proven the violation. It has not met its burden of proving monetary damages. There is no evidence in the record that any Employe in the MofW collective bargaining unit suffered any loss of pay because of Carrier's violation of the contract. The inference from the record, if any can be drawn, is that the MofW Employes were steadily employed by Carrier during the period of the project. Therefore, for this Board to make an Award as prayed for in Parts (2) and (3) of the Claim would be imposing a penalty on the Carrier and giving the MofW Employes a windfall — neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of this Board.

Upon the basis of the foregoing findings, reasons and conclusions, Parts (2) and (3) of the Claim must be denied."

But, in Award 11937, he held:

"Carrier avers that Claimants can show no damages because they were fully employed at the time the fence was erected. But, Carrier has adduced no evidence that Claimants could not have performed the work by working overtime, or that the work could not have been delayed until a time at which it could be included in Claimants' work schedule. When a Carrier violates the scope rule of an Agreement, the covered employes have been damaged de jure; but, the extent of the monetary damages, if any, is a matter of proof. Where, as here, the violation has been established, the Claimants have made a prima facie case of damages as claimed and the burden to rebut, by factual evidence, shifts to the Carrier. Carrier, in this case, has not met the burden of negating damages as claimed.

Carrier confuses 'damages' and 'penalties.' While monetary 'damages' awarded are sometimes loosely referred to as 'penalties', the

terms are technically distinct. Technically, in contract law, monetary 'damages' make whole a person injured by violation of an agreement; 'penalties' are the assessment of a fine over and above damages suffered. Monetary 'penalties' are imposed as punishment for a violation of a contract with the objective of deterring like future conduct. Therefore, the making whole of Claimants herein for work they would have performed and wages they would have earned, absent Carrier's violation of the Agreement, is the award of compensatory 'damages'; not a 'penalty.' Award No. 10963, cited by Carrier, is distinguishable from the instant case in that: (1) the Claim in Award No. 10963 prayed for a windfall for unnamed employes, all of whom, obviously, could not have been damaged by the violation of the agreement; and (2) Carrier timely denied the Claim on the property, averring, inter alia, that it was vague and indefinite."

His purported distinguishment is tenuous, to say the least, and plainly contrary to the first award.

Next came Award 13236, which he followed in Awards 13237, 13326 and 13334. There we find the Referee reverting to basic tenets of Award 10963, but awarding nominal damages on the basis of Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 338 F. 2d 407 (1964), cert. den. 85 S. Ct. 1330 (1965), viz.:

"The Agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The record contains no evidence that the Claimants suffered actual monetary loss or hardship from the violation of the Agreement. Therefore, since the 'Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act . . . recovery is limited to nominal damages.' Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company (C. A. 10, decided November 19, 1964). Accordingly, we will award each Claimant nominal damages of ten dollars ($10)."

Then, by Award 13958, we find the Referee having some further reflections on the Rio Grande decision and reverting, in toto, to his Award 10963, viz.:

"Claimant suffered no loss of wages for the calendar day involved inasmuch as Article III (f) of the Agreement prescribes that 'Extra employes . . . will not be used for more than one shift having a starting time in a calendar day.' Consequently, we are confronted with the issue whether this Board has jurisdiction to impose penalties for breach of an agreement. Throughout the history of the Board this issue has brought forth a host of conflicting Awards.

In Award No. 10963, the Board, with the Referee herein sitting as a member, held the Board to be without jurisdiction to assess a penalty. Subsequently, the United States Court of Appeals for the Tenth Circuit, in Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Company, 338 F. 2d 407; cert. den. 85 S. Ct. 1330, held the Board to be without jurisdiction to assess a penalty, but found 'nominal damages' were in order — an unusual holding in a contract action. Thereafter, in a number of Awards, in some of which this Referee participated, nominal damages were

awarded where a violation of an agreement was found but there was no proof of loss of earnings.

Upon reflection, we are of the opinion that the holdings in the Trainmen case are contradictory. Labelling a monetary award as 'nominal damages', where such damages have not been proved, makes such an award no less a de facto and de jure penalty.

It is a common practice for Federal quasi-judicial bodies not to change their opinions as to their jurisdiction unless and until reversed by the Supreme Court. The denial of certiorari in the Trainmen case cannot be construed as an affirmance of the Tenth Circuit's holdings thereon; only that the questions, as presented in the petition for certiorari, were not deemed of sufficient importance to merit consideration by the Court.

There appears no way to resolve the conflicts in our Awards concerning the subject of penalties short of a Supreme Court finding: — whether we have the statutory power to impose penalties for violation of agreements as to which we are charged with interpretation and application. The resolution of the issue is of great importance to the orderly administration and decisional consistency of the National Railroad Adjustment Board; and, the effectuation of the public policy enunciated in the Railway Labor Act as intended by the Congress."

But in Award 14004, he reverted to Award 11937, viz.:

"The fact that Claimant was elsewhere working at the time of the violation is not proof that he could not have performed the crane work. In the instant case, therefore, Carrier having failed to adduce any evidence that the work involved could not have been performed by Claimant, has failed in its burden to prove an affirmative defense to overcome Petitioner's prima facie case. In the posture of the record, we are not confronted with the legal distinction between 'penalties' and 'damages.' See Award No. 11937."

The next chapter is that covered by Award 14853, wherein he held:

"Issue is raised as to whether Claimants have been damaged. Recent opinions of the courts have held: (1) this Board has no power to assess a penalty; (2) monetary damages are to be determined as in contract law; and (3) the party pleading for the payment of damages has the burden of proof. See and compare: Gunther v. San Diego & A. E. R. Co., 382 U. S. 257 (1965); Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co., 10 Cir. 338 F. 2d 407 (1964), cert. den. 380 U. S. 972 (1965); Brotherhood of Railroad Signalmen v. Southern Railway Company, United States District Court for the Middle District of North Carolina, Civil Action No. C-2-G-65 and Civil Action No. C-9-G-65, May 25, 1966.

Throughout the handling of the Claim on the property Carrier, inter alia, initially and consistently denied it for the given reasons:

> '. . . claimants were regularly employed during the period involved. . . . Thus your claim in their behalf is for double pay. **They do not have a contract right to be so paid.** . . .' (Emphasis ours.)

This put Petitioner to its proof that the named Claimants suffered de facto monetary damage from the alleged violation of the Agreement. Petitioner chose to ignore the issue and failed to adduce any evidence to prove monetary damages. Failure of proof compels us to dismiss paragraphs 3 (except as to Claimant Gibson) and 4 of the Claim.

It is admitted that Claimant Gibson was on furlough the first period of September, 1963. Therefore, his availability and loss of work stands proven for that period. We will sustain paragraph 3 of the Claim as to Gibson for one day's pay at pro rata rate for each day the 'bush hog' was operated during said period.

The argument has been presented that when work has been wrongfully removed from employes in the collective bargaining unit it logically follows that damages have been incurred. It does, indeed, give rise to a suspicion. But, we may not speculate. The pronouncements of the courts are that the monetary damage suffered by each particular employe claimant must be proven."

With the latest chapter covered by the subject award, in relation to the earlier chapters, the Referee has, as it were, been "all over the lot." The merry-go-round began by denying penalty payments (Award 10963), then sustaining penalty payments (Award 11937), then allowing nominal damages (Awards 13236, 13237, 13326, 13334), then denying penalty payments (Award 13958), then sustaining penalty payments (Award 14004), then denying penalty payments (Award 14853), and now, sustaining penalty payments.

Nothing in the Referee's analysis on the subject in this Award 15689 justified or warranted his departure from a proper application of the law of damages. There is no authoritative judicial pronouncement on the law of damages contrary to that found in Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 338 F. 2d 407, cert. den., 85 S. Ct. 1330, hereinafter referred to as the first Rio Grande case. Contrary to the impression the Referee has attempted to create, the law of damages was not in any manner, shape or form changed by the June, 1966 amendments to the Railway Labor Act, the second Rio Grande case — Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 370 F. 2d 833 cert. den. 87 S. Ct. 1375, the decision of the Supreme Court in Transportation-Communication Employees Union v. Union Pacific Railroad Company, 87 S. Ct. 369, or the decision of the Fourth Circuit in Brotherhood of Railroad Signalmen v. Southern Railway Company.

The Tenth Circuit, in the first Rio Grande case, applied the law of damages in a case where the claimants suffered no wage loss by allowing nominal damages and the Supreme Court denied certiorari. While the denial of certiorari does not necessarily mean that the Supreme Court agreed with the Tenth Circuit, the fact is the Tenth Circuit's decision was permitted to stand and, as will be evident from what follows, there is no authoritative judicial pronouncement on the law of damages contrary to the first Rio Grande case.

While the first Rio Grande case went up, the District Court had another Rio Grande case to which the law of damages was applied by allowing nomi-

nal damages where the claimants suffered no wage loss. While the second case was pending on appeal before the Tenth Circuit the Railway Labor Act was amended to limit judicial review of awards of this Board. The Tenth Circuit, in this case, did not change, modify or overrule its decision in the first Rio Grande case with respect to the law of damages. Rather, it simply held that the change in the Railway Labor Act precluded review of such an award. Again, the fact that the Supreme Court denied certiorari in the second Rio Grande case does not necessarily mean that it agreed with the Tenth Circuit's decision.

As for the Supreme Court's decision in the TCEU case, the **Supreme Court did not therein rule on or concern itself with the law of damages** and the Referee's excerpt from that decision was taken out of context. Apparently, the Referee culled the language from the decision to convey the impression that the Supreme Court thereby ruled out the law of damages as applying to collective bargaining agreements. That is not what the Supreme Court said. Rather, the excerpt chosen by the Referee, in full context was directed only to the interpretation of collective bargaining agreements and full context the Supreme Court stated:

> "Petitioner contends that it is entirely appropriate for the Adjustment Board to resolve disputes over work assignments in a proceeding in which only one union participates and in which only that union's contract with the employer is considered. This contention rests on the premise that collective bargaining agreements are to be governed by the same common-law principles which control private contracts between two private parties. On this basis it is quite naturally assumed that a dispute over work assignments is a dispute between an employer and only one union. Thus, it is argued that each collective bargaining agreement is a thing apart from all others and each dispute over work assignments must be decided on the language of a single such agreement considered in isolation from all others.
>
> We reject this line of reasoning. 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, 376 U. S. 543, 550; cf. Steele v. Louisville & N. R. Co., 323 U. S. 192. '. . . It 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 of a particular plant.' United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U. S. 574, 578-579. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments."

As for the Fourth Circuit's decision in the Signalmen's case, the Referee is equally in error. While the Fourth Circuit did get into a discussion of damages, what it said with respect thereto was obiter dictum, i.e., entirely unnecessary to its decision. This should have been obvious to any attorney.

The crux of the Fourth Circuit's decision was that a third party was involved and, on the basis of the TCEU case, should be remanded to this Board for further proceedings; hence, the discussion of damages was entirely unnecessary to its decision, and superfluous. However, on the question of damages, and like the Referee, the Fourth Circuit erroneously quoted out of context from the Supreme Court's decision in the TCEU case, but, more important, the Fourth Circuit cited no authority whatever in support of the conclusion it reached on the question of damages.

As the law of damages stands, the first Rio Grande case is the only authoritative judicial pronouncement thereon — see Award 15624, which involved a similar dispute between the present parties. In short, the Supreme Court has not ruled on the law of damages contrary to the Tenth Circuit's decision in the first Rio Grande case, and the Tenth Circuit did not, in the second Rio Grande case, overrule its holding with respect to the law of damages in the first Rio Grande case.

For these and other reasons, we dissent.

R. A. DeRossett
W. B. Jones
C. H. Manoogian
J. R. Mathieu
W. M. Roberts

ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 15689, DOCKET SG-15473

MERITS

The Minority's remarks are interesting in that they demonstrate a determination to establish inconsistency and confusion in the Awards of this Board. This Board has consistently and repeatedly held that all work in connection with the "construction, installation, maintenance and repair of * * * electrically operated highway crossing protective devices and their appurtenances" is reserved to the employes classified in the Agreement between the Carrier and the Brotherhood of Railroad Signalmen. (See Awards Nos. 6702, 9749, 13236, 14121, 15062, 15497, and 15624.) Of equal, if not greater, interest is the fact that Award No. 15624 was adopted by a Majority of the Board, consisting of the Carrier Members (here the Minority) and the Referee. (See our dissent in 15624.) Award No. 15624 denied the monetary award prayed for by the petitioning Brotherhood which fact clearly further demonstrates the Carrier Members' disregard for the resolution of governing questions and their obsession with giving the violating Carrier a "free" hand in its contempt for its agreement.

DAMAGES

The Minority's apparent efforts to characterize the instant Referee as an indecisive nomad in the area of proper damages is inappropriate. We, like the Minority, have not always been in agreement with his former views on this subject, nor with his interpretation and application of such material

as was available for his information and guidance. We, however, believe that he was conscientious in his search for the proper disposition of this question and submit that his varying decisions are evidence to this conclusion. Further evidence, if needed, lies in the wide variance of decisions rendered by the many Referees who have served this Board, some of whom have stated that no final solution of the matter will be found until the Supreme Court has had an opportunity to and does render a direct decision.

The Minority has indeed demonstrated its own confusion in classifying as obiter dictum a discussion by a Court of the question of damages under labor contracts when such was a part of the subject of the case before it. Further misunderstanding is evidenced by repeated referral to the "first Rio Grande case" which involved entirely different circumstances, contracts, and parties.

We submit that it is the Minority that is in error.

W. W. Altus
For Labor Members
7/27/67

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