Award No. 16009
Docket No. MW-16458

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it used employes of the George M. Eady Construction Company to assist B&B Gang WB No. 5 in the work of repairing bridges under the immediate and direct supervision of the regular B&B foreman on July 27, 28, 29, 30, 31; August 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 1964 and on dates subsequent thereto.

[Carrier's File MW-21615]

(2) B&B Mechanics H. Springate, E. L. Hackney, R. S. Sanders, J. A. Buchanan, C. C. Rhodes, C. H. Ward, F. R. Buchanan and D. W. Corbett each be allowed pay at their respective straight time rates for and equal proportionate share of the total number of man hours consumed by the outside forces in performing work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimants were employed as regularly assigned B&B mechanics in B&B Gang WB-5. Their customary duties included the repair of bridges, buildings and trestles on the Carrier's St. Louis-Louisville Division.

Beginning on July 27, 1964, the Carrier used employes of the George M. Eady Construction Company to assist B&B Gang WB-5 in performing regular repair work on bridges 45.5W, 43.7W and 40.1W on the Carrier's St. Louis-Louisville Division. All of the Contractor's employes worked under the supervision of the Foreman of B&B Gang WB-5, who kept and reported their time. The number of employes used by the Contractor on each day varied from a maximum of eleven (11) men to a minimum of eight (8) men. Each of the Contractor's employes worked eight (8) hours on July 27, 28, 29, 30, 31, August 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31, September 1, 2, 3, 4, 8, 9, 10, 11, 14, 15, 16, 17, 21, 22, 23, 24, 25, 30, October 1, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22 and 23, 1964. For their services the Contractor's employes were compensated at rates of pay ranging from $3.025 per hour to $4.075 per hour.

Claimants contend that the work was not emergency, as alleged by carrier, and they were adversely affected as a result of the work being let to contract.

Therefore, Scope, Rules 1, 3, and 61 of the current foreman's agreement were violated, and I respectfully request that the claim be allowed as presented." [sic]

Throughout the entire period handling this claim Carrier's Director of Labor Relations made clear to the Brotherhood's General Chairman that if any of the claimants were adversely affected as a result of employes of George M. Eady Co. being utilized in emergency to work with and assist members of B&B Gang No. 5 in the performance of work they would be made whole for any monetary loss sustained. Carrier's Director of Labor Relations, however, made clear to the Brotherhood's General Chairman that no penalty payment would be made, that unless it could be shown that the claimants were adversely affected no monetary payment would be made because no monetary payment would be due under the terms of the agreement here controlling. Carrier's Director of Labor Relations also reminded the Brotherhood's General Chairman of the fact that the Adjustment Board had on numerous occasions declined to award penalty payments and that Carrier would resist to the utmost the efforts of the Brotherhood to exact sums of money from the company for work not performed and which in fact could not have been performed by claimants.

OPINION OF BOARD: This claim is based upon Petitioner's contention that Carrier violated the Scope and seniority provisions of the Agreement between the parties when it assigned and used employes of an outside contractor to work with its Bridge and Building Gang, WB-5 in the repair of certain trestles on Carrier's St. Louis-Louisville Division from July 27, 1964 through November 20, 1964. It is undisputed that employes of the outside contractor worked under the supervision of Carrier's B&B Foreman and were assigned the disputed work on an eight (8) hour, five (5) day work week basis.

Carrier, in its submission, contends for the first time that the Claim is "vague and indefinite." This is was not raised on the property and will be dismissed as it is not properly before us. Award 11937.

As to the merits of the dispute, Carrier asserts that an emergency situation existed; that the Scope Rule of the Agreement merely lists the various workers covered without describing the disputed work or in any way granting to covered employes a specific type of work to be performed by them exclusively; and that the named Claimants either were fully employed, on vacation or did not work for personal reasons during the period encompassed by the Claim.

The record reveals that the disputed work involved the repair of trestles over a period of approximately four (4) months by both employes of the Carrier and employes of outside contractor without the imposition of overtime assignments on rest days, holidays or during scheduled vacation periods. There is no evidence that the condition of the trestles prior to repair resulted from an unforeseen combination of circumstances requiring immediate action such as is generally found in emergency situations, nor that the disputed assignment required completion within a specified period of time. Conse-

quently, we must conclude that the work involved here was clearly routine repair work, which did not arise out of an emergency situation as asserted by Carrier. Award 10965, 13316, 13626, 15597 and others.

The parties herein have been involved in numerous disputes concerning the application of the Scope Rule before us. Petitioner contends that the work of repairing trestles is reserved by the Scope Rule of the Agreement to Carrier's B&B employes, and that the disputed work does not come within any of the exceptions which have developed over the years such as the need for special skills or equipment, certain construction work not contemplated by the Agreement, or emergency situations in which time is of the essence. Award 5304.

Carrier attempts to justify its action by asserting Claimants were fully employed and that other qualified personnel was not available for hire. However, no evidence has been offered to support Carrier's assertion that bonafide efforts were made to find such additional skilled help before contracting out such work to others. Furthermore, if time was of the essence, it is difficult to comprehend why overtime assignments for regular employes would not have resulted in a reduction of the substantial period of time required to complete the disputed work.

Analysis of the relevant evidence in this case clearly supports Petitioner's contention that the repair of trestles has been performed customarily and historically by Carrier's B&B employes. Moreover, Carrier has failed to prove that its contracting out of the disputed work came within the purview of any of the recognized exceptions to the coverage of the Scope Rule. Accordingly, we must find that Carrier's action violated the Agreement. Awards 11139, 11937 and 12937.

The remaining question for determination is the matter of damages. Petitioner contends that named Claimants, who are mechanics, should each be allowed payment at their respective straight time rates for an equal proportionate share of the total number of hours worked by employes of the outside contractor in performing the disputed work. Carrier contends that Claimants are not entitled to any compensation because they were working on the same project everyday for which claim is made or were otherwise unavailable, and that none suffered any monetary loss. Moreover, Carrier asserts that Rule 49 of the Agreement bars this Division from making a monetary award. Rule 49 provides as follows:

"RULE 49. WORK NOT PERFORMED

Except as provided in these rules, no compensation will be allowed for work not performed."

A recent award of this Board has rejected Carrier's interpretation of Rule 49 as to monetary awards directly predicated upon a breach of contract such as is found in the instant case. Award 11938. This earlier award arose out of a similar dispute between the same parties under the same Agreement. Accordingly, we find that Rule 49 is inapplicable in this case.

Thus, we are finally confronted with a situation in which Petitioner has established the violation of the Scope Rule of the Agreement by Carrier and seeks compensatory damages, directly arising out of Carrier's breach of the Agreement, to compensate the Claimants for wages they would have

earned if Carrier had assigned such work to them on an overtime basis or had postponed such work until Claimants could have performed it as part of their regular assignment. The record reflects that Claimants were furloughed between December 4, 1964 and January 4, 1965. Conceivably, Carrier might have extended the period of time during which the disputed work could be completed to include this period.

We already have found that no emergency situation existed and that Carrier has failed to sustain its burden by offering any factual evidence supporting its further assertion that time was of the essence. Clearly, there was a loss of opportunities for earnings resulting from the contracting out of work reserved by agreement to members of the Organization.

The most recent judicial pronouncement on the issue of damages for contract violations where no actual losses were alleged or shown and the controlling agreement contains no penalty provisions is found in Brotherhood of Railroad Signalmen of America v. Southern Railway Company, a corporation —— F. 2d —— (C. A. 4, decided May 1, 1967). Therein, the court disavowed the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings and stated that this Board is not precluded from granting compensation for the loss of opportunities of earnings resulting from the contracting out of work under circumstances similar to those found in this dispute. We find the Fourth Circuit decision applicable in this case and will sustain the claim with certain modifications.

The record discloses that Claimant Corbett was unavailable during the entire period between July 27 and November 20, 1964 because of illness. As he suffered no loss of opportunity of earnings as a direct result of the contracting out of work, he is not entitled to receive any compensatory payment. Claimant J. A. Buchanan was unavailable for work on July 27 and 31, 1964, and Claimant Ward also was unavailable on August 3, 4, 5, 6, 7, 1964. The proportionate shares of each of these Claimants will be reduced to reflect their unavailability on such specified dates.

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 Carrier violated the Agreement.

AWARD

Claim sustained with the monetary award modified in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1967.

CARRIER MEMBERS' DISSENT TO AWARD NO. 16009, DOCKET NO. MW-16458

The majority erred in sustaining the alleged violation of the agreement. The decision is contrary to the evidence of record, as well as Award 10715, 10931, 11525, 12927 and 12929 in which this Division interpreted the plain, unambiguous language of the scope rule of the agreement between the here involved parties.

Furthermore, we do not agree with the conclusion that no emergency situation existed. The trestles involved had to be repaired in order for the railroad to continue operations. All employes were working and the record is clear that additional forces could not be employed. In the situation thus presented, time was of the essence. In numerous awards the Board has recognized an emergency time requirement as a condition which in itself justifies the contracting of work that may otherwise be covered by the agreement. In many other awards, legion in number, the Board has recognized that Carriers may take such action as is appropriate to meet emergency conditions. The fact that claimants were furloughed between December 4, 1964, and January 4, 1965, has no bearing on the case and the observation that—

> "Conceivably, Carrier might have extended the period of time during which the disputed work could be completed to include this period."

is purely speculative. This Board has many times held that it will not sustain alleged violations on speculation or presumption.

The majority further erred in its consideration on the issue of damages when it disregarded the precedent awards cited by the Carrier and sustained claim to the extent indicated that claimants who were on duty and under pay and not adversely affected be paid unearned sums of money as an exaction, penalty or windfall. The more recent pronouncement on this issue is found in **Brotherhood of Railroad Trainmen, et al., v. Central of George Railway Company**, Civil Action No. 1720, United States District Court for the Middle District of Georgia, Macon Division, decided on December 11, 1967. (The District Court's opinion also covers **Brotherhood of Locomotive Engineers, et al., v. Central of Georgia Railway Company**, Civil Action No. 1721.) The District Court there held:

> "Under **Gunther** it is now, even in this suit to enforce a money award, an uncontrovertible fact that the carrier breached that letter agreement. A crucial question remains, however, namely, whether in this particular case this court is bound by the Board's money awards. The organizations say 'Yes.' The carrier says 'No.' The organizations say that Public Law 89-456, 89th Congress, H.R. 706, withdraws this entire matter from court jurisdiction. This would seem to be an over-contention in view of this sentence in the amendment: 'The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct.' 45 U.S.C.A. § 153 First (q). This significant language appears in the Senate Committee Report accompanying the amendment:
>
> > 'The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside

an award "arbitrariness or capriciousness" on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary and capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was **actually and indisputedly without foundation in reason or fact,** and the committee intends that, under this bill, **the courts will have that power.'** (Emphasis ours.)

* * * * *

It will be noted that the letter switching agreement above quoted does not as much as hint at any penalty pay or liquidated damages for its breach. It contains no suggestion that in the event the carrier should violate the agreement by making a change in assignment of switch local service except through negotiations with the engine and train service local committees, any organizations or any members would be entitled to any damages, such as a basic day's pay or otherwise, or to any relief, other than, of course, the right to compel the carrier to un-do the change and comply with the agreement.

* * * * *

The Carrier contends that since the 'Schedule[s] of Wages, Rules and Regulations' and the letter agreement provide for and contemplate no damages for the violation under consideration, and contemplate no claims for damages as distinguished from a grievance procedure to require compliance with the agreement, the First Division has failed in the language of the amendment to the Act 'to conform, or confine itself, to matters within the scope of the Division's jurisdiction,' and that for that reason the award should not be enforced, and, on the contrary, should be set aside by this court, except only as to the few small awards under Claims 1, 2 and 4, which either do not involve the principle contended for under Claim 3, or are of such small amounts as not to justify opposition. It contends also that the awards under Claim 3 are, in the language of the Senate Committee Report, 'actually and indisputedly without foundation in reason or fact,' and that for that reason this court must 'have the power to decline to enforce' it. This court agrees with those contentions. Whether we regard the Board as primarily an administrative tribunal, or as primarily a board of arbitration (it partakes of the nature of both), it must act responsibly, and if it, as an administrative tribunal, is construing and interpreting an agreement its interpretation must find some basis in the language of the written agreement, or in the conduct of parties under that language, or in some uniform custom and practice concurred in by the parties. No such basis exists here. If it acts as a board of arbitration and is arbitrating a dispute it must act within the scope of the submission:

'An award must be made on matters included within the agreement for submission and must not exceed the powers granted by the submission. In general, an award on matters

not included in the submission is void, and is always open to attack on the ground that the arbitrators exceed their powers.' 5 Am. Jur. 2d, Arbitration and Award, §137, page 619.

And the carrier has never voluntarily agreed that the Board should decide whether the agreement calls for damages, much less penalty payments, as distinguished from an award ordering a restoration of the original home terminal.

* * * * *

Thus the order of the First Division insofar as it relates to Claim 3 must be set aside for failure of the Division to comply with the requirements of the Act and for failure of the order and award to confine itself to matters within the scope of the Division's jurisdiction. It should be set aside rather than remanded to the Division. The Division held this controversy on its dockets from February 6, 1954 until January 20, 1959, 4 years, 11 months, and 14 days. We know that dockets are crowded, but the carrier is not responsible for this controversy's remaining undecided by the First Division for such a long period of time. Perhaps precedence should be given to grievances arising under contracts and agreements which do not provide for either compensatory or penalty payments.[6] This case, therefore now stands for decision by this court rather than by the First Division. While the Adjustment Board, in properly handling a controversy, if there be no failure of the Division to comply with the requirements of the Act and no failure of the order to conform or confine itself to matters within the scope of the Division's jurisdiction, may not be bound by common-law principles where its interpretation of a contract is not 'wholly baseless and completely without reason' (**Gunther, supra,** at page 261), nevertheless, when, because of the Board's failure to comply with the requirements of the Act and failure of its order to conform or confine itself to matters within the Division's jurisdiction, its award must be set aside and the controversy determined by a court, the court is then bound by common-law principles. This means that the award as it relates to all three of the claimants in Claim 3 cannot stand and must be set aside because the letter agreement contemplated no such awards but only grievance procedures or complaints to compel compliance therewith; and the award as it relates to Avera and Nunn cannot stand and must be set aside for the additional reasons that there must be applied the general law of damages relating to contracts: 'that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned, Atlantic Coast R. Co. v. Brotherhood of Ry., Etc., 210 F. 2d 812, 815 (4th Cir. 1954) . . .'; Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co., 338 F. 2d 407, 409 (10th Cir. 1964)."

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[6]While these cases have been pending in this court since January 18, 1961, they were so pending at the desire of counsel for all parties. Fortunately, a trial could be, and was, afforded as soon as counsel desired it, and following the evidentiary hearing counsel requested, and were allowed, until November 6, 1967 to complete the filing of briefs.

The error in this decision was compounded when the majority rejected the Carrier's interpretation of, and completely disregarded, the following language of Rule 49 of the agreement, captioned "Work Not Performed":

> "Except as provided in these rules, no compensation will be allowed for work not performed."

This rule is clear and unambiguous. It means precisely what it says. It excluded the payments claimed because the claimants did not perform any work in return for the payments sought. The fact that the rule was subject to attack by a prior referee (Award 11938) does not render it meaningless. Neither has it been rendered meaningless by the court decision cited by the referee involving another agreement entirely. If either of the parties to the agreement here involved desires the elimination or modification of Rule 49, the Railway Labor Act provides the course to be followed.

For the reasons stated above, we dissent.

P. C. Carter
W. B. Jones
R. E. Black
G. L. Naylor
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