Award No. 16455
Docket No. TE-15166

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

THE TEXAS MEXICAN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Texas Mexican Railway, that:

1. The Carrier violated the Agreement effective between the parties hereto when by bulletin dated August 19, 1963 it assigned an outsider, Manuel J. Ramirez, an employe not under the scope of the Telegraphers' Agreement, to the position of agent at Laredo, Texas, ignoring the rights and application of First Telegrapher E. B. Juarez.

2. Carrier shall compensate Telegrapher E. B. Juarez the difference in pay of the first telegrapher position at Laredo, Texas, rate of $510.20 per month, to that of the agent's position, rate of $667.14 per month, beginning August 20, 1963 and continuing thereafter as long as Telegrapher Juarez is denied the right to assume the position of agent at Laredo, Texas.

3. Carrier shall compensate Extra Telegrapher G. R. Lopez the difference between what he is compensated to that of the first telegrapher position at Laredo, Texas, beginning August 20, 1963 and continuing thereafter, due to being deprived of assuming the first telegrapher position at Laredo, Texas account of the violative act described in Points 1 and 2 hereinabove shown.

EMPLOYES' STATEMENT OF FACTS: This dispute involves the bulletining and assigning of an outsider to the position of agent at Laredo, Texas without giving any consideration whatsoever to the application of Telegrapher E. B. Juarez, the sole applicant. The agent's position is listed in Rule 36 of the Agreement and is controlled by the provisions contained in the Scope Rule, Rule 1(b)(c) and (f).

Carrier accepted the application of Manuel J. Ramirez, a clerk holding no seniority under the Telegraphers' Agreement, and assigned him to the agent's position at Laredo.

Ramirez, who held assignment as Chief Clerk, Traffic Department, Laredo, Texas, was assigned August 20, 1963, as Agent at Laredo. Coincident with this assignment, the name of Manuel J. Ramirez was added to the seniority roster of telegraphers with a date of August 20, 1963, and thereafter Ramirez became subject to the applicable rules of the Telegraphers' Agreement.

August 19, 1963, General Chairman of the ORT wired Carrier's Vice President-General Manager, asserting that the assignment of Ramirez was in violation of Rule 36, and asked that position be filled by "telegrapher under our agreement." The officer replied and pointed out that no qualified telegrapher had made application for the position, and stated that in accordance with Rule 36, he had selected an Agent who possessed such qualifications.

The General Chairman wrote, and after arguing that the rules of the Agreement forbid the assignment of other than a Telegrapher, asked for the names of the applicants for the position. Reply was made and the facts again set out. The General Chairman then attempted to set a date for an "investigation", alleging unjust treatment of Juarez and alleging that Rule 22, paragraph B, provided for such "investigation." The officer replied, pointing out the meaning of the rule and inviting the General Chairman to bring the matter to him for a conference in the usual manner if the General Chairman concluded after his investigation that there was proper basis for his contention.

The General Chairman refused to follow the usual and customary conference procedure, but stated that he would be in Laredo at 10:00 A. M., September 10, with an attorney and stenographer, and demanded that the Vice President-General Manager be subjected to questioning concerning the conclusion he had reached. The Vice President and General Manager would not agree that he was subject to such examination, and did not agree to the date arbitrarily set by the General Chairman.

At 10:00 A. M., September 10, 1963, General Chairman appeared at the office of the Vice President and General Manager with E. B. Juarez, the Local Chairman of the Order of Railroad Telegraphers, and two others whom he introduced at W. R. Blackshear, Jr. and W. E. Haynes, Jr. The Vice President and General Manager asked the purpose of the call upon him and was told it was for the purpose of investigating him. The General Chairman was told that it was not the intention of the Vice President and General Manager to submit himself to such examination, and that if those who were not duly elected representatives of the employes would withdraw, the Vice President and General Manager would be glad to discuss any matter in conference with the Committee as he had told them he would do. Upon this insistence, the General Chairman and those who accompanied him left the office.

September 20, 1963, the General Chairman wrote and presented the claims which have been made the subject of the dispute now submitted to the Third Division, National Railroad Adjustment Board. The claims were declined and were discussed in conference. Following conference, the decision of the Management was affirmed. Carrier's Exhibit A reproduces the correspondence referred to above.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization claims that Carrier violated the agreement when it assigned as agent an employe not covered by the

Telegraphers' Agreement thereby to fill vacancy of agent at Laredo, Texas. The agent's position is listed in Rule 36, and is allegedly controlled by the provisions contained in the Scope Rule, Rule 1(b) (c) and (f). The ORT further alleges that Carrier refused to permit investigation to be held in accordance with Rule 22(b) concerning unjust treatment of Claimant.

"RULE 36.

* * * * *

Vacancies in positions of Agent at Corpus Christi and Laredo will be filled in accordance with seniority, provided applicants are qualified, the General Manager to be the judge of such qualification."

Carrier asserts that no violation of the agreement occurred when Claimant's application for assignment as Agent at Laredo was not accepted after consideration of his qualifications had been determined by the General Manager as set forth in Rule 36.

The right reserved to the Carrier of being sole judge of the applicant's qualifications does not take the position out from under the Telegraphers' Agreement. Carrier is bound to make its selection from employes covered by the Telegraphers' Agreement. See Award 5652 and 3820.

Rule 1, Scope, (b) (c) and (f) expressly provide that "Positions covered by this agreement **must be filled by employes coming within the scope of the agreement. . . .**" The Agreement, in our opinion, contains no exception to this mandatory requirement, and is quite clear that the position of Agent at Laredo as shown in Rule 36 must be filled by employes coming within the scope of the Agreement. Positions covered by this agreement will also be filled from the official seniority list.

Carrier further argues that the recognized meaning of the language of Rule 36 was expressed in a letter agreement dated January 8, 1958. In this letter agreement, if in the opinion of the General Manager, applicants were not qualified, vacancies in position would be filled from any source. This Memorandum of Agreement of January 8, 1958 was cancelled in its entirety on December 10, 1962; therefore, the prerogative of filling this position from any source by Carrier no longer exists, and the filling of agent's position under Rule 36 is controlled by the Scope Rule, Rule 1 (b) (c) and (f).

Since we have found a violation of the rules heretofore set out, in our opinion, it is not necessary to interpret Rule 22(b). The Complaint has been handled on appeal in the usual manner.

The claim presented by Extra Telegrapher Lopez is based upon the theory that had Claimant been assigned Agent at Laredo, he would have enjoyed an assignment as First Telegrapher. Rule 17(g) states that a successful applicant's position shall be filled by advancing regular assigned employes in such office according to seniority **if they so desire.** We find no proof that Lopez was qualified or could have filled the position had it been open or if by assuming he would apply for said position that he would have been assigned. Claim No. 3 denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement by using an employe not covered thereby to perform the duties of Agent at Laredo.

AWARD

Claim (1) and (2) sustained.

Claim (3) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June 1968.

DISSENT OF CARRIER MEMBERS TO AWARD 16455, DOCKET TE-15166

The majority's decision to sustain the claims presented on behalf of Telegrapher E. B. Juarez has no sound basis in fact or logic. To this extent, therefore, **Award 16455** is a complete nullity, without any force or effect whatsoever.

The scope of this Board's jurisdiction, and the limits of its authority are outlined, in part, in Section 3 First (i), (m), (p) and (q) of the Railway Labor Act:

> "(i) **The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board** with a full statement of the facts and all supporting data bearing upon the disputes.
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> * * * * *
>
> (m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the

awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the District in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board on the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties * * *. **The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, that such order 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 confine 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.**

(q) If any employe or group of employes, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms in such award, then such employe or group of employes or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order * * *. **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. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine 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.**" (Emphasis ours.)

The courts, in applying the Act, have consistently recognized (1) that the Adjustment Board is confined to interpreting collective bargaining agreements; (2) that it does not have license to issue awards based on its own sense of equity or justice; and (3) that its awards are legitimate only so long as they are soundly grounded in the collective bargaining agreements between the disputants. One of the earlier judicial pronouncements on the limits of the Board's power under the Act is found in **Shipley v. Pittsburgh & L. E. R. Co.**, 83 F. Supp. 722, 759 (D. C. Pa., 1949):

"An award before the National Railroad Adjustment Board which alters, changes or amends a collective bargaining agreement is an usurpation of the power granted the Board under the Railway Labor Act to interpret such agreement. Hunter v. Atchison, T. & S. F. Ry. Co., 7 Cir. 171 F. 2d 594."

Even the Supreme Court's recent opinion in **Gunther v. San Diego & Arizona Eastern Railway Company,** 382 U. S. 257 (1965), which narrowed the scope of judicial review of Adjustment Board awards, and led to the 1966 amendments to the Act, clearly indicates the Board still is not at liberty to issue awards based on interpretations that are "wholly baseless and completely without reason."

Countless awards of the Board, including the following, have echoed and emphasized the validity and importance of this most basic principle:

Second Division **Award No. 3040,** TWUOA v. P&LE, Referee Thomas A. Burke:

"Our function is to determine if the existing rules of the agreement have been violated. We have no power to write rules for the parties * * *."

Third Division **Award No. 13491,** ORT v. SP, Referee John H. Dorsey:

"The Board is a statutory body of limited jurisdiction. It may only interpret and apply collective bargaining agreements negotiated and executed by the disputants. It may not insert in such agreements its sense of equity or economic and labor relations predilections. When the parties to an agreement, or one of them, find it wanting, recourse lies in the collective bargaining procedures prescribed in the Railway Labor Act."

Fourth Division **Award No. 1487,** RED v. FGE, Referee Harold M. Weston:

"It is certainly not our province to rewrite the agreement or to subject it to strained and artificial interpretations, no matter how tempting it may be to do so in a particular case. * * *."

In interpreting and applying the collective bargaining agreements before them, the various divisions of this Board have wisely followed the sound and widely accepted common law rules of contract construction whenever possible. See Third Division **Award No. 14340,** SG v. FEC, Referee Bernard E. Perelson. The reason for this is obvious: stability and predictability are just as desirable in setting disputes arising under collective bargaining contracts as under other types of contracts, and no one has yet proposed a more rational set of rules for achieving these goals in settling the day-to-day disputes which arise under collective bargaining agreements in the railroad industry.

Among the many primary rules of contract construction consistently applied by the various divisions of this Board over the years are:

1. Unless otherwise clearly indicated by the contracting parties, the words used in an agreement are to be given their plain and normal meaning. See, e.g., Third Division **Awards 14242,** SG v. JTD of CRI&P–FWD, Referee Bernard E. Perelson; and 13828, ORC&B v. PC, Referee John H. Dorsey.

2. The meaning of general words or terms will be restricted by more specific descriptions of the subject matter or terms of performance. See, e.g., Third Division Awards 15785, CL v. SR, Referee John J. McGovern; and 14415, CL v. LI, Referee Levi M. Hall.

3. A contract will, if possible, be interpreted so as to render it reasonable rather than unreasonable. See, e.g., Third Division Awards 11519, ATDA v. L&HR, Referee Wesley Miller; and 12367, JCDCE v. UP, Referee Bernard J. Seff.

It is not clear what guideposts were used by the majority in the instant case to arrive at the conclusion that Telegrapher Juarez's claims should be sustained. What is clear, however, is that the abovementioned rules of contract construction were either ignored or overlooked in arriving at this conclusion; and the net effect of the award is to establish this Board as the final arbiter of Juarez's qualifications for the Agent's position at Laredo, Texas, an act that clearly usurps the power granted the Board by the Railway Labor Act.

The words used in the parties' Schedule Rule 36, quoted in pertinent part in the majority's opinion, are clear and unambiguous. Given their plain and normal meaning, they indicate in no uncertain terms that the parties intended to eliminate seniority as a controlling factor for appointment to the Agent's position at Laredo, Texas. The right of the Carrier's General Manager to be "the judge" of all applicants' qualifications is clearly expressed. The right of management to fill the position other than in accordance with seniority, provided no qualified applicants holding seniority under the Agreement are bypassed, is also clearly expressed.

Insofar as the instant case is concerned, the meaning of the phrase "will be filled in accordance with seniority" in Rule 36 is essentially the same as that of the phrase "must be filled by employes coming within the scope of the agreement" in Rule 1, for an individual who does not come within the scope of the agreement obviously holds no seniority thereunder and thus cannot be appointed to the Laredo Agent's position in accordance with seniority. Accordingly, when the application of Rule 36 is qualified by the express condition that that position will be filled in accordance with seniority only if the Carrier's General Manager determines the applicants are qualified, it necessarily follows that the position cannot — and thus need not — be filled by an applicant "coming within the scope of the agreement" if the General Manager determines he is not qualified. To find, as the majority does, that the Carrier must fill the position with an applicant covered by the agreement, even though he is unqualified, is clearly unreasonable, and obviously was not contemplated by the parties because such a finding renders Rule 36 virtually meaningless. Indeed, if the parties had intended such a result, there would have been no need for them to include Rule 36 in the agreement; Rule 1 is all they would have needed.

Even if Rule 36 did not exist, the majority's statements about the Agreement requiring all positions covered thereby to be filled by covered employes could not withstand logical analysis. Suppose, for instance, that the number of positions covered by the Agreement exceeded by one or more the number of covered employes who were competent and available to fill them. Under the majority's findings the Carrier would be absolutely pre-

cluded from filling the odd positions so long as such a condition existed, since anyone hired or otherwise selected to fill the vacancies would not be an employe covered by the Agreement. As the number of odd positions increased, either because of the need for more positions or because of natural attrition of the employes covered by the Agreement, the situation would become even more ridiculous. By natural attrition of covered employes alone, it eventually would be impossible for the Carrier to fill any of the positions covered by the Agreement.

Rule 36 does exist, however, and since it is a specific rule, dealing specifically with the issue presented in the instant case, the filling of a vacancy in the Laredo Agent's position, it is abundantly clear, if we accept the validity of the premise that specific provisions should prevail over provisions of more general application, that there is no basis in fact for the majority's "opinion" that Rule 36 does not constitute an exception to the general provisions of Rule 1. The language of Rule 36 speaks for itself and eliminates any need to venture into the realm of opinion on this matter.

Under the clear and specific language of Rule 36, when the Carrier's General Manager determined that Claimant Juarez — the only individual covered by the Agreement who applied for the Laredo Agent's position at the time in question — did not possess the necessary qualifications, the Carrier was freed from its conditional commitment to make the appointment in accordance with seniority. It then rightfully proceeded to make the appointment other than in accordance with seniority — by hiring an individual who, prior to the moment he was hired, held no seniority under the agreement.

Contrary to what is inferred in the majority's opinion, no one, including the Carrier, has ever suggested that the prerogatives specifically reserved to the Carrier by Rule 36 in judging an applicant's qualification for the Laredo Agent's position take that position "out from under the Telegraphers' Agreement." The existence of Rule 36 and the language contained therein would make any such suggestion sheer nonsense.

Neither does the appointment of an individual not previously covered by the Agreement to the Laredo Agent's position take the position out from under the Telegraphers' Agreement. The moment such an individual is so appointed he becomes an employe covered by the Agreement and begins accumulating seniority under Rule 15.

Third Division **Awards 3820 and 5652**, cited in the majority's opinion, are easily distinguished, and clearly do not support the proposition that "Carrier is bound to make its selection from employes covered by the Telegraphers' Agreement" in the instant case. In **Award No. 3820**, it was found, among other things, that "the Agreement contains no exception to [the] requirement that [the star agency position in question] be filled from the ranks of the employes covered by the Telegraphers' Agreement," and that "There were qualified Telegraphers, including applicant, who could have been assigned to [the] temporary vacancy." Rule 36, a clear and specific exception to Rule 1, and the lack of any evidence showing that a qualified employe covered by the Agreement applied for the Laredo Agent's position should have been enough to make the majority realize that similar findings cannot logically be made in the instant case.

In **Award 5652** the position in question was subject to a rule which reserved to the Carrier the right to be the sole judge of the applicant's

qualifications but which, unlike Rule 36 in the instant case, contained no language permitting appointments to be made other than in accordance with seniority if none of the covered employes was considered qualified. Moreover, in that award the Board based its partial sustainment of the claim solely on the ground that the parties' scope rule had been violated; it specifically found that the position in question had **not** been filled and thus concluded it was not necessary to get involved with the problem of determining whether the Carrier had even exercised its contractual right to be the sole judge of the applicant's qualification for the position.

One of the awards of this Board which more closely parallels the instant case than either of those cited in the majority's opinion is Third Division **Award No. 15074**, CL v. CUT, Referee Arnold Zack, which involved a claim by one of the respondent Carrier's furloughed clerical employes that the Carrier violated the following provisions of the controlling collective bargaining agreement when it hired an "outsider" to fill a covered position in the Carrier's Ticket office:

"RULE 1. SCOPE

* * * * *

NOTE NO. 1. Positions within the scope of this Agreement belong to the employes herein covered, and nothing in this Agreement shall be construed to permit the removal of such positions or work from the application of these rules except as provided herein.

* * * * *

RULE 10. SENIORITY RIGHTS

Seniority rights of employes covered by these rules may be used only in case of vacancies, new positions, or reduction of forces, except as otherwise provided in this Agreement.

The exercise of seniority in the reduction or restoration of forces or displacement of junior employes is subject to the provisions of Rules 11 and 16.

RULE 11. PROMOTION BASIS

Employes covered by these rules will be in line for promotion. Promotions, assignments and displacements shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail. Management to be the judge, subject to appeal.

NOTE: The word 'sufficient' is intended to more clearly establish the right of senior employes to bid on a new position or vacancy where two or more employes have adequate fitness and ability. * * *

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RULE 17. REDUCTION IN FORCE

* * * * *

When forces are increased or vacancies occur, furloughed employes shall be returned and required to return to service in the order of their seniority rights, except as otherwise provided in this rule. Such employes, when available, shall be given preference on a seniority basis to all extra work, short vacancies and/or vacancies occasioned by the filling of positions pending assignment by bulletin, which are not filled by rearrangement of regular forces * * *."

Denying the claim, this Board said:

"On July 11, 12 and 13, 1962, an extra employe was required in the Carrier's Ticket Office. The Carrier hired Rosaleen Jaehnen, who had had experience as a Telephone Operator, to fill this position.

Mrs. Margie Thompson, who was hired on May 18, 1959 and worked until November 3, 1960, when she was furloughed, had been called in to work in the Ticket Office May 28, 29 and 31, 1962.

The instant claim was filed on her behalf as a furloughed employe, claiming that Rosaleen Jaehnen was not an employe of the Company and did not hold seniority on the clerical roster.

The Organization contends that the work here being performed was accounting work in the Ticket Office in which Mrs. Thompson was competent; that such work is reserved to employes of the Organization under the Scope Rule; and that the seniority provisions of the parties' Agreement require the recall of furloughed employes for such work before outsiders may be hired.

The Carrier asserts that the work in dispute was of a technical nature for which the Claimant was not trained and for which she had never indicated her availability. Accordingly, it concludes that it acted properly in hiring a new employe with previous pertinent experience for this work.

The evidence indicates that the disputed work to be performed at the Carrier's Ticket Office was not of the accounting type which the Claimant normally performed. It is clear that the work was more concerned with time tables, fares, rates and ticket selling routines, and that Claimant had neither performed such tasks nor sought an opportunity to be trained therefor.

Although the Carrier is required by Rule 17 of the parties' agreement to give preference on extra work to furloughed employes, we find nothing therein which prohibits it from hiring employes qualified for an open position when the furloughed employes lack the necessary qualifications for filling it."

Cf., Third Division Awards **7410**, CL v. PRR, Referee A. Langley Coffey; **7810**, MW v. PTR, Referee John Day Larkin; **12480**, MW v. PE, Referee Lee R. West; **13766**, CL v. CofG, Referee Harold M. Weston, **15387**, CL v. SR, Referee John H. Dorsey; **15784**, CL v. SR, Referee John J. McGovern, and **15929**, CL v. SR, Referee George S. Ives.

Straining to reach the conclusion that the claims of Telegrapher Juarez should be sustained, the majority distorts the facts of record when it sug-

gests the Carrier is relying heavily on the cancelled January 8, 1958 Memorandum of Agreement to give meaning to the language of Rule 36. As previously indicated, the plain and ordinary meaning of the language of Rule 36 needs no amplification or elaboration insofar as the issue presented in the instant case is concerned. It speaks for itself, and clearly relieves the Carrier of any obligation to fill vacancies in the Laredo Agent's position in accordance with seniority if, in the General Manager's judgment, no applicant holding seniority under the Agreement is qualified.

The Carrier, it is true, does refer to the cancelled January 8, 1958 Memorandum of Agreement and other related correspondence between the parties in its submissions, but it does this primarily for the purpose of documenting the fact that up to the time of the instant dispute the Organization had never seriously challenged the Carrier's prerogatives under Rule 36, which, insofar as the Laredo Agent's position is concerned, had their origin in Rule XXX of an earlier Agreement between the parties effective February 1, 1942. On page 13 of its initial submission, after discussing the circumstances surrounding the cancellation of the January 8, 1958 Memorandum of Agreement, the Carrier states:

> "* * * the cancellation of the letter agreement did not change the meaning of Rule 36. Rule 36 remained in effect in the same language as it is now written and as it was written in the agreement of February 1, 1942, as it pertained to the filling of vacancies of Agent at Laredo."

As if to add insult to the injury, the majority summarily concludes that Telegrapher Juarez's claim for damages, as set forth in Part 2 of the Organization's Statement of Claim, is "sustained." It reaches this conclusion despite the fact that the record establishes the Carrier's General Manager judged Juarez to be unqualified for the Laredo Agent's position, despite the fact that the parties' collective bargaining agreement does not contain a liquidated damages clause or a provision for the payment of punitive damages, and despite the fact that there is no evidence in the record from which it can logically be concluded that the Claimant has been adversely affected under the Agreement to the tune of $156.94 per month for each and every month from August 20, 1963 until he is appointed to the Laredo Agent's position. If the Carrier's General Manager never judges the Claimant to be qualified to fill that position and does not bow to coercion from this Board by appointing him to the position even though he is not qualified, what is the Carrier supposed to do? Must it pay the Claimant this monthly allowance for the rest of his life? Must it pay him this monthly allowance even if a qualified applicant holding seniority under the Agreement has subsequently been appointed to the Laredo Agent's position or is so appointed in the future?

Even without answers to these questions, it is clear that the award of any compensation at all to Claimant Juarez constitutes the imposition of a penalty, which as hundreds of awards of this Board recognize, is beyond the limits of the Board's authority under the Railway Labor Act. Two of these awards read in part as follows:

Second Division **Award No. 3967**, CM v. D&RGW, Referee Howard A. Johnson:

> "No pecuniary loss or damage to Claimants is shown, and the Agreement does not provide for any arbitrary or penalty for this violation.

It is a well settled rule of statutory construction that a penalty is not to be readily implied, and that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it. Tiffany v. National Bank of Missouri, 85 U. S. 409; Keppel v. Tiffin Savings Bank, 197 U. S. 356.

The rule is equally applicable to the construction of contracts, for the parties can readily agree upon penalty provisions if they so intend, and the absence of such provisions negatives that intent.

The Supreme Court of the United States said in L. P. Steuart & Bro. v. Bowles, 332 U. S. 398, that to construe a statute as imposing a penalty where none is expressed would be to amend the Act and create a penalty by judicial action; that it would further necessitate judicial legislation to prescribe the nature and size of the penalty to be imposed.

Similarly, for this Board to construe an agreement as imposing a penalty where none is expressed, would be to amend the contract, first, by authorizing a penalty, and, second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide these matters, they are the only ones entitled to decide them. Consequently, there have been many awards refusing to impose penalties not provided in the agreements. Among them are: Awards 1638, 2722 and 3672 of this Division; Awards 6758, 8251 and 15865 of the First Division; and 7212 and 8527 of the Third Division."

Third Division Award No. 15914, TCEU v. SR, Referee John J. McGovern:

"It is our judgment that the messages in question were train orders coming within the purview of Rule 31. Although there was no record made of these messages, they did direct the movement of trains. We find, therefore, that the Carrier was in violation of Rule 31, insofar as all claims as submitted are concerned.

On November 3, 9 and 17, 1961, at Chamblee, inasmuch as the claimant was on duty and under pay, we shall award him nominal damages of $1.00. To allow the claim as submitted in these instances would be tantamount to imposing a penalty. We have found in many other awards that this Board lacks authority so to do. Claims on October 20 and December 7, 1961 at Duluth and Norcross shall be paid as submitted to those claimants who were off duty at the time the orders were issued."

These awards are consistent with the holding of the United States Court of Appeals, Tenth Circuit, in **Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western R. Co.**, 338 F. 2d 407 (1964), cert. den. 85 S. Ct. 1330 (1965):

"The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act. See Prieve & Sons v. United States, 332 U. S. 407, 413. And if, as counsel for the Brotherhood contends, there exists within the industry a long established and accepted custom to pay what would amount to a windfall for contract violations such

as here occurred, such custom was not established by finding, nor requested as a finding, in the procedures before either the Board or the District Court. We conclude that the District Court correctly determined that the instant case is governed by 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 Line R.R. v. Brotherhood of Ry. Clerks, 4 Cir., 210 F2 812, 815; United Protective Workers v. Ford Motor Co., 7 Cir., 223 F2 49, 53-54. Absent actual loss, recovery is properly limited to nominal damages. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 10 Cir., 113 F2 308; Norwood Lumber Corp. v. McKean, 3 Cir., 153 F2 753; 5 Williston, Contracts (rev. ed.) Section 1339A."

A more recent judicial pronouncement on the issue of damages under collective bargaining agreements in the railroad industry is found in **Brotherhood of Railway Trainmen, et. al. v. Central of Georgia Railway**, Civil Action No. 1720, United States District Court for the Middle District of Georgia, Macon Division, decided on December, 1967. (The District Court's decision also covers **Brotherhood of Locomotive Engineers, et. al. v. Central of Georgia Railway**, Civil Action No. 1721.) Therein, the District Court held:

"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. Jr. 2d, Arbitration and Award, Section 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. 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)."

Accordingly, we vigorously dissent to Award 16455 insofar as it sustains the claims presented on behalf of Telegrapher E. B. Juarez.

C. L. Melberg
R. A. DeRossett
C. H. Manoogian
J. R. Mathieu

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