Award No. 18540

Docket No. SG-18919

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Thomas Rimer, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Illinois Central Railroad that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Article 4, Section 418, when Springfield Division Signal Gang No. 335 was assigned to perform work on the Illinois Division.

(b) The Carrier be required to pay Signal Foreman R. J. Vadbunker and members of Illinois Division Signal Gang No. 304, as follows:

1. Actual hours worked by Springfield Division Gang No. 335, at the pro rata rate of their regular assignment and any or all overtime at the overtime rate.

2. Actual necessary expense as provided in Article 2, Rule 214.

3. Actual travel time from Division Headquarters to the point of Camp Car headquarters, computed on a basis of actual mileage via direct route used either by rail or highway, on a basis of thirty miles per hour and return, to be paid at the respective rate of the position. This to include week-end trips to and from camp car headquarters to Division headquarters for the duration of time that Gang No. 335 is working on the Illinois Division.

(Carrier's File: 135-842-97 Spl: Case No. 236 Signl.)

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties to this dispute bearing an effective date of August 1, 1958, which is by reference made a part of the record in this dispute. Article 4, Section 418 of that Agreement provides:

"Except for emergency conditions such as flood, snow, storm, hurricane, earthquake or fire, employes will not be temporarily transferred from one seniority district to another. However, during a large signal construction program a signal gang may be temporarily transferred from its seniority district to the district on which the work is

Traffic Control (CTC) at Kankakee, Illinois. Both of these projects had to be completed by mid-September, 1968.

The company was able to obtain a sixty-day extension on the ICC order for Indian Oaks, and gang 306 was able to complete the CTC work at Kankakee by early September. Gang 306 was assigned to the AFO project; however, one gang could not complete this work within the required time. The company had two alternatives: 1) subcontract the work; or 2) transfer a gang from another district to assist the Illinois Division gangs. The company decided to transfer a former Springfield Division gang under Rule 418.

The company contacted General Chairman Leroy Harley to discuss the transfer of the Springfield gang. Mr. Harley insisted that the February 7, 1965 Agreement required that the transfer be made under an implementing agreement. The company yielded to the General Chairman's demands, and reached an oral implementing agreement which provided that the transferring gang would be paid actual necessary expenses while working on the Illinois Division. The oral understanding is identical to the written agreement governing an earlier transfer on the Iowa Division, which is attached as Exhibit B.

On September 5, 1968, Springfield gang 335 began working on the AFO project near Farmer City, Illinois. On September 11, 1968, gang 306 completed the CTC work at Kankakee and joined gang 335 at Farmer City. Both gangs worked until mid-October, at which time gang 335 returned to their own territory and gang 306 returned to finish installing road crossings at Indian Oaks.

On October 16, 1968, Mr. B. J. Woodruff succeeded Mr. Harley as General Chairman. General Chairman Woodruff denied any knowledge of the oral agreement and refused to accept the company's word that such an agreement existed. The correspondence is attached as Exhibit A.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim here involves the temporary transfer of signal gang 306 out of its home seniority district to join gang 335 to complete a construction project.

Article 4, Rule 418 prescribes the conditions under which such transfers may be made, the effect on their seniority, and other matters, including the requirement that the Carrier obtain the written consent of the majority of the gang to be transferred. The text of the Rule 418 need not be reproduced here for review and study since the Carrier acknowledges violation of this latter requirement of the Rule, i.e. that it did not obtain the written consent of a majority of the gang for transfer. It denies violation of any other terms of the Rule.

In its statement of the issue the Carrier concludes that, "The sole issue for the Board to consider, then, is whether the claimants are entitled to any additional compensation", as a consequence of the admitted violation.

Since the employes were not damaged in any way and did not suffer any financial loss, the Carrier argues that the monetary relief claimed is not a remedy permitted under the contract. In view of the conflicting awards on this vital point in the case, it becomes necessary for the Board to briefly review

the record in the case as it reflects upon the Carriers action and the pros and cons of punitive damages here sought by the Organization.

There was then in existence an agreement dated February 7, 1965, (Mediation Agreement, Case No. A-7128) which provided in Article III, Section 1, for the right to transfer work and/or employes throughout the system without restriction, excepting only that such transfers may not cross craft lines. Section 1 also provides for the making of implementing agreements between the parties when such transfers are to be made. This Agreement, by its terms, serves to override Rule 418.

In the first instance, the then General Chairman of the Organization insisted on an implementing agreement under the February 7, 1965 Agreement to which the Carrier orally agreed. When this claim was filed, however, the new General Chairman denied the existence of the oral implementing agreement and took the position that Rule 418 was controlling. For reasons not explained by the Carrier in the record, it agreed with the Organization on this point and made its defense accordingly. As a result, no evidence is given the Board to support the existence of an oral implementing agreement and the Board cannot conclude on that matter as fact or mere assertion.

Since Rule 418 is agreed to be controlling by the parties, the Board must accept that as the boundary within which it can reach a conclusion, despite the existence of the February 7, 1965 Agreement. The Carrier admits to a violation of one part of that Rule and thus we are concerned only with the compensatory damages claimed, or any alternative remedy which might be available under the contract.

It is the Carrier's position that the claim seeks punitive damages for which there is no contractual or legal basis. The Organization contends, on the other hand, that there is ample precedent for the damages claimed which, if denied, would permit the Carrier to repeat the violation with impunity. In support of this argument it relies heavily on Award No. 15689 (Referee Dorsey) where punitive damages were awarded in a contracting-out case. Others are cited where the fact situations differ markedly from the instant case and where the intent of the Carrier was in question. Referee Dorsey, after an extensive and scholarly review of prior awards and the "evolving law" on the subject of punitive damages states "In the light of the amendments to 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."

A contrary and, we believe, a majority view of other Referees on this point is expressed by Referee Dolnick in Award No. 10511, quoted below in pertinent part:

> "It is true that this Board has held in numerous cases that a Carrier is liable for punitive damages if there is a violation of the Agreement and this Board has sustained claims even though the Claimants did not themselves suffer damages by reason of such contract violation. Few of such awards, however, apply to situations where no employe at all suffered damages by reason of the contract violation. It may very well be that it is justifiable to assess punitive damages where the Carrier deliberately, willfully or maliciously

violated the terms of the contract. In such a case, an employe not directly damaged may file a claim and collect for such contract violation. But this is not the case here. * * * It is not the function of the Board, however, to indiscriminately assess punitive damages where no fraud, no discrimination or no malice is shown in the record and where no employe, whether it be the proper Claimant or not, had suffered or may have suffered any damages by reason of such alleged violation.

It is a fundamental principle of law that damages for a breach of contract is the amount which the Claimant actually suffered by reason of such a breach. Consequently an employe wrongfully discharged is entitled to the amount he would have earned if he had not been so wrongfully discharged. See Award No. 1638 (Carter) Second Division. In Award No. 8673 (Vokoun) this Board said:

> '. . . In the assessment of penalties the usual penalties are based on losses to individuals who are caused monetary loss because of a contractual violation, in order to make one "whole". Punitive damages are ordinarily approved by the Board'."

Where the contract itself does not expressly provide for relief for violation of one of its parts, this Board feels strongly that it is without authority to assess damages where no monetary loss is suffered by the employes. In the bargaining process specific remedies may be negotiated in disciplinary cases for example; in other situations, the contract may be silent and thus permit a third party determination of contract violation the single course of issuing a "cease and desist" award. This is common even where there has been a repitition of the violation of a section of a contract over a long period of time, indeed, through a series of contracts which have been renegotiated, but where the parties have failed to agree on appropriate relief for violation of such sections.

If the contract is deficient in this respect, as here, it becomes a matter for the parties to resolve at the bargaining table by interim agreement or upon expiration of the current contract. The Board is not empowered to, in fact, it is precluded from writing a new rule which would significantly add to, amend, or alter the contract which it has been given the authority only to interpret and construe.

The Board has read with care many of the awards cited on this point of punitive damages claimed here by the Organization. We are struck with their lack of unanimity of findings and their widely divergent philosophies of contract enforcement. It is our conclusion that the most persuasive arguments lie with those who were guided by the well established principle that damages may be awarded in cases of this type only in the amount and to the extent that monetary losses have been suffered by the claimant employes.

The statement of claim also requests the payment of travel expenses and other necessary expenses as provided in Article 2, Rule 214. The Board finds that no such expenses were incurred which are reimbursable under the terms of the contract.

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 Rule 418 was violated to the extent shown in Opinion, but no monetary loss has been shown.

AWARD

Part (a) of claim sustained to the extent indicated in Opinion and Findings; part (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1971.

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