NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22194
THIRD DIVISION Docket Number CL-21165

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7784) that:

(a) Claims of Betty J. Van Overen dated May 25, 1969, claiming four hours' pay for each car load inspection made by the R.P.I.A. at the Spartan Stores Warehouse and at any other point that was formerly done by the clerk assigned to Job FG-16-F at Grand Rapids. Duties included in said assignment as stated on Bulletin #11 dated February 19, 1969; car load inspections, freight claims, claims correspondence, etc., claim to continue in force until settled.

(b) Claims of Betty J. Van Overen, dated December 26, 1970, claiming four hours' pay for each car load inspection made by the R.P.I.A at the Spartan Stores Warehouse and at any other point that were formerly done by the clerk assigned to Job FG-16-F at Grand Rapids, Michigan. Duties of assignment as stated on Bulletin No. 38 - Group 1, October 28, 1970. Claims to start October 22, 1970, while temporarily assigned, while working extra board clerk assignment, and subsequently assigned permanently November 5, 1970. Claim to remain in force until settled.

OPINION OF BOARD: The claimant was regularly assigned to the clerical position FG-16-F located in the Freight Office, Grand Rapids, Michigan with duties that include car load inspections and freight claims. This claim results from an alleged contract violation because carrier contracted out carload inspections covering non-perishable freight to R.P.I.A., an agency that specializes in inspection of freight.

The claim is divided in two parts, (a) and (b). Claim (a) is dated May 25, 1969 and is for 4 hours pay for each carload inspection by R.P.I.A., at Spartan Stores Warehouse and at any other point formerly done by this clerk at Grand Rapids. Claim (b) is dated December 26, 1970

seeking the same hours pay for each carload inspection by R.P.I.A. The difference in the claims relates to interruption in service in that claimant was temporarily on an extra board assignment from October 15, 1970 to October 22, 1970. Both parts are alleged to be continuing claims until settled.

A previous case, F-4-67, involved the same question at the Grand Rapids location between this carrier and a predecessor employe which resulted in an understanding at the conference held on January 20, 1969, the nature of which is in conflict here. The understanding is described in the attachment to employe's submission to the board as Exhibit "A" made up of two pages. The first page appears to be an internal document signed by J. R. Weaver, Jr. requesting payment of the claim in a stated amount. Significantly, the following sentence is included: "This with the understanding that no precedent will be established and without prejudice to our position in this or any similar claim."

The second page is a letter dated February 3, 1969 signed by the same carrier representative and provides in full:

> "J. B. Kuhnie, Jr. Chicago - February 3, 1969
>
> Fort Wayne Division Clerical Case No. F-4-67 involves the following:
>
> "(a) That the Carrier violated the Rules Agreement dated May 1, 1942, as amended and particularly the Scope Rule, Extra List Agreement No. 21, and others in effect between the Brotherhood of Railway and Steamship Clerks and Itself, when the Carrier assigns, allows or permits the Railroad Perishable Inspection Agency to make carload damage inspections at various firms in Grand Rapids, Michigan, which work is the assigned duty of the clerical employees at Grand Rapids, Michigan.
>
> (b) That T. C. Oullette, H. Basore, each be compensated with eight (8) hours pay per day retroactive to September 8, 1966 and for each and every subsequent date until this violation is corrected."
>
> Investigation developed that prior to the date of this claim clerical employees at Grand Rapids, Michigan, performed the work of making physical inspections of carload damage non-perishable freight.

"During a special meeting held on January 20, 1969, with the Clerks' Division Chairman, the monetary claim in this case was settled on a greatly reduced basis, with the understanding that the work of inspecting non-perishable carload freight would be returned to clerical employees at Grand Rapids, Michigan.

While the claim was settled without precedent to the respective positions of the parties, new claims which in our opinion cannot be successfully denied will result if the work is not returned to the clerical employees.

We suggest that you handle with all concerned on the Northern Region to preclude this possibility."

(a) G. R. Weaver, Jr.
(t) G. R. Weaver, Jr."

The carrier makes a number of procedural objections to this claim which we will consider at the outset. These involve such matters as: the claims are vague and indefinite; they are not specific as to dates; they involve pyramiding; they are not continuing; and they were not timely filed within the rule requirements.

We are not inclined to favor these procedural objections. In the first place, there are well reasoned decisions of this Division that have had no difficulty sustaining claims that depend upon facts easily ascertainable from the records of the Carrier. For example, See Award 10955 (Dolnick).

We believe the carrier can provide the necessary information here as to the dates of the non-perishable car inspections covering the periods stated. The Claimant's explanation for the division of the claim into two parts appears acceptable in that it is based on a break in service when she served on the extra board. Therefore, we can see no reason to view this as pyramiding of claims. Moreover, these inspections are continuing and there is no reason to restrict the claims to fixed dates. Under the circumstances the employee's explanation that it waited a reasonable time for carrier to comply with the earlier understanding before filing its claim, has justification. We have examined the dates closely and we cannot say time limitations of Rule 7-B-1 were violated.

On the merits the carrier asserts a number of arguments to the effect this work, under the applicable scope rule and bulletin, is not exclusively the work of the clerks here. We believe these arguments miss the point and fail to give value to the understanding reached in the above cited F-4-67 case which, by its terms, established the required rights for clerks at Grand Rapids locations. It should be emphasized this case involves specific locations, rather than a question of system-wide exclusivity. We rely upon the statements of the parties as to the nature of the January 20, 1969 understanding and the terms are reflected in the two pages referred to above and designated as Employe's Exhibit "A". We do not believe page 2 of this understanding can be disregarded as an internal document, as carrier attempted to do before this Board. That argument was not made on the property and it cannot be raised here for the first time under well established rules.

The carrier relies upon the phrase, quoted above, to the effect the understanding would have no precedential value and was without prejudice to the carrier's position. Presumably, the carrier believes this provision serves to defeat this claim. To adopt this view we must believe, somehow, the carrier gave rights with one hand and took them away with the other. Such an agreement would be illusory and we do not construe this provision in this way. We must interpret the agreement to give effect to its terms. This provision reasonably may be viewed as protection for the carrier in any other case at any other point, away from Grand Rapids. The very essence of the understanding contemplated future actions in that

> "...the work of inspecting non-perishable carload freight would be returned to clerical employees at Grand Rapids, Michigan."

The employes claim they did not receive the quid pro quo for this understanding in that the carrier failed to live up to its promise. We agree with their view.

We are not convinced the carrier representative lacked authority to do what was done here. In addition, we do not see that the merger agreement affected these responsibilities. Whether we rely upon the law of agency or contracts or the doctrine of promissory estoppel, the results are the same. The employes compromised their earlier claims and in doing so acted to their detriment. They relied upon the carrier's promise to return this work to the clerical employes at Grand Rapids and the carrier cannot be permitted to do otherwise at this late date. On this basis we hold inspections by R.P.I.A. of non-perishable freight at Grand Rapids during the periods alleged, violated this understanding. We have reviewed

those awards cited to this Board to the effect that settlement agreements made on the property do not constitute binding interpretations of agreements. By way of illustration, see Award 16544 (Devine). We believe these are clearly distinguishable from the instant case.

The more difficult question remains for consideration. The claimant received full pay during regularly assigned days covering the period of these claims. Nevertheless, she seeks a right to 4 hours pay for every improper inspection. The carrier, for its part, claims such inspections require only one half hour and steadfastly maintains claimant suffered no monetary loss.

We are entering upon well-trod ground but a review of the numerous awards here indicates it might better be described as a morass covered with entanglements. Needless to say, we approach the terrain with some hesitancy.

This question has produced a clear division in the awards which has not been resolved over the years despite court considerations and legislative enactments. The problem is now somewhat better defined but the divided views continue and at this late date the question remains virtually an open matter.

The carrier considers the question in terms of a punitive award or a penalty and its logic is direct: there is no provision for a penalty in the agreement and the Board may not write one in for the parties. See Award 18687 (Rimer). The Employes position is explained in its submission to this Board as follows:

> "...the question of whether or not she did, in fact, suffer a monetary loss is irrelevant and immaterial. The fact is that the Rules Agreement was violated when she was deprived of work included within the assigned duties of her position and she is entitled to reparation or damages therefor."

The same submission suggested the claimant may have been deprived of overtime and therefore monetarily aggrieved. No proof of such loss was attempted and under the well established rules of this Board speculative claims cannot be honored. See Award 16490 (Perelson) We view this claim on the basis quoted above.

These opposing views are reflected in the numerous awards, briefs and articles reviewed in connection with this case. Each side

includes examples authored by respected neutrals yet the elusive nature of the conceptes coupled with the strong feelings generated and reflected in the dissents has tended to produce a condition one neutral described as "confounding conflict." Award 13237 (Dorsey) We make these prefatory remarks by way of explanation for the extended opinion that follows.

We do not believe the view calling for imposition of a penalty should prevail. The underlying agreement of the parties provides no basis for punitive sanctions and there is no foundation in this record to imply such a provision. In Second Division Award 3967 (Johnson) the principle was expressed well:

> "...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 a better position than the Board to decide those matters; they are the only ones entitled to decide them."

In one of the now-famous Trilogy cases the Supreme Court through Justice Douglas endorsed this view in the following quotation:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

The subject raises questions of deeper implications related to the proper roles and goals of arbitration and collective bargaining. Much has been written about this and there are many views of diverse nature on various aspects. However, there is basic agreement on at least one matter: arbitration and collective bargaining should not be viewed as alternative and competing processes for securing and establishing rights. The prevailing concept is that rights and remedies are established in the basic collective bargaining agreement and arbitration is the means of enforcing those rights. In this context the Board, when it demonstrates a willingness to provide a penalty where none exists, displaces the collective bargaining process and embarks on a novel course, one that is outside the contemplation of the courts and the arbitrators themselves.

The late arbitrator Harry Shulman pointed out the real limitations inherent in the arbitration process, saying:

> "The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the court's aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award?"
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> Shulman, Reason, Contract and Law in Labor Relations, 68 Harv. L.Rev. 999, 1024 (1955).

It is puzzling therefore that the Third Division awards which follow the penalty approach have not seen fit to come to grips with the basic question here: If we subscribe to the principles of collective bargaining, why isn't it preferable to leave the matter of penalties for negotiation by the parties?

The question is rehetorical but the answer or explanation may be provided by another distinguished Arbitrator Emanuel Stein:

> "Sometimes the question whether arbitration is a substitute for litigation or for the strike seems less relevant than whether it is substitute for collective bargaining. For the behavior of the parties sometimes gives rise to the suspicion that they have abdicated their responsibilities to resolve their difficulties by negotiation and have deposited them in the lap of the arbitrator
>
> in the expectation that he will provide the answer towards which they were either unwilling or unable to strive." Stein, Remedies in Labor Arbitration, in National Academy of Arbitrators, Challenges to Arbitration, 39, 44 (McKelvy ed. 1960).

We are not in a postiion to suggest that the parties in railroad negotiations are abdicating their responsibilities. We doubt this as a general proposition. We do know, however, the attention and intensity given these awards could give rise to the speculation (if not the expectancy) that a solution to this question could develop out of the awards of the National Railroad Adjustment Board rather than collective bargaining. This would be unfortunate for good reason.

Historically, too much time, too many awards and too much energy of this Board has been devoted to this matter with little to show for it in terms of resolving the problem. One might speculate as to the reasons: Certainly in the minds of some the evisceration of stare decisis has played a part although there may be room to argue that it never applied. 73 Corpus Juris Secundum 482. Probably the process itself is at fault in that the polarized positions before this Board tend to present the issue as all black or all white. Few venture into the grey areas where there may be approaches, if not solutions. One exception, Award 18792 (Rosenbloom), attempted a novel approach where no past or present damages could be established and provided for in futuro losses should there be a lack of work due to the contract violation.

Of course, we find more to fault than favor in this decision but, in another sense, it deserves credit for its effort to bridge the widening schism.

In the broad field of arbitration this same problem has received considerable attention. (It would be a presumption to think it is a problem peculiar to railroading.) We mention a few awards where approaches and solutions are suggested. See Globe-Union, Inc. v. U.A.W. Local 509, 42 L.A.713, 720 (1963)(Arbitrator Prasaw)and Gulf Oil Corporation, Port Arthur Refinery and Oil, Chemical & Atomic Workers Int'l Union, 30 L.A. 374, 378 (1958) (Arbitrator Coffey). We do not suggest the ideas expressed in these and other cases have application in the railroad industry. Our discomfort arises more because we find no indication they have been considered or explored.

Probably a measure of blame, if blame we are seeking, should be assigned to the awards themselves. It is apparent they follow a pattern of rhetoric where the elliptical phrase or the equivocation is accorded a place of honor and even repeated in award after award. In this we provide no examples but it should be apparent something is amiss. Award 19635 (Hayes) sustained a penalty award and called upon the Board "to chart a new course", and in making this plea seems to have been an unheard voice in a plethora of decisions. Putting aside the questions as to how a new course could be charted or even contemplated, the point we make is that the arbitration process under the National Railroad Adjustment Board, whatever its capabilities, has not resolved the question, one that has continued for four decades.

By way of contrast, the great accomplishments of the collective bargaining process during the last half century are noteworthy in terms of the innovative solutions achieved with respect to problem after problem. And these innovative approaches have been most notable in railroad collective bargaining. On this basis, when we look to the larger objectives, there is wisdom in the view advocating restraint in following the penalty award approach.

When we consider the law and the decisions of this Board we find no proper justification for penalties. At the outset, however, it is important to make clear we are discussing the awards of this Board that authorize money payments for violation of the agreement, regardless of proof of loss or damages where the purpose is to impose punishment for the breach of the agreement. We are not referring to awards where the agreement expressly provides for a penalty or provides a basis for implying one. It is our position that these awards, and this approach (hereafter referred to as the "penalty award approach"), are incorrect under the authority of Brotherhood of Railroad Trainmen v. Denver and

Rio Grande Western Railroad Company, 338 F.2d 407 (10th Cir. 1964) Cert. denied, 380 U.S. 972 (1965).

We make a further distinction for the sake of clarity. Penalty awards have been rendered in cases involving scope rule violations and system-wide exclusivity. Awards such as Second Division Award 1369 (Wenke) come to mind. Whether this would make a difference we have no viewpoint and we reserve judgment in the light of this opinion. That is not involved here. Although the numerous awards covered necessarily include an admixture of scope rule violations and others, our references to those awards are in relationship to the contract violations such as those under consideration here.

Clearly, this whole subject has been the source of considerable confusion. A few awards have been straight-forward and direct in that they described the money damages as a penalty. See Award 2277 (Fox); 12374 (Dolnick); and 17523 (Rohman). The greater number, however, chose a different terminology and it requires a close analysis of the underlying facts to determine what had been done. In Award 10033 (Webster) it was even termed unfortunate the word "penalty" crept into the language of the Board. It was Cardozo who said "The rule that functions well produces a title deed to recognition." Nature of the Judicial Process, 102, 103. On this basis, the penalty award approach deserves no such claim. For example, the following involved penalty awards but in each case it was called something else: In Award 10051 (Dugan) it was said the award was made to enforce the scope of the agreement; 11701 (Engelstein) it was claimed the award was not a penalty - it was a claim for damages because of carrier's breach of the agreement; 11984 (Rinehard) it was described as a consequence of the violation, not a penalty; 15888 (Heskett) the award was authorized in order to follow "...the more meritorious views in consideration of the foundational concepts of collective bargaining and enforcement of the parties' agreement"; 17523 (Rohman) the penalty argument was said to be outweighed by considerations of the sanctity of the agreement; in 17973 (Kabaker) the award is called reparations for carrier's breach; 18287 (Dorsey) authorized the award because the work and emoluments were vested in claimants; in 18500 (O'Brien) the penalty award is termed compensation.

The common motivation for all these awards appears to be a desire to curtail contract violations and dispense justice in the particular case. But a rule of law must be grounded upon more than an ephemeral desire to "do justice." Brandeis is quoted by a biographer as saying:

> "Justice is but truth in action, and we cannot hope to attain justice until we have the proper respect for truth." Mason, Brandeis, 437

The desire to "do justice" has probably been a larger factor than we realize in deciding arbitration cases. Even distinguished authorities have rendered decisions on this lone basis. See Electric Storage Battery Co. (Local 265, IUE) 19 AAA 22 (1962) (Arbitrator Archibald Cox). There it had the virtue of being expressed with eloquence. The difficulty with the approach, of course, is that it invariably leads to a dispensation of subjective justice and as a solitary test it fails. A Second Division award by a revered neutral, Referee Carter, explained it succinctly in Award 1638.

> "The power to inflict penalties when they appear just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

When we seek out a legal basis for these awards we find the proponents of the penalty award approach generally hearken back to the Presidential Emergency Board of February 8, 1937, Chaired by John P. Devaney, Chief Justice of the Minnesota Supreme Court. That decision is quoted in Award 685 (Spencer) of this Division:

> "The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation." (emphasis added).

This statement and its variations have been repeated in many subsequent awards. Award 20311 (Lieberman) of this division is a fairly recent example.

As we see it, the underscored statement would be considered wise advice to a legal draftsman about to draft a legislative provision or a contract where he has control over the wording. In that activity everyone would agree it would be prudent to include penalties for violations in order to ensure effective compliance. But such counsel and advice can play no role in a situation where the legislation has

been enacted or the contract has been executed and the provision for penalties has been omitted. It cannot be twisted then into a rule of construction that permits the addition of penalties where they did not exist and there is no basis to imply them. In this context the Devaney Boards' statement had dubious value when it was made in 1937 and the years since have not given it validity.

Nevertheless the penalty awards rely upon the Devaney Board and the logic is unstated but it appears to be that every right calls for a remedy and a contract that seems to provide a right, requires that a remedy be added. As it happens our system of jurisprudence does not follow that approach.

We have always been mindful of the anomaly of "rights without remedies". One legal scholar described them as "ghosts in the law" presumably because they lack form and substance. Our point here, if we may continue the metaphor, is that there is considerable danger involved when we arbitrarily add a remedy to a so-called right, just as there is a hazard when we breathe life into a corpse: a Frankenstein monster may result.

This subject is well handled in Corbin on Contracts, S990:

> "In the whole field of law there is no right without a remedy. The reason that this statement is true is that the only useful test as to the existence of a right is that *some* legal remedy is provided. It is somewhat more enlightening to say that, where no remedy is provided, there is neither right nor duty. In the progress of any human society, the recognition of new rights and duties, by both courts and legislatures, is necessary. This recognition is made effective by providing and enforcing a remedy for breach. Until this has been done, although advocates and pressure groups with an interest to serve may assert their existence from the house-tops there is no sufficient reason for saying that rights and duties exist as a part of any legal system."

At this stage it may appear trite to state that it is the province of the legislature to make laws and the courts to enforce them. Barrett v. Indiana, 228 U.S. 26, 30 (1913). When this Board authorizes a penalty not provided for in the agreement it makes a new law. This is a central, and we believe, fatal flaw in the entire approach we are considering in that it requires this Board to step beyond the bounds of its authority and usurp legislative powers. And nowhere is this venture into legislation more apparent than in the awards dispensed in the penalty cases. In Award 16 of Public Law Board No. 249 Chairman Bailor sustained a claim to the extent of one-half the amount requested by the claimant. Similarly, Award 19635 (Hayes) authorized another Solomon-like award. We believe this argument is sound and, having stated it once, we will not dwell upon it. We prefer to rely upon those arguments that point up the anomalies and inconsistences of the penalty award approach.

For instances, we are caught up in a maize when we attempt to understand the real nature of these claims for penalty awards. If they are grounded on the analogous law of contracts we would have insoluble difficulties as we explained. But, we are told, they are something different. This Board is urged to consider the dissent in Award 20311 where the Devaney Emergency Board was defended and it went on to point out that this Board

> "...has jurisdiction to resolve disputes growing out of grievances that concern more than the application of an Agreement."

It is far from clear what is meant here and there is ample authority in the awards of this Board permitting rejection of claims or arguments that are unclear or undeveloped. The Board should not be forced to speculate or presume. Nevertheless, we prefer to deal with this argument on a substantive basis.

The statutory wording of the Railway Labor Act makes the apparent distinction regarding disputes, stating: "grievances or out of the interpretation or application of agreements." 45 U.S.C. S151(a) (5), S153 First(i). The Board, therefore, is authorized to deal with grievances other than contractual claims. These may take the form of statutory law or they may be civil wrongs founded on tort law. The argument would follow that penalty claims based upon such tort law are appropriate for this Board. The trouble is, even if we accept this premises, we are lead into further anomalies.

The penalty awards of this Board treat penalties and compensatory damage awards as mutually exclusive remedies. If compensatory damages cannot be established the claimant seems to be afforded the penalty as an alternative. We have examined numerous penalty awards and they invariably provide for a penalty in lieu of compensatory damages. The distinction we make is fundamental, not obscure, in the tort law on penalties. In Stein on Damages and Recorvery, S182, page 357, reference is made to punitive damages under tort law:

> "...by whatever name the award is designated, it is in addition to, and not in lieu of, the amount which is awarded to the plaintiff as compensation for his loss, and the right to an amount of punitive damages is measured, not by the loss to the plaintiff, but by the circumstances under which the injury is inflicted." (emphasis added).

The difficulty with this whole approach is that scant attention has been paid to the "circumstances under which the injury was inflicted" in the penalty awards of this Board. They have developed along different lines and the tortious basis for these claims, largely, has not been met. There are exceptions: Award 10511 (Dolnick) states that punitive damages would be justified by proof of malice or fraud. See also Awards 3423 (Blake) and 17574 (Lieberman). Outside of railroading Arbitrator Valtin rendered an award in Bethlehem Steel Company, Stillton Plant and United Steelworkers of America, Local Union No. 1688, 37L.A.821 (1961) that amounted to a penalty for contract violation where there was no provision for such penalties. The basis for the award was the repeated violations of the contract where the employer knew its actions violated the employes' rights. In effect, this amounted to a willful and intentional contract violation although the arbitrator did not use these terms.

In the case under consideration, it may be said the carrier repeatedly violated the contract or understanding. But this, of itself, does not bring the case within the ambit of these awards. The carrier cannot be accused of intentional or willful wrongdoing in the sense required. The carrier relied on its interpretation of the understanding, albeit a wrong interpretation. Nor can we say the carrier evidencedmalice, fraud or any other tort basis. As a consequence there is no grounds in that developed law for the remedy sought here. We would do considerable mischief with our fundamental concepts if we were to permit penalty awards without insisting upon compliance with the well defined requirements of the underlying laws.

Needless to say we know of no statutory basis for a penalty here and none has been advanced.

Examples could be multiplied. Another anomaly requires that we look back to the Devaney Presidential Emergency Board. A portion of the above quotation from that Board has received insufficient attention in the subsequent awards. Referring to penalties the Board said, and we repeat in part:

> "...there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case."

Phrased differently the Board seemed to question the propriety of awarding penalty payments to individuals who have not been harmed, and even further, questions which individuals might have the better claim. These questions deserve answers because penalty payments take on the appearance of fines imposed by a policing authority. Even if we assume en arguendo that penalties are appropriate it is reasonable to question whether or not these penalties should be paid to a public authority rather than paid to an individual claimant. See Stein, supra, S182, page 358. Clearly, there seems to be no justification for windfall payments to individuals who are neither harmed nor discomoded. Perry v. U.S., 294 U.S. 330, 354 (1935). Frequently, such recipients are little more than witnesses to the occurrence complained about, no more. This is illustrated in Award 10575 (LaBelle) where it was apparent the penalty claim might have been made by a different individual with a better right. The referee was undisturbed by this fact and explained this was no concern to the carrier because its contract violation called for a penalty in order to maintain the integrity of the agreement.

Another thread runs through the fabric of these penalty award decisions and asserts that each claim should be judged on a case by case basis rather than upon general pronouncements. See Award 18773 (Edgett). This amounts to a restatement of the common law methodology. We do not, however, see it as a principle that advances our understanding or improves our comprehension of this difficult problem. The real problem is that this phrase has been woven into the pattern of penalty awards to enable the neutral "to dispense his own brand of industrial justice." We have pointed out previously this is condemned by the Supreme Court. United Steelworkers v. Enterprise Wheel & Car Corp., supra.

A particularly injurious aspect of the penalty award approach is evidenced in Award 17801 (Kobaker) where an improper assignment resulted in a contract violation. The unusual feature of the case was that claimant earned considerably more for only four days work on the improper assignment than he would have earned in five days on his regular job. It is difficult to see how he was harmed but the neutral sustained a money award in accordance with the penalty award approach. For a further example, see Denver and Rio Grande Western Railroad Company v Blackett, 398 F.Supp. 1205 (D.C.D. Colo. 1975) reversed on other grounds 538 F2d 291 (10th Cir. 1976) where the court reduced the award claimed on the well established basis of mitigating damages which the Public Law Board apparently ignored affording the claimant a substantial windfall.

To summarize, we have examined the goals to be achieved by the penalty award approach and we find they are inconsistent, if not in direct opposition, to the aims and objectives of collective bargaining. When we look to its origin there is a dearth of support in the law and decisions. Going still further, its application would necessarily require this Board to usurp legislative powers, lead to anomalies and inconsistencies amounting to radical departures from established principles. By all indications it is a doctrine that is unique and sui generis in one line of cases of the National Railroad Adjustment Board, and beyond this has little to commend it.

When we look to a separate yet analogous area we find no support for this approach. The authority is predominantly the other way. For instance, in Local 127, United Shoe Makers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3rd Cir. 1962) a divided court concluded as a matter of first impression that punitive damages were not permissable in a Section 301 enforcement action under the National Labor Relations Act. Speaking for the majority Chief Judge Biggs said:

> "It is the general policy of the federal labor laws, to which the federal courts are to look for guidance in Section 301 actions, to supply remedies rather than punishments [and this]....does not include the power to award punitive damages." page 284.

This view of Section 301 has been uniformly followed in subsequent cases. See Kayser - Roth Corp. v. Textile Workers Union of America, 347 F.Supp. 801 (E.D.Tenn. 1972) aff'd 479 F.2d 524 (6th Cir. 1973) cert. denied 414 U.S. 976 (1973). See also Federal Prescription Service, Inc. v. Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO, and its Local P-1149, 527 F2d 269 (8th Cir. 1976).

During the past decade support for the penalty award approach has been mustered mainly by references to the 1967 court of Appeals decision in the Fourth Circuit, Brotherhood of Railroad Signalmen of America v. Southern Railway Company, 380 F.2d 59 (4th Cir. 1967). Two Third Division awards by outstanding neutrals are prominent in that they relied upon this decision to reverse their former positions, and accordingly, adopted the penalty award approach. See Award 15689 (Dorsey) and 16009 (Ives). Subsequent awards by other neutrals followed this same view and on this basis the Southern Railway case deserves close examination.

That case involved two awards of the National Railroad Adjustment Board that had been submitted to the District Court for enforcement. Briefly, they involved contracting out that gave rise to scope rule violations. The affected employes in both cases had been "fully employed" at all relevant times. The Board authorized damage awards, presumably following the reasoning of the penalty cases. The District Court refused enforcement on the grounds that no damages had resulted from the contract violations because the measure of damages under contract law is compensation for reduced earnings. Absent such reduction the Court felt an award for damages might have the "flavor of punitive damages" and denied the award save for nominal damages. On appeal the opinion of Chief Judge Sobeloff is enigmatic, less because of what is said but more because of what is supposed to have been said.

First, the court's opinion seems to have focused one eye on the then recent decisions of the Supreme Court while keeping the other eye on the then recent 1966 amendments to the Railway Labor Act, 45 U.S.C.A. S153, S3 First (m), First (p), that severly limited judicial review of Railroad Adjustment Board awards. It is indeed interesting that those amendments became effective twelve days after the District Court judgment in that case. On this basis it has been argued that the Court's expressions regarding monetary awards lacked validity. See Award 15624 (McGovern). The opening considerations of the Court related to questions of judicial review and the court decided to remand the awards to make a determination in the record that the Board had taken into account the contract of competing unions under the Supreme Court's mandate in Transportation - Communication Employees Union v. Union Pacific Railroad, 385 U.S. 157 (1966).

The decision, therefore, had been effectively made when the court went on to consider the District Court's views on monetary awards. It follows necessarily that everything the Court said thereafter was dicta. Subsequent difficulties with this decision are related to the Court of Appeals view that "full employment" did not necessarily foreclose further compensatory damages. Referring to the more narrow and restrictive approach of the District Court, the opinion said:

> "This approach, however, completely ignores the loss of opportunities for earnings resulting from the contracting out of work allocated by agreement to Brotherhood members - a deprivation amounting to a tangible loss of work and pay for which the Board is not precluded from granting compensation."

Notice the court here addresses the matter of jurisdiction and it did not say the Board could make such an award without proof of loss. This point will be treated further.

Then, to add to the problem, the court went on to administer what proponents of the penalty award approach might consider the coup-de-grace to the application of contract law principles to collective bargaining agreements, saying:

> "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 purpose of goods and services, nor is it to be governed by the same old common-law concepts which control such private contracts."

These are strong views, stated with emphasis, by a respected court. Yet, we have difficulty accepting them in the sense advocated by the penalty awards. First, they are not holdings and the above-quoted views are extraneous to the essential rationale of the decision. Granted, they represent strong dicta. However, even when they are viewed in the most favorable light we conclude there is nothing there to validate the penalty awards of this Division. In no sense does the Southern Railway case sanction penalty awards at variance with the traditional concepts of the law of damages. A close reading of the opinion indicates the court rejected the District Court's more narrow view on the measure of damages applicable to the "full employment" approach. All that can be said of the Court of Appeals opinion is that it mandated a different approach on compensatory damages. The thrust of its concern was the "loss of opportunities for earnings" which could have occurred on overtime or off-days beyond normal hours. The Court did not substitute a penalty approach. The previous view seems to have been that a claimant who had been fully employed when a contract violation occurred is precluded from a damage award on the assumption no injury had occurred. The Southern Railway dicta contests that and indicates there may well be losses despite such full employment. But it did not establish a presumption of such loss nor did it indicate that proof of loss was unnecessary.

In this connection the Southern Railway case did not provide a departure from prior awards of this Division. See Award 14981 (Ritter); 14853 (Dorsey); 17064 (Dugan). In fact the Dorsey Award includes the following quote of particular interest here:

> "The argument has been presented that when work has been wrongfully removed from employees 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 employee claimant must be proven." (emphasis added).

Referee Dorsey's view expressed in that award is sound and what is more, nothing in the Southern Railway opinion stands at variance with it. We might have hoped that the Court would have provided us with some clarification in this regard. But, the absence of such clarifying words cannot be viewed as an implied holding to overturn what had been settled and accepted law: that a claim for compensatory damages requires proof of loss to be sustained.

In reliance upon the Southern Railway case Referee Dorsey's award 15689 authorized a money award without proof of loss. That award will be discussed subsequently. It is sufficient here to point out Award 15624 (McGovern) analyzed the same opinion, quoting from it at length, and reached the opposite conclusion on the damage award relying on Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, supra, which required proof of loss in accordance with the law of damages applicable to contracts. The difference, however, is more than a matter of opposing awards following the authority of different court cases. The Southern Railway opinion simply does not provide authority for the penalty awards that cite it.

We have already quoted the Southern Railway opinion and the Supreme Court views that collective bargaining agreements should not be "governed by the same old common law concepts which control...contracts." Referee McGovern in Award 15624 made reference to this quotation saying it "offers little assistance in guiding us toward resolving this knotty problem."

We agree with Referee McGovern and we necessarily reject any view that interprets these phrases to mean the Supreme Court was urging that we abandon settle principles before any developed, substitute rules were in existence. A new common law applicable to collectively bargained agreements would require time to develop and mature. Only in mythology

can the goddess of wisdom, Minerva, spring full blown from the mind of Jupiter. The Supreme Court aside, this doesn't occur in the world of mortals. Moreover, in the decade since the Southern Railway case there is slim evidence the development of a new common law has begun, let alone progressed.

If the Southern Railway case truly contemplated the kind of holding suggested by the cases authorizing penalty awards, the subsequent history of that decision would have made this clear. More than ten years have passed since that decision and not one subsequent federal court decision has cited the Southern Railway for the position on damages advanced in the penalty awards. This time period, of course, coincides with the decade since judicial review of Board awards have been been curtailed. This may explain the paucity of railroad cases but the rule ascribed to the Court of Appeals opinion involves a substantial departure on damages which would effect a broader field beyond railroads. Only one state court case cited the Southern Railway case for on the matter of money damages. Saginaw Pattern Makers Association v. Saginaw Pattern & Manufacturing Company, 233 NW.2d 527 (Court of Appeals Mich. 1975). Even in this lone case the Michigan court expressed views that could only be interpreted as opposed to the penalty award approach.

The penalty awards of this Board subsequent to the Southern Railway case includes some of the more experienced and distinguished referees. The following are listed as examples, and, in no sense is this this list intended to be complete: Award 15689 (Dorsey); 15888 (Heskett); 16009 (Ives); 17523 (Rohman); 17801 (Kabaker); 18500 (O'Brien); 18942 (Dolnick); 19337 (Edgett); 19635 (Hayes); 19840 (Blackwell); 19899 (Sickles); 20311 (Lieberman). We single out only two for specific comment, Award 15689 (Dorsey) and Award 19899 (Sickles).

In Award 15689 Referee Dorsey reviewed the legislative amendments and the court decisions, particularly the Southern Railway case, and concluded with this statement:

> "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."

This statement serves as an example of the elusive nature of the concepts we struggle to comprehend. This holding makes no reference to punitive damages nor penalties. Even a dedicated opponent of the penalty award approach might find little or nothing to oppose in what is said. The difficulty comes about because of what is unsaid. Following the above-quoted statement this award went on to authorize payments without proof of loss resulting from the violation of the agreement. In other words, the total effect of the decision was to authorize a penalty.

In no sense are we suggesting this referee evidenced a lack of candour in this award. His record on this difficult question is displayed in detail in carrier's dissent to Award 15680. And we agree with the Labor answer thereto that his record reflects a conscientious search for a proper disposition of the question. We cite Referee Dorsey because this is a leading award (a measure of the referee's esteem) and it illustrates the perplexing nature of the concepts involved.

Award 19899 (Sickles) involved the peculiar requirements of notice on work contracted out under the Maintenance of Way Agreement and on this basis alone should be distinguished from the present case. However, the Employes' brief places some reliance on it as authority for the penalty award approach. We do not see it in this light. The opinion flirts with that approach and quotes the Southern Railway case at length, particularly the reference to the "loss of job opportunities." Nevertheless, the opinion took pains to point out the damages claimed in this "full employment" situation were not speculative but a tangible loss of pay citing specifics to justify the money award. It follows that a reasonable interpretation of this award is that its holding finally embraced the traditional compensatory damage approach. The quantum of proof accepted may be a subject for debate but proof there was. On this basis the award cannot stand as authority for the penalty award approach.

In conclusion and after full and complete consideration of this matter we rely upon the holding of Brotherhood of Railroad Trainmen v. Denver and Rio Grande and Western Railroad Company, supra, where an individual injured by breach of an agreement was limited to the amount he would have earned under the contract less such sums as he in fact earned in accordance with the general law of damages relating to contracts. There the award was limited to nominal damages. We are persuaded that nothing has occurred since this decision in either the legislative or judicial arenas that detracts from the essential validity of this conclusion. See IBEW Local No. 12, AFL-CIO v. A-1 Electric Service, Inc., 535 F.2d 1 (10th Cir. 1976).

Referring finally to the question at hand, for the reasons given, we conclude that a damage award will be limited to a nominal award of $1.00 for each violation on the grounds the claimant is not entitled to a penalty award (as the issue was narrowed before this Board) and she failed to provide proof in the record, beyond speculation and conjecture, that she could establish that the contract violations resulted in loss of earnings opportunities for work on overtime or at other times when not on duty and under pay.

We do not lose sight of carrier's contention the inspections required only one half hour. This was not an admission that claimant actually suffered a loss of earnings to that extent, nor was it claimed. Accordingly, we hold the burden of such proof of loss is on the claimant and we are not provided a basis here for holding this burden has been met.

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

The Carrier violated the agreement.

A W A R D

Claim sustained to the extent of nominal damages as stated in this opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1978.

LABOR MEMBER'S DISSENT
TO
AWARD 22194 (Docket CL-21165)
(Referee Wallace)

Award 22194 as it pertains to "damages" is in error and woefully inadequate for the purposes of the Railway Labor Act. It is based on faulty premises and the Referee's uncontrolled desire to attempt a "scholarly treatise" on a subject about which he refused to become informed. He was apparently so far out in his "treatise" that the "losing party" pressed to move for adoption of this erroneous award. The award requires explanation and dissent.

At all times relevant to this dispute, a position identified as Job No. FG-16-F, with the title of O.S.D. Clerk, was maintained in the Grand Rapids Freight Office with assigned hours 8:00 a.m. to 5:00 p.m. (one-hour lunch), Monday through Friday, assigned rest days of Saturday and Sunday, and assigned primary duties of:

> "Carload inspections, freight claims correspondence, demurrage, sort inbound and outbound waybills for reporting, match memo waybills with revenue waybills."

Through the exercise of seniority, i.e., bulletin and award, Claimant was regularly assigned to the position prior to May 25, 1969. Effective October 15, 1970, she was displaced from the position by a senior employe exercising seniority. Through the exercise of seniority, Claimant was again assigned to the position on October 22, 1970, and remained thereon until November 29, 1971. The claims involve the two periods of time.

On December 8, 1966, a claim was filed asserting violations of the agreement in assigning to Railroad Perishable Inspection Agency at Grand Rapids the work of making physical inspections of carload shipments. The

parties agreed that the claim did not involve inspection of carload shipments of perishable commodities. The claim was settled on February 3, 1969, after conference between the Division Chairman and Superintendent-Labor Relations. The latter stated in his letter of the same date:

> "During a special meeting held on January 20, 1969, with the Clerks' Division Chairman, the monetary claim in this case was settled on a greatly reduced basis, with the understanding that the work of inspecting non-perishable carload freight would be returned to clerical employes at Grand Rapids, Michigan."

Although the agreed monetary settlement was paid in due course, the Carrier did not return to clerical employes the work of inspecting nonperishable carload freight at Grand Rapids. Such inspections continued to be contracted to and performed by the outsider, Railroad Perishable Inspection Agency. On May 25, 1969, a continuing claim was filed on behalf of Claimant, the regularly assigned occupant of Job No. FG-16-F. When she was displaced from the position on October 15, 1970, this portion of the claim before the Board was terminated. When she was again regularly assigned to the position, a second continuing claim was filed on December 26, 1970, with claimed compensation to commence on October 22, 1970.

Following a conference on the claim for four hours' pay for each inspection by RPIA, the Director of Labor Relations (the highest officer of Carrier designated to handle claims) stated in a letter dated December 27, 1973:

> "We have also developed that an estimated 30 minutes per car is required to make a thorough positive inspection, to take pictures when necessary and to prepare required forms."

We concur in the Referee's finding that the Carrier violated the agreement, particularly the understanding set forth in the settlement letter dated February 3, 1969; however, we must respectfully dissent to the finding that Claimant cannot recover damages. Our reasons therefor follow:

To the inexperienced, or to a novice in this field of labor arbitration, the awards of this Board may oftentimes appear to be a maze of contradiction. One must consider the fact that several hundred referees have written more than twenty thousand awards on this Division alone over a period of forty-four years. These referees came to the Board with varied backgrounds: Justices of State Supreme Courts, law or economics professors, practicing lawyers, professional arbitrators, itinerant philosophers, and others. Some came without prior knowledge of customs and practices in the railroad industry and without experience in the interpretation of the collective-bargaining agreements. Each expressed himself based upon his experience, guided by the evidence of record upon the particular issues presented by the parties, and the views expressed by the permanent Members of the Board who had access not only to the case law of this Board but to that of predecessor boards as well. For instance, the Federal Railroad Administration in the World War I period set up Adjustment Boards with broad powers to resolve disputes relative to existing agreements and to make agreements for the parties. Wolf[1/] reports:

1/ Wolf, Harry D.
The Railroad Labor Board. Chicago, University of Chicago Press, 1927.

"So much has been said concerning the manner in which the adjustment boards functioned during the period of government operation of the railroads that it may be well to look rather closely to their accomplishments. From the time of their establishment until April 7, 1920, a total of 3,753 controversies were disposed of by the three boards. 16/ Of this number, Board No. I had to its credit 1,944; Board No. II, 1,276; and Board No. III, 533. Of the total number of decisions rendered by the boards, 1,799 were in favor of the carriers, and 1,369 in favor of the employees.17/

"That these boards were of invaluable service in bringing about a speedy settlement of disputes and in maintaining harmonious relations between the carriers and the employees is indicated by the foregoing figures. In his report to the President for the fourteen months ending March 1, 1920, Director-General Hines paid tribute to their services in the following statement:

> ... The work of these boards of adjustment has been eminently satisfactory. Each board has been composed of an equal number of expert representatives of the management and expert representatives of the employees. With a full practical knowledge of the problems, the members of these boards have approached their work with the desire to do justice and with the recognition of the importance of reaching an agreement. The result is that in the several thousand cases which have come before the three boards which have been created there has been an agreement in practically every case.18/

"It is interesting to note that Board No. I not only disposed of the largest number of disputes, but that throughout its career there was never an appeal to the Director-General, nor even a dissenting vote.19/.....

"16/ Monthly Labor Review, XI (July, 1920), 41.

"17/ The discrepancy between the sum of these two figures and the total number of cases disposed of is explained by the fact that in 121 cases a compromise was effected by the disputants, and 464 cases were withdrawn.

> "18/ Report of the Director-General for the Fourteen Months Ending March 1, 1920, p. 15. Cf. Professor Frank Haigh Dixon, Railroads and Government, p. 185: 'That these boards accomplished the work assigned them with extraordinary success there is no doubt.'"

After termination of Federal control, the Congress enacted the Transportation Act of 1920 which provided for a similar tribunal, the United States Railroad Labor Board. Many of the decisions of those predecessor Boards are still incorporated in current collective-bargaining agreements. Decisions of those Boards are reflected in awards of this Board, particularly the earlier decisions. Added to this mixture of practice, custom and tradition in the industry are decisions of the courts. Thus, an enormous volume of written material going back more than sixty years is available. It is no wonder then that this Referee confessed:

> "This statement serves as an example of the elusive nature of the concepts we struggle to comprehend...."

In Slocum vs. Delaware, Lackawanna & Western R. Co., 339 U.S. 239 (1950), involving the question whether Carrier was entitled to maintain a state court action for declaratory judgment to determine whether clerks or telegraphers were entitled to perform certain work, the Supreme Court held that the Adjustment Board had exclusive primary jurisdiction of such disputes, saying:

> "... The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon.2/ Long and varied experiences have added to the Board's initial

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2/ Commented on Garrison, Lloyd K., The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale Law Journal. Feb. 1937

> "qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

(Professor Garrison wrote a memorandum accompanying his Award 1680 setting forth the reasons a referee should follow precedents. The memorandum has been cited in many awards as the basis for refusing to disagree with prior holdings and has been recommended by some of the permanent Members of the Board as required reading for every new referee.)

In Order of Railway Conductors vs. Pitney, 326 U.S. 561 (1946), in a dispute between two unions as to whose members, road conductors or yard conductors, were entitled to man certain trains within yard limits, the Court said:

> "...An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue..."

The first case to reach the Supreme Court after the establishment of the National Railroad Adjustment Board involved Third Division Award 548. (Prior Award 298 held the Board had jurisdiction of the dispute, denied Carrier's motion to dismiss, and ordered hearing on the merits, which resulted in Award 548.) The Board found that in 1930 Claimants had executed agreements to accept a lesser rate of commission for handling express than that set forth in a 1917 agreement between the union and a predecessor company. The respondent had assumed the agreement on March 1, 1929, and the Board held that the collective bargaining agreement was binding; that the claim was pending on June 21, 1934, that individual employes could

not enter into valid agreements to accept a rate of commission less than that provided in the collective agreement, and ordered the company to pay claimants the full amount prescribed in the collective bargaining agreement. The company refused to comply with the award, suit was filed in federal court, and the Supreme Court enforced the award in Order of Railway Telegraphers vs. Railway Express Agency, 321 U.S. 342 (1944).

In Brotherhood of Railroad Trainmen vs. Chicago River & Indiana, 353 U.S. 30 (1957), the Court sustained an injunction against the union which sought to strike over minor disputes submitted to the Adjustment Board by the carrier.

In Union Pacific vs. Price, 360 U.S. 601 (1959), the Court held that an employe who had received an adverse decision in pursuing his claim before the Board could not maintain a common-law action for damages on the same issue.

In Pennsylvania Railroad vs. Day, 360 U.S. 548 (1959), the Court held that a retired employe could not maintain action in federal court relative to time claims filed during his active work period and that the Adjustment Board has exclusive primary jurisdiction.

In Brotherhood of Locomotive Engineers, et al. vs. Louisville and Nashville, 373 U.S. 33 (1963), the Court held that the union could not strike to enforce an Adjustment Board award.

In Gunther vs. San Diego & Arizona Eastern, 382 U.S. 257 (1965), enforcing First Division Award 17646 (and Interpretation) wherein the Carrier contended (1) that no rule required the appointment of a medical

board and (2) that the decision of its chief surgeon was not subject to review, the Supreme Court said, as to (1) above:

> "The Courts below were also of the opinion that the Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information...."

and as to (2) above:

> "The District Court, whose opinion was affirmed by the Court of Appeals, however, refused to accept the Board's interpretation of this contract. Paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts, the District Court found nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement. As hereafter pointed out Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field."

Andrews vs. Louisville and Nashville, 406 U.S. 420 (1972), held that the Adjustment Board is the exclusive forum for redress, overruling Moore vs. Illinois Central, 312 U.S. 630 (1941) which held that a railroad employe alleging wrongful discharge had an option to treat the discharge as final and file a common-law action for damages, or pursue the dispute before the National Railroad Adjustment Board.

The Court, in construing the Railway Labor Act provisions establishing the Board, relied in part upon testimony before Congressional committees which revealed the powers to be granted the National Board. It is clear that the Board was to resolve disputes involving interpretation of the collective bargaining agreements. The resolution of disputes included a remedy. One need not cite authority to know that issuance of declarations of rule violations would be an extreme exercise in futility without providing an appropriate remedy.

In both Price and Gunther, involving awards of this Board, the Court expressly stated that principles of common law, with reference to employment contracts, were not appropriate guidelines for interpreting collective bargaining agreements. In ORT vs. REA, supra, the lower courts applied common-law principles and held that the claimants were estopped by their individual agreements. Not so, the Supreme Court said, in upholding the award as rendered. See, also, J. I. Case Company vs. N.L.R.B., 321 U.S. 332, decided on the same day.

The Board has consistently applied principles set forth in decisions of the Supreme Court that individual agreements in conflict with the collectively bargained agreement are not binding upon the employe. Some awards are Second Division 1125; Third Division 2576, 2602, 2731, 2841, 3038, 3416, 3517, 3694, 3785, 5302, 5793, 5834, 11958, 12712, 12713, 12667, 13164, 14139, 14208, 14580, 14679, 17158, 19064, 20581, 20705; Fourth Division 2594.

In Gunther, the Court held that the use of a medical panel to provide unbiased medical evidence was reasonable and fair. The award held that seniority rights, provided by the collective agreement, was sufficient reason for refusing carrier an absolute right to unilaterally determine physical fitness of employes - otherwise stated, the common-law rights were superseded by, and subject to, the vested seniority rights of the employe who could not be divested, by the unilateral decision of carrier, of the right to retain and exercise seniority rights granted in the collective agreement. Gunther has been cited in many awards of this Board, some of which are Second Division 5847; Third Division 14246, 14249, 14328, 14853, 14960, 15028, 15689, 15699, 15740, 16564, Serial 238 (Interpretation to Award 17971); Fourth Division 2308.

It is now clear that the Brotherhoods and employes of the railroads have only one forum to which to appeal for redress of agreement violations: this Board. The Supreme Court has spelled out the role of this Board in effectuating the purposes of the Railway Labor Act. It is an administrative agency of the United States specifically chartered by the Congress to exercise its function in maintaining labor peace. Whenever there is a failure, as here, to perform its proper function, to that extent it has failed to perform its Congressionally-imposed duties.

Let us look first to the enormity of the violations in this case. On January 20, 1969, the Carrier agreed, through its authorized officer (confirmed in writing on February 3, 1969) "that the work of inspecting non-perishable carload freight would be returned to clerical employes at

Grand Rapids, Michigan." The Carrier retained the monetary advantages received in the settlement but willfully and deliberately failed to return the work to the clerical employes. The claims, except for a one-week period, covered the period May 25, 1969, to November 29, 1971. The record showed that other claims were pending for the same violations. Thus, the Carrier, without the slightest regard for the integrity of its commitment, failed to comply with the agreement.

The Referee held that Claimant cannot recover damages because she was "fully employed," based upon a premise that "Claimant received full pay during regularly assigned days covering the period of these claims." In the first place, there is doubt that "fully employed" has any relevance in the interpretation of the agreements of this Brotherhood. The eight-hour day, the forty-hour week is the minimum compensation guaranteed the regularly assigned employe who is available for service. We repeat: it is the minimum, not the maximum, compensation guaranteed under the agreement. The rules provide that an employe may be required to work overtime, is subject to call to perform overtime work, may be required to work on assigned rest days, may be required to work holidays, and may be required to work during an assigned vacation period. It is thus clear that under our agreements, including the agreement here involved, that a finding that an employe was "fully employed" - merely because she worked her regular assignment and was paid therefor at the proper rate of pay - is meaningless. It is not helpful to a rational decision to present a fictional impediment just because the Carrier suggested that Claimant was "fully employed."

As the record showed and as the Referee found, the work of making physical inspections of the nonperishable carload shipments belonged to clerical employes at Grand Rapids. Through the mechanics of agreement application, this particular work was assigned to Claimant's position. She was not permitted to perform the work. The failure - the violation - was a matter of deliberate choice of the Carrier. Assuming, arguendo, that all of the inspections were made during the assigned work hours of Claimant, it is irrelevant to the question of a remedy. It was Carrier which prevented her from carrying out the assigned duties of her position. She was available at all times. We do not know from the record whether or not, had Claimant performed this part of her assigned duties, overtime would have resulted. This, too, is irrelevant. It is obvious that wrongful removal of work, thus depriving Claimant of work to which contractually entitled, results in damages for which a remedy must be provided. To hold, under these circumstances, that this Claimant may not recover damages on behalf of herself, other employes in the seniority district, and the Brotherhood, is arbitrary and capricious, without foundation in the case law of this Board or legal decisions. To so hold is to reward the Carrier for its own wrongdoing. The authorities cited by the Referee to support his grossly erroneous conclusion simply do not support that conclusion.

The Referee quoted (page 11) from "a Second Division award /1638/ by a revered neutral, Referee Carter" [3/] which was distinguishable from the issue before him because it concerned the matter of whether outside

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3/ We agree with the Referee on the esteem and respect accorded Referee Carter.

earnings should be deducted in a discipline case. However, when confronted with a factual situation comparable to the present case, Referee Carter said, in Second Division Award 1803:

> "The record shows that claimants were working on regular assignments during the time the work was done. From this it is argued that they suffered no damage. If this be so, the carrier by reducing forces or refusing to employ an adequate number of employes could circumvent the agreement with impunity. It is the function of the organization to police the agreement and protect the contract rights of the employes it represents. When work is lost to the craft, a recovery for such lost work may be had. It may be that the claimants named would have been required to work overtime if the work had been given them or that, as here contended, they could not have performed it at all if they worked their regular assignments. But this does not excuse the contract violation. It is the carrier and not the organization that has the means to marshall its forces to avoid such contingencies. There can be only one recovery for the breach and it may not be defeated because carrier kept its employes working on other work during the time the contracted work was performed."

Other referees have expressed the identical principle as shown in the following Third Division awards:

Award 11450 (Coburn):

> "Carrier's defense that covered employes were not available to perform the work because of other assignments and thus suffered no damage does not shield it from liability under the Agreement. We concur in the reasoning and conclusions of Award No. 1803, Second Division, on this point..."

Award 11701 (Engelstein):

> "... It is not enough to recognize the breach without expecting the violator to accept the consequences for its act. We, therefore, cannot sustain Carrier's position that Claimant must show that he 'was in some manner adversely affected by the action of the Carrier' for this factor is irrelevant and distracts attention from the real issue of the admitted violation of the Agreement. The argument that compensation to Claimant would be in the nature of a penalty is likewise extraneous, for it brushes aside the sanctity of the Agreement...."

Award 11937 (Dorsey):

> "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...."

Award 12374 (Dolnick):

> "A collective bargaining agreement is a joint undertaking of the parties with duties and responsibilities mutually assumed. Where one of the parties violates that Agreement a remedy necessarily must follow. To find that Carrier violated the Agreement and assess no penalty for that violation is an invitation to the Carrier to continue to refuse to observe its obligations. If Carrier's position is sustained it could continue to violate the Scope Rule and Article I of the Agreement with impunity as long as no signal employes were on furlough and all of them were actually at work. For economic or other reasons, Carrier could keep the Signalmen work force at a minimum and use employes not covered by the Signalmen's Agreement to perform signal work. No actual damages could ever be proved. This is not the intent of the parties nor the purpose of the Agreement."

In Brotherhood of Railroad Signalmen vs. Southern Railway, 380 F.2d 59 (1967) the United States Court of Appeals, in a proceeding to enforce Third Division Awards 11733 and 12300, said:

> "Courts have uniformly held that Gunther precludes judicial re-examination of the merits of a Board award. Thus, beyond question, it is not within our province, or that of the District Court, to reappraise the record and determine independently whether Southern violated its obligations under the collective bargaining agreement when it denied Brotherhood members the opportunity to perform the work in question. Southern insists, however, that with respect to the monetary

> "portions of the awards, the District Court acted not in conflict with Gunther in limiting Brotherhood to nominal damages on its findings that the records in both cases contain 'no evidence of any loss of time, work or pay' by any of the employees who were designated to receive compensation for the lost work. In accepting this contention of Southern, the District Court relied on the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings. The court reasoned that since Gunther permits judicial computation of the size of the monetary awards, it could exercise a discretion to allow Brotherhood nominal damages only where its members lost no time.
>
> "This approach, however, completely ignores the loss of opportunities for earnings resulting from the contracting out of work allocated by agreement to Brotherhood members -- a deprivation amounting to a tangible loss of work and pay for which the Board is not precluded from granting compensation. Nothing in the record establishes the unavailability of signalmen to perform the work contracted out by the railroad. The vast number of factual possibilities which arise in the field of labor relations, and which must be considered by the Board in cases of this kind, clearly reflects the wisdom of the Gunther rule."

The principle enunciated in Signalmen has been consistently followed by this Board. Some Third Division awards are:

Award 15689 (Dorsey):

Claimants were assigned to do the signal work in the installation of automatic electrically-operated flashing-light highway crossing protective devices. Carrier contracted out the work of breaking concrete, digging, and lifting required on the project. Awards 9749, 13236, 14121, 15062, and 15497 were cited and it was held:

> "... 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....

"In Award No. 10963 (1962)....(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.

/Gunther (1965) cited./

"...on June 20, 1966 /Railway Labor Act amendment/ was enacted. It provided for severe restraints 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....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.....

"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." (Interpolations ours.)

Award 16009 (Ives): 4/

"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...(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."

For a while in 1973 it appeared that the issue of damages had been put to rest. Referee Sickles, in Award 19899, following Signalmen vs. Southern, favored the rationale of the Fourth Circuit and held that a claim for damages may be sustained for an agreement violation even though the employes in question were fully employed at all times and that on the matter of speculative damages, it was the carrier itself, by its failure to comply with the agreement, that placed the matter in that posture, not the employes. That Award 19899 is authoritative on the subject is

4/ Presently a Member of the National Mediation Board.

demonstrated by the fact that it has been cited in no less than two dozen cases, among them, Award 20020 (Rubenstein) which also referred to Signalmen and succinctly stated:

> "... Contracts are not entered into for the purpose of practice in semantics. They seek to establish certain rights of the parties. A violation of a contract, especially, if persisted, causes some damages to the injured party. Unless the violator is restrained in some way from breaching the contract by punishment it will continue to do so, thus turning the 'sanctity' of contracts into a mockery.
>
> "Furthermore, had there not been a violation of the contract, the claimants might have worked overtime and earned additional money. The violation 'resulted in a clear loss of work opportunity' (19552)."

To demonstrate that the referee's approach in Award 19899 was not novel, one need only look at a few awards preceding it:

Award 15497 (House):

> "Carrier argues that the Claim should be denied because 'there were no signal employes available to perform the work' and the Claimants were on duty and under pay at the times the involved work was performed.
>
> "These arguments are not valid....
>
> "We have often held that employes have a right not to be deprived of work belonging to them under an agreement. Without a monetary award, such rights would be empty and of no consequence...."

Award 15874 (Miller):

> "...at this time period in the history of the Board, there is an abundance of precedential authority to support allowance of the pro rata time claimed herein."

Award 15888 (Heskett) compared Awards 15624 and 15689 and, in citing his prior Award 15808, the referee stated:

> "....This holding was in general accord with the Dorsey award. We affirm these positions on the basis that they are the more meritorious views in consideration of the foundational concepts of collective bargaining and the enforcement of the parties' agreements.
>
> "....Therefore, we will....grant/ing/ each Claimant his pro rata share of the number of hours contracted out by the Carrier."

Award 16376 (Heskett)

Award 16430 (Friedman):

> "Carrier contends that Claimants were fully employed and therefore the compensation sought should not in any case be granted. But there was a loss of earnings opportunities and, pursuant to many Awards of this Division (6063, 6284, 16009), the hours worked by employes who held no seniority in Territory No. 40 are a proper measure of the Claimants' loss and should be paid...."

Awards 16520 and 16521 (Devine):

> Cited Awards 15888, 15874, 15689, 15497, 16376

Award 16608 (Devine)

Award 16734 (Brown)

Award 16796 (House)

Award 16830 (Ritter):

> "....In absence of proof to the contrary, the work involved in this dispute belonged to the Claimants and was wrongfully taken from them. Even though they were fully employed at the time this work was performed, there is no proof they could not have performed this work at other times. Therefore, they are entitled to the monetary claim. See Awards 16338, 16335, 15874, 16520, 14004, and 14982 by this referee."

Award 16946 (House):

"By its violation, Carrier deprived Claimant of the opportunity to perform and to be paid for the work, possibly at overtime rates. We do not see an award to Claimant of pay for the time spent on the involved work as a penalty, like a fine for passing a traffic light, but rather as a part of redressing the damage done by Carrier's violation."

Award 17093 (Criswell):

"....We do not agree that because he was otherwise employed during the period in dispute he is not entitled to the requested pay, which is so granted."

Award 17108 (Cartwright)

"A violation of this contract is not limited to lost earnings of Claimants, but the loss of opportunities of earnings must also be considered."

Award 17319 (Devine):

"As to the Claimants being employed full time, the Board has held in numerous recent awards that where there is a loss of earnings opportunities, such as here involved, the employes should be compensated at the straight time rate. Awards 16430, 16521, 16608, 17108, among others."

Award 17931 (Dolnick)

Cited 16430, 16608.

Award 18287 (Dorsey):

"As to paragraph 2 of the Claim, Carrier contends it should be denied because Claimant suffered no loss (compensation) in that they worked during the entire period in which the contracted out work was being performed.

"....Carrier's violation of the Rule damaged Claimants in that it wrongfully divested Claimants of contractual rights. For reasons stated in the following Awards we will sustain paragraph 2 of the Claim: Awards No. 11937, 12785, 13832, 14004, 15689, 15888, 16009, 16430, 16520, 16521, 16608, 16734, 16796, 16830, 17093, 17108, 17319 and 17931."

Award 18288 (Dorsey):

Sustained on authority of 18287.

Award 18792 (Rosenbloom)

Award 19337 (Edgett):

"Damages for violation of a collective bargaining agreement should adhere to a 'make whole' principle. As is the case with other general rules this one is subject to exception. In the instant case refusal by the Board to award damages would effectively rewrite the Agreement, for in practice it would then say that Carrier is at liberty to contract out work reserved by the Agreement to its employes at anytime all employes are fully employed. The Agreement does not so state, and the Board should not interpret it in a manner which makes it do so. There was unqestionably lost work opportunity to Claimants in the decision to use outside forces to perform work which is reserved to them by the Agreement. It is the Board's obligation, and right, to provide a remedy for the loss...."

Award 19354 (Cole):

"We have carefully examined the Board's findings in Award 19337, and we will follow Award 19337 which involved these same parties and similar issues and sustain this claim for as was stated in Second Division Awards 6113...and 6308 /on the necessity of following precedent awards/..."

Award 19552 (Edgett):

"The Board finds that Carrier violated the Agreement when it contracted with outside forces to repair the roof of Union Station; work which was reserved to Claimants by the Agreement. This resulted in a clear loss of work opportunity to Claimants and for this loss the Board may, and should, provide a remedy."

Award 19619 (Blackwell):

"....In this case the outside forces performed four (4) hours overtime....while claimants performed no overtime on that date; thus the issue is raised of whether the overtime performed by outside forces represents lost earnings opportunities for claimants....We shall therefore sustain the overtime claim to the extent of awarding the claimants four (4) hours overtime for the overtime performed by outside forces on May 18...."

Award 19846 (Hayes):

> "With respect to Carrier's contention that Claimants were 'fully employed' when the disputed work was performed and therefore suffered no monetary loss, the Board would make two observations. First, this seems to be a new defense, not raised on the property and not properly before the Board. Second, even if a proper defense, to support it Carrier would be required to show that Claimants could not have performed the contested work during overtime hours or on weekends and this it has failed to do."

Second Division Award 6238 (Shapiro)

Five additional awards authored by four referees additionally had this to say:

Award 20562 (Blackwell):

> "....We further conclude that such violation deprived the Claimants of an opportunity to perform work secured to them by agreement, and thus the Carrier's assertion that most of the Claimants worked on the claim date, plus overtime and declined overtime during the claim period is no defense. The Claimants are the employees who would have performed the work if the agreement had been followed; by a conscious decision of the Carrier, the Agreement was not followed and thus the Claimants are entitled to a compensatory award for the loss of their work-opportunity...."

Award 20754 (Edgett):

> "....However, after the employees had established a prima facie case, it fell to Carrier to establish, by evidence with probative value, what the employees were doing on the dates in question. It did not undertake to do so. The failure of proof, under the facts and circumstances present here, falls not on the employees, but on Carrier.
>
> "The claim will be sustained for the loss of work opportunity suffered by Claimants...."

Award 21340 (Blackwell):

> "....With regard to compensation, numerous prior authorities have held that an award of compensation is appropriate for lost work opportunities notwithstanding that the particular claimants may have been under pay at the time of the violation....

Award 21534 (Lieberman):

"Carrier asserts that even if the claim had merit, this Board is without authority to award damages and Claimant has suffered no loss of earnings. Recognizing that a divergence of views exist, we have dealt with the identical issue involving the same parties on a number of past occasions (Awards 19924 and 20338 for example). As we have stated previously, Claimant herein lost his rightful opportunity to perform the work and therefore is entitled to be made whole for that loss."

Award 21751 (Caples):

"The Carrier also asserts 'the monetary payment being sought by the Organization is improper. Claimant was fully employed on the dates in question and suffered no loss of earnings.' Thus under the principle that a Claimant is limited to the actual pecuinary loss necessarily sustained no monetary payment is due.

"The question to be decided here, however, is not whether the Claimant suffered actual pecuniary loss, but rather there having been an improper assignment of work within the terms of the Parties Agreement of work to which the Claimant was entitled, is he without remedy?

"The Organization asserts Claimant under Rule 3 was entitled to perform the work in his seniority district. There is no evidence to the contrary as Carrier did not have the authority to transfer the work, as it contends. The Organization submits the remedy is to pay the Claimant the rate for the work performed citing many awards, essentially, assessing such a penalty for violation, citing, among other Third Division ward 685:

'The Division...found that the Carrier made an improper assignment.... Accordingly, the claim, although it may be described as a penalty is meritorious and should be sustained. The Division quotes with approval this statement from the Report of the Emergency Board created by the President of the United States on February 8, 1937:

"The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet experience has shown that if rules are to be effective, there must be adequate penalties for violation."'

"The Organization also cites, Third Division Award 20310:

> 'Seniority rights are of prime importance in the bargaining relationship and are to be tampered with at Carrier peril.'"

The foregoing awards clearly and without dispute are the authorities of this Board. They are the authorities that have withstood the test of time and they are the authorities that will withstand the future test of time. We find mind-boggling the Referee's statement that (page 9):

> "....It is our position that these awards, and this approach (hereafter referred to as the 'penalty award approach'), are incorrect under the authority of Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 338 F.2d 407 (10th Cir. 1964), Cert. denied, 380 U.S. 972 (1965)."

and (page 21):

> "In conclusion and after full and complete consideration of this matter we rely upon the holding of Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, supra, where an individual injured by breach of an agreement was limited to the amount he would have earned under the contract less such sums as he in fact earned in accordance with the general law of damages relating to contracts. There the award was limited to nominal damages. We are persuaded that nothing has occurred since this decision in either the legislative or judicial arenas that detracts from the essential validity of this conclusion. See IBEW Local No. 12, AFL-CIO v. A-1 Electric Service, Inc., 535 F.2d 1 (10th Cir. 1976)."

In the first place, the claim at Grand Rapids did not in any manner involve a "penalty." With all his words, references, citations, and rambling rhetoric, the Referee cannot make it so. Simply stated, the claim was for redress, compensation for actual loss of work suffered by the Brotherhood and the clerical employes at Grand Rapids because work

belonging under the agreement was removed therefrom. The Claimant was named by the Organization as the employe to receive compensation for that loss.

Secondly, the Referee either did not read D&RGW or failed to comprehend it. It is completely distinguishable on the facts and the general principle therein stated does not apply here - it involved enforcement proceedings in First Division Award 19372 which sustained the "Claim of Brakemen G. W. Black and R. E. Gardner for one day's pay each date, June 5, 7, 12, 13, 14 and 18, 1952, account Tintic Local assignment changed and improperly bulletined." The rule involved provided:

> "Article 64 - Establishing New Runs
>
> "The Company is not prohibited by any Article or provision of this Agreement from establishing new runs, or new assignments. Notices calling for bids on any new run or new assignment must state definite limits and must show number of days per week (6 or 7) to be worked and time crew will go on duty.
>
> "Rates of pay for any new run or new assignment will be in accordance with rates for similar assignments on the same Sub-Division. If no similar assignment on the same Sub-Division, rates of pay will be a matter of negotiation between the designated General Officer and General Chairman of the Brotherhood of Railroad Trainmen.
>
> "NOTE: Time for crews to go on duty will not be changed without at least 48 hours' notice. When time to go on duty is changed one (1) hour or more the assignment will be rebulletined."

The facts were stated by the Court:

> "....Prior to March 6, 1952, the railroad operated a forty-five mile straightaway run between terminals located at Provo and

> "Eureka, Utah. On March 6 the railroad notified the Brotherhood that the run would be changed from a straightaway to a daily turnaround run operating over the same line. As a result, the crew would return each evening to the home terminal, Provo, rather than every other evening. The change required the same number of crew members, called for the same rate of pay, and maintained the same length of assignment, six days per week...."

The Court agreed that Rule 64 was violated and found further:

> "...Although the Board order awards to the individual appellants a full day's pay for each claim filed, both the findings and the order of the Board make no mention of the basis for the amount of the award. And since the parties have stipulated that the aggrieved employees have suffered no actual monetary loss or hardship from the contract violation, both the weight of the Board order as evidence of fact and the presumptive correctness of the Board order....are completely dissipated....
>
> "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.... 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 or 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 F. 2d 812, 815; United Protective Workers v. Ford Motor Co. 7 Cir., 223 F.2d 53-54. Absent actual loss, recovery is properly limited to nominal damages..." (Emphasis added.)

Even to the uninitiated, a claim seeking to have the carrier properly bulletin the assignment, a claim that would be akin to a "mandamus," differs substantially from claims involving removal of

work from an agreement and assigning it to individuals outside the agreement, claims involving violation of seniority provisions, or claims involving myriad other types of contract violations. An example of the treatment of different types of claims is the second D&RGW court decision on which the Referee herein chose to remain silent in spite of the fact that it was furnished him and in spite of the fact that he was able to find, on his own or with inept assistance, remote state court decisions.

Two years later, in 1966, in enforcement proceedings in First Division Award 19389 involving the same parties, the same Court of Appeals decided Brotherhood of Railroad Trainmen vs. Denver & Rio Grande Western, 370 F.2d 833. The Court said:

> "....The Board order had granted the sum of $472,000 to the individual appellants, employees of the appellee railroad and members of the appellant Brotherhood, as an award compensating the claimants for services required by the railroad in violation of their collective bargaining agreement. The contract controversy involved the 'herding' of locomotives and the award constituted a full day's pay for each claim filed... "

The Court of Appeals reversed the District Court which had reduced the damages to a nominal sum of $1.00 per day for each claimant, holding that the 1966 amendments to the Railway Labor Act restricted judicial review of awards. As to jurisdiction of the Board to award damages, the Court said:

> "....So, too, the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of damages, like the application of affirmative defenses, offers no jurisdictional question."

In Diamond vs. Terminal Railway Alabama State Docks, 421 F.2d 228 (5 Cir. 1970), involving enforcement proceedings in Third Division Award 13632, the Court of Appeals, after citing Gunther and Chicago River, supra, said:

> "....The federal courts do not sit as super arbitration tribunals in suits brought to enforce awards of the Adjustment Board. They may not substitute their judgments for those of the Board divisions. They need not inquire whether substantial evidence supports the Board's awards. Under the Railway Labor Act, as amended in 1966....the range of judicial review in enforcement cases is among the narrowest known to the law. Board awards are 'final and binding' upon the parties. In court the findings and order of the Board are 'conclusive.' Judicial review of orders is limited to three specific grounds: (1) failure of the Board to comply with the Act, (2) fraud or corruption, or (3) failure of the order to conform, or confine itself, to matters within the Board's jurisdiction...."

After citing United Steelworkers of America vs. Enterprise Wheel & Car Corp., 363 U.S. 593, including the same quotation the Referee set forth in Award 22194 (page 6), the Court, in affirming the District Court's enforcement of the award, said:

> "....No less than the private arbitrator, the Adjustment Board must have flexibility to deal with the variety of situations it encounters in arbitrating 'minor' disputes. The courts, therefore, must be careful not to restrain the Board in a strait jacket of precedent under the guise of determining whether the Board exceeded its jurisdiction in making a particular award. So long as the Board's decision is drawn from the 'essence' of the bargaining contract, we cannot say that once the Board has fashioned a particular remedy for a particular contract violation, any other remedy fashioned in the future is beyond the Board's authority."

It is interesting to note that the first D&RGW decision, 338 F.2d 407 (1964) cited Atlantic Coast Line vs. Brotherhood of Railway and Steamship Clerks, 210 F.2d 812. The issue before the Court in that case was

almost identical to that before the Court in Diamond, i.e., failure to accord a hearing to the employe at the time and in the manner prescribed in the collective bargaining agreement. ACL held that a hearing held later sufficed but that the employes were entitled to pay for days withheld from service prior to the belated hearing. Diamond upheld the award even though the Carrier had belatedly offered a hearing. The answer to the seeming conflict is that the 1966 amendment to the Railway Labor Act freed the Board of restraint by the courts in its role of interpreting the bargaining agreements and fashioning appropriate remedies for violations.

The Court of Appeals explicitly pointed this out in the second D&RGW decision, 370 F.2d 833, holding that formulation of a remedy was a prerogative of the Board, that it was not jurisdictional, that it was not reviewable. The award there allowed a full day's pay for the few minutes' work involved. Thus, for the Referee to hold in Award 22194 that this Board does not have the power to assess reasonable damages for violations, for loss of covered work, in the face of these court decisions subsequent to the 1966 amendment, is simply arbitrary and capricious.

In the case before us the Referee, "in conclusion," cited (page 21) IBEW Local No. 12 vs. A-1 Electric Service, Inc. 535 F.2d 1, where action was brought under Section 301 of the Labor Management Relations Act of 1947. It did not involve an arbitration proceeding. The union alleged, and the Court so found, that A-1 had violated the collective bargaining

agreement in failing to pay amounts due under union dues check-off, etc. The union contended that damages awarded by the District Court were inadequate. The Court of Appeals said:

> "In the instant case, the lower court determined that the proper measure of damages for breach of the contract should be general contract law, citing Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. R., 10 Cir., 338 F.2d 407, 409, cert. den. 380 U.S. 972, as authority. We agree. However, we question whether in computing the damage award the district court correctly applied general contract law in an effort to effectuate the national labor policy of enforcing collective bargaining agreements.
>
> "...A proper remedy in breach of contract suits is to place the plaintiffs in the position they would have attained had the contract been performed...
>
> "...In sum, the district court erred in refusing to grant damages for the period of time following May 17, 1973. We reverse and remand the damage award for a computation in accord with the holding herein, including interest on and after the date of the district court's original entry of judgment."

Why the Referee cited IBEW as supporting his conclusion when it does not do so is unfathomable. On the other hand, the principle stated by the Court fully supports the position of BRAC in the instant case:

> "....A proper remedy in breach of contract suits is to place the plaintiffs in the position they would have attained had the contract been performed...."

Had the agreement been performed (complied with) in the instant case, clerical employes (i.e., Claimant, to whom the work was assigned) at Grand Rapids would have made the inspections. Carrier conceded that the work contracted out required at least thirty minutes for each inspection.

In his award, the Referee cited (page 16) Local 127, United Shoe Makers vs. Brooks Shoe Mfg. Co., 298 F.2d 277, wherein the District Court

had awarded the union judgment against the defendant in the sum of $28,011 as compensatory damages and $50,000 as punitive damages. The District Court projected loss of union dues for twenty years in the future as a part of the compensatory damages. The Court of Appeals said:

> "Therefore, that portion of the district court's judgment awarding punitive damages will be reversed and that portion awarding compensatory damages will be affirmed."

As in IBEW, it is difficult to understand why this case is cited. If we assume that the Court correctly decided that the Congress did not intend to allow punitive damages in Section 301 actions, it is a fact that it affirmed the judgment for compensatory damages, damages which included twenty years' projected loss of union dues. In Award 22194, we were not concerned with punitive damages but were vitally concerned with compensation, redress, for a loss that had already occurred, and the Referee was requested to rule that the Claimant was entitled to compensation for this loss of work, not for punitive damages.

Following his citation of Brooks Shoe, the Referee said:

> "This view of Section 301 has been uniformly followed in subsequent cases. See Kayser - Roth Corp. v. Textile Workers Union of America, 347 F.Supp. 801 (E.D.Tenn. 1972) aff'd 479 F.2d 524 (6th Cir. 1973) cert. denied 414 U.S. 976 (1973). See also Federal Prescription Service, Inc. v. Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO, and its Local P-1149, 527 F2d 269 (8th Cir. 1976)."

Supposedly, the Referee intended to say these cases confirm the holding in Brooks Shoe. If so, he was in error. In Roth Corp., the plaintiff recovered a large sum for alleged damages during a strike. The suit was not based on a contract; it was simply a tort action for alleged tortious conduct by the

union during the strike. Federal Prescription also involved an action for damages by the jury, but the trial court set aside the damage award on the ground of not being justified on the evidence. However, it was specifically found that:

> "Under Iowa law, punitive damages may be awarded where an act is 'done in such manner and under such circumstances as to show heedlessness and utter disregard and abandonment as to what result may flow from the doing of an act or from the manner in which it is done.'"

In his award the Referee said (page 16):

> "A particularly injurious aspect of the penalty award approach is evidenced in Award 17801 (Kobaker) /sic/ where an improper assignment resulted in a contract violation. The unusual feature of the case was that claimant earned considerably more for only four days work on the improper assignment than he would have earned in five days on his regular job. It is difficult to see how he was harmed but the neutral sustained a money award in accordance with the penalty award approach...."

This statement is absolutely amazing. The Referee either read the award not at all, or superficially at best. In the first place, the claimant was an extra employe and the agreement provided for assignment of extra employes. Had the claimant been properly assigned, he would have worked on November 1 and 3, 1966, but he was not allowed to work and received no compensation for either day. The amount of compensation received for work on other days was irrelevant. Referee Kabaker there found:

> "The Board must conclude that the only true test of what damage the Claimant sustained must be on the basis of comparison of what the Claimant earned on November 1st and November 3rd and what he would have earned on those days had he been properly assigned. Since the Claimant did not work on the two days above mentioned, it is obvious that his damage was 8 hours for each of the two above mentioned days at the pro rata rate of $2.9268 per hour."

The Referee continued his statement (page 16):

> "....For a further example, see Denver and Rio Grande Western Railroad Company v Blackett, 398 F.Supp. 1205 (D.C.D. Colo. 1975) reversed on other grounds 538 F2d 291 (10th Cir. 1976) where the court reduced the award claimed on the well established basis of mitigating damages which the Public Law Board apparently ignored affording the claimant a substantial windfall."

The facts are, however, that the D&RGW, contending the award was invalid, filed suit for review. Blackett, a switchman represented by the United Transportation Union, and the UTU filed counterclaim for enforcement of the award. (Before the case was tried, Blackett died and his widow and children were substituted as parties to the suit.) Relief yardmasters are selected solely from the ranks of switchmen on the basis of seniority. Yardmasters are represented by Railroad Yardmasters of America. Blackett was disqualified as an extra yardmaster and the sole dispute before the public law board was whether he was properly disqualified on March 27, 1971. RYA was not a party to the dispute. The Board agreed that Blackett was wrongfully disqualified and sustained the claim, but made no finding as to the amount due. The Court found that he would have earned $23,889.99 during the period he did earn $23,414.16 as a switchman. The Court said:

> "... Admittedly, Blackett could not have worked as both a switchman and a yardmaster at the same time and thus have earned wages as both a yardmaster and a switchman during the time period involved...."

On the finality of awards, the Court said:

> "On June 20, 1966, 45 U.S.C. Sec. 153 was amended....which made monetary awards of the arbitration panel also conclusive on the parties. See Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Co., 370 F.2d 833, 836 (10th Cir. 1966). But these changes still left open the question of the proper role of the Court when the award clearly states that monetary damages are recoverable without specifying the exact amount."

The Court then discussed cases remanded to the Board for the purpose of ascertaining the amount due and said:

> "... However, where as in this case determination of damages does not touch on matters beyond the jurisdiction and competence of the Court, then the Court should find the damages itself and avoid the delay resulting from a remand."

The Court then held:

> "On the second question we hold the recoverable damages are the difference between the wages for the position he was denied (extra relief yardmaster) and the wages he received for the position he actually held (switchman). The Courts which have ruled on this issue have consistently held that benefits conferred by the employer (as opposed to a third party) are deductible.
>
> .....
>
> "It should be noted, however, that Raabe, Mitchell, Cook and Brotherhood of Railroad Trainmen (338 F.2d 407) were all decided prior to the 1966 Amendments to the Railway Labor Act when the damage aspect of the awards was not binding. Even though they may no longer be controlling authority of the issue, they nevertheless remain highly persuasive. Consequently, this Court finds that the defendants are entitled to recover the difference between what Blacket should have earned and what he actually earned which is $475.83."

Thus, when one actually reads, and comprehends, Award 17801 and the cited court decision, it is clear that neither offer any support for the conclusions expressed by the Referee. Furthermore, the Court agreed that the first D&RGW decision (338 F.2d 407) is no longer controlling; referees sitting with this Division have long since recognized this point and the present Referee is the first since 1968 to cite it. As we have shown, and as the Referee in the instant case admitted, the overwhelming majority of the decisions since that time have found that "loss of earnings opportunities" support an award of damages even though the employe may have

been working on his regular assignment at the time the work was performed by outside contractor or others not entitled to perform it.

The Referee stated he does not agree with these awards. He devoted three pages (17, 18, 19) to saying the Court of Appeals' decision in Signalmen vs. Southern is in error. We do not see, in Award 22194, his qualifications to declare a nullity a decision of the United States Court of Appeals. Such arrogance brings to mind a line from Shakespeare's Julius Caesar:

> "Upon what meat doth this our Caesar feed, that he is grown so great?"

Insofar as we are able to determine, no other referee in the history of this Division has attempted to belittle a decision of the United States Court of Appeals and find it not binding on this Board. On the contrary, although a number of referees cited first D&RGW as authority, when it was no longer controlling, it was no longer cited as authority.

The Referee said (page 20) that BRS vs Southern has been cited only once on the question of damages, in Saginaw Pattern Makers Association v. Saginaw Pattern & Manufacturing Company, 233 NW.2d 527 (Court of Appeals Mich. 1975) and that "even in this lone case the Michigan court expressed views that could only be interpreted as opposed to the penalty award approach." Even a simpleton would find that it was there held that the employer did not violate the collective bargaining agreement and consequently there was obviously no reason to discuss damages whatsoever.

A referee sitting on this Division once remarked that labor relations law was a specialty in the legal field, but that the field of law under the Railway Labor Act was a specialty on top of a specialty. This is why

it is so difficult, even for a well-meaning newcomer to the Board, to understand the latter specialty and the case law developed over the years by several hundred referees. The treatise attempted by this Referee in his erroneous award is fully illustrative of the difficulty. The cited miscellany of magazine articles, textbooks, etc. reveal his misunderstanding of the role and function of this Board under the Railway Labor Act. We use the term "misunderstanding" with all charity although we are convinced that many, upon reading this Referee's attempted treatise, will argue that it is corrupt.

In United Steelworkers vs. Warrior & Gulf, 363 U.S. 574, the Supreme Court said:

> "... The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement."

Award 22194 complies with the foregoing in that it finds the work of inspecting nonperishable carload shipments at Grand Rapids belonged to the clerical employes at that point.

The Referee quoted (page 6) from United Steelworkers vs. Enterprise Wheel & Car Corp., 363 U.S. 593:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency...."

but denied that he had the right to provide a remedy. Instead, he assessed a $1.00 fine upon the Carrier for each inspection made by the outside contractor during the period of the claim. The assessment of such a fine cannot be found within the confines of the collective agreement.

One ought not need cite authority to show that collective agreements in the railroad industry are made in contemplation of and in compliance with the provisions of the Railway Labor Act. Section 2, Seventh of the Act provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act."

The Referee could have directed the Company to comply with the agreement in assigning the involved work to the clerical employes. This would have been in compliance with the agreement. In Award 16531 (Friedman), the Board said:

> "....Where the violation of the Agreement is of a continuing and permanent nature, the appropriate remedy is a direction to restore the status quo ante. Tribunals in other industries do award the restoration of work which has been wrongfully removed from a unit."

Neither the Brotherhood nor the Claimant had information as to inspection dates or the amount of time involved. The Referee found, however (page 3):

> "We believe the carrier can provide the necessary information here as to the dates of the nonperishable car inspections covering the periods stated..."

When the Carrier produces those records as directed by the Referee for the ascertainment of inspection dates, they can also be utilized to determine actual time consumed by the outside contractor's employes in making the inspections. The Carrier admitted (1) the outside contractor (RPIA) performed the inspection work, and (2) at least thirty minutes was required for each inspection. There was no contrary evidence by the Brotherhood.

Thus, as to the loss of work opportunities by the clerical employes at Grand Rapids, the Referee could have restricted the loss to thirty minutes per inspection in view of Carrier's admission with no evidence to the contrary, or he could have remanded to the parties the question as to the amount of damages. In the latter event, the Board would have retained jurisdiction with leave to either party to submit evidence confined to the amount of damages only. Such remedy would have been in accord with the record in this case and within the confines of the bargaining agreement.

In concluding his Opinion, the Referee said (page 22):

> "Referring finally to the question at hand, for the reasons given, we conclude that a damage award will be limited to a nominal award of $1.00 for each violation on the grounds the claimant is not entitled to a penalty award (as the issue was narrowed before this Board) and she failed to provide proof in the record, beyond speculation and conjecture, that she could establish that the contract violations resulted in loss of earnings opportunities for work on overtime or at other times when not on duty and under pay.
>
> "We do not lose sight of carrier's contention the inspections required only one half hour. This was not an admission that claimant actually suffered a loss of earnings to that extent, nor was it claimed. Accordingly, we hold the burden of such proof of loss is on the claimant and we are not provided a basis here for holding this burden has been met."

This is open contradiction to his earlier acknowledgment (page 3) that there was no way, absent discovery proceedings not authorized in the agreement, for the Claimant or the Brotherhood to know the dates of inspections or the amount of time consumed. This was the basis for the ordering production of the records. How could the Brotherhood or the Claimant reasonably be expected to produce proof that was available only in the records

of the Carrier and the outside contractor? The Brotherhood made a prima facie case and when the Referee found the agreement was violated the sole remedy was to provide a method for determining the exact loss. In Award 13349 the Board said;

> "The burden is upon the employe to show what his loss has been. But upon showing that he has sustained a loss of certain work and what that work was he has overcome this burden...."

Of a certainty, it was shown that Claimant was deprived of work and the details as to how she was so deprived. Knowledge as to the quantum, and dates, was in the Carrier's records.

This is a classical case of the Brotherhood, in its statutory function, exercising its responsibility to police the agreement. It has named the proper claimant to receive the compensation for the breach of the agreement. The Carrier did not suggest that any clerical employe at Grand Rapids was idle on the regularly assigned days of the assignments, at relevant times. If the Referee is correct, then this Carrier has succeeded in negating the effectiveness of the agreement; it has succeeded in reaping a financial advantage from its own wrongdoing. Such actions are not supported by awards of this Board or any decisions of the courts.

The following awards illustrate the contractual rights of employes to perform covered work:

Award 11072 (Dorsey):

> "...The work is the catalyst which gives substance to the Rules pertaining to rates of pay, hours of work, seniority, working conditions, etc. If the Carrier remained free to assign, unilaterally, the work to whosoever it chooses, crossing craft and class lines, the over twenty (20) Rules in the Agreement, here being interpreted and applied, would be for naught in that they would have meaning only at the whim of Carrier."

Award 12903 (Coburn):

> "It is too well established to require citation of authority that work once placed under the coverage of a valid and effective agreement may not be arbitrarily or unilaterally removed therefrom...."

Award 14591 (Dorsey):

> "The heart of the collective bargaining agreement is the work and the right to perform the work vested in the employes in the collective bargaining unit as against the world. The bargain once made may not thereafter be lawfully unilaterally changed by either party."

Award 4256 (Second Division) (Anrod):

> "It is firmly settled in the law of railroad labor relations that work embraced within the scope of a labor agreement cannot, as a rule, be removed therefrom and assigned to or performed by employes not covered by the agreement..."

This Board has the obligation and the duty, as a matter of law, to resolve disputes submitted to it. The instant award fails to do that - not only fails to fashion a just and equitable remedy but unconscionably rewards the Carrier for its own wrongdoing. The Brotherhood and the Claimant were denied due process.

What is the essence of a railroad agreement? The essence goes back at least to the period of Federal control which we have demonstrated above - the concept of allowing payment to the injured employe when the agreement was silent.

We dissent to the award with respect to its comments on damages.

J. C. FLETCHER
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT
TO AWARD 22194 (DOCKET CL-21165)
(Referee Wallace)

We submit the Dissentor's comments pertaining to the issue of damages would have been unnecessary in this case had the claim been decided correctly on the merits, for the claim should have been denied.

Perhaps it could be characterized as poetic justice, in view of the evidence submitted by Petitioner which consisted of a settlement letter which contained the following statement: (Employes' Exhibit "A")

> "This with the understanding that no precedent will be established and without prejudice to our position in this or any similar claim." (Emphasis supplied)

They also submitted a confidential memorandum between one Carrier official and another which was never handled with the Organization. Their possession of this document has obvious "Watergate" implications. Moreover, its use in an adjudicatory setting raises serious questions of professional ethics. The fact that the Referee saw fit to quote this letter at the outset of the Opinion, establishes the weight he attached to the document.

That portion of the decision is erroneous which dismisses the "procedural objections" raised by Carrier with the reasoning that Board decisions "have had no difficulty sustaining claims that

depend upon facts easily ascertainable from the records of the Carrier." If the facts were easily ascertainable, we would have to assume the Organization would be able to secure them in light of their submission of an otherwise confidential and private document, which was not available to them in their normal business endeavors.

Thus, although we must disagree with the Referee as outlined above on sustaining the claim, we fully subscribe to the decision limiting damages in this case and for that reason, moved the adoption of the award. The Dissentor finds this behavior egregious. We do not. It is done regularly before the highest court in the land. The Bakke case is the most recent example. The Dissentors quite recently moved the adoption of Awards 21452 (for a nominal sum) and 21583 (for no reparations) although extensive damages were claimed. Their actions were obviously influenced by the Referee's decision on the merits. If it is correct and proper for Labor Members to move an award when it denies or modifies their damage request, why is it improper and incorrect for Carrier Members to move the adoption when the damages requests are modified; unless, of course, the real purpose of the claim is to obtain financial reward rather than a proper interpretation of the contract.

D A M A G E S

The question of damages has been one plaguing the industry since various tribunals have been deciding railroad disputes where they have found a breach of contract occurred. The problem was exacerbated by neutrals who appear to follow the easy course of assessing a day's pay as a penalty because that amount was provided by certain contracts e.g., in the operating field, when road crews were used in the yard, or vice versa. One of the rules common to most operating contracts contained the following rule:

> "At initial terminals where yard crews are employed, freight firemen required to perform any work other than set forth in paragraph (a) of this regulation will be paid a minimum yard day's pay separate and apart from the road trip pay for performing such work. When a yard day is paid under the provisions of this paragraph (b), the road trip pay will begin at the time the yard pay ends."

Another rule which provides for liquidated damages, reads as follows:

> "At points intermediate between the initial and final terminals where yard crews are employed, freight firemen may be required, as part of their regular road trip, to set out cars from their train, etc. . . . Freight firemen required to perform any work other than that set forth in this paragraph (c) will be paid a minimum of a yard day's pay in addition to road trip pay and without any deduction therefrom for the time consumed in performing such work."

The error first occurred when some neutrals, unlearned in the law of damages, yielded to the arguments of able advocates for the Organizations, to extend the payment of a day's pay in cases where

such claims were made, on the theory that where the contract did not specify any damages, a minimum day was required. See First Division Award 9601. Fortunately most neutrals, learned in the law, and familiar with the common law rule of damages, avoided this tragic error. They applied the make whole theory when they sustained claims, limiting the damages to the proven loss supported by the record. Their attitude was summed up by Referee Stone in First Division Award 5080, rendered September 26, 1940, where the applicable principle was enunciated:

> "This claim is frankly one for a penalty. Penalties are not awarded under a contract unless it clearly so provides. The contract does not expressly so provide. If Penalty is to be awarded it must be based upon implication. Such implication as there is runs the other way, for the reason that the contract in the numerous cases indicated provides for additional pay for stipulated arbitrary periods, even though the work requires much less time. Silence of the contract concerning a minimum day's pay in such cases as this is convincing that it was not intended.
>
> * * *
>
> "The question is highly important to the public also - to the shippers and passengers who foot the bills. How much these 'penalty days' are costing, the referee has no means of knowing. If the huge payments involved are to continue, not only for no equivalent in service, but also to those who profit rather than to those who lose by the supposed wrong, it is, the referee respectfully submits, a situation so utterly indefensible as to demand reversal by legislation, if it defies correction by existing agencies.
>
> "The correction is most needed in the interest of collective bargaining, the success of which is essential to industrial peace and security. To be long successful, it must be free from any injustice so gross as to be abhorrent to common sense and universal standards of conduct."

This principle was applied by the Board literally hundreds of times, before and after, the opinion expressed by Referee Stone. We have a list of early awards from all four Divisions applying the make whole principle should anyone interested in the subject, care to investigate. We emphasize early awards because Dissentor asserts: (page 5)

> "Decisions of those Boards are reflected in awards of this Board, particularly the earlier decisions."

What is particularly relevant in the evaluation of these awards, is the significant number which are rendered without a referee. Thus, the Board, a bi-partisan body, agreed that the applicable rule of law to be applied, was the make-whole principle. When claimant either sustained no loss or could prove no damages, he was awarded no compensation.

As noted earlier, some neutrals took the easy path from awarding liquidated damages specified in the contract to awarding the same amount where the contract was silent on the question. Impetus for this rationale was supplied by an Emergency Board operating under Section 10 of the Railway Labor Act, commonly called the Devaney Board, which held, inter alia, as follows:

> "'The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation.'"

Section 10 of the Railway Labor Act required the Emergency Board "to investigate and report respecting such dispute." The Board was not authorized nor were they empowered to interpret contracts. This is a role restricted to Boards established under Section 3, First and Second of the Act. The Emergency Board conceded this fact when they said:

> "* * * Therefore the dispute before this Emergency Board has only to do with compliance with agreements, as interpreted and applied by an authority duly established under the Railway Labor Act."

Thus, any conclusions reached by the Emergency Board regarding the interpretation of contracts, had no force or effect under the law. Some of the earlier neutrals did not appreciate this distinction and the Carriers were required to join the issue by refusing to put such awards into effect, requiring the Organization to sue for enforcement. As a result, the courts carefully considered the issue and applied the controlling legal principles derived from centuries of contract interpretation. The question of penalty was specifically presented to the U. S. District Court in Colorado in BRT v. D&RGW, and on September 23, 1963, the Court rendered its decision holding in its conclusion of law:

> "4. Since the collective bargaining agreement contains no provisions for punitive damages for contractual violations such as that found in this case, damages, if any, must be assessed on the basis of ordinary contract law. Petitioners here have not been damaged monetarily by the contractual violation, and they are, consequently, under well-settled principles of contract law, entitled to no more than

"nominal damages. The award of the Railroad Adjustment Board, insofar as it awards damages of one day's pay for each date for which a claim was filed is erroneous, and the award of damages predicated upon that basis must be set aside.

"5. Individual petitioners and other employes of respondent carrier who filed claims based on the contract violation involved are entitled to nominal damages in the amount of one dollar ($1.00) per day for each claim filed."

The matter was then appealed to the Tenth Circuit Court of Appeals, ably and exhaustively discussed by learned counsel from both sides, and the decision of the District Court was upheld as follows:

"The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The Board has no specific power to employe sanctions and such power cannot be inferred as a corollary to the Railway Labor Act. See Priebe & 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 correctively 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, recover is properly limited to nominal damages. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 10 Cir., 112 F2 308; Norwood Lumber Corp. v. McKean, 3 Cir., 153 F2 753; 5 Williston, Contracts (rev.ed.) §1339A."

This decision was rendered on November 19, 1964. (338 Fed. 2d 407).

These decisions were followed by the four Divisions of the National Railroad Adjustment Board as the settled law in this area. True, there were some exceptions, but that was to be expected. In Award 10963 (Dorsey), later affirmed in Award 13958 (Dorsey) and 14853 (Dorsey), the Board held:

> "Parts (2) and (3) of Petitioner's Claim prays for an Award of money to Carrier's MW workers to be computed by an arbitrary formula without regard to losses of pay actually accruing from the contract violation.
>
> "Petitioner did not introduce any evidence that MW Employees 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 analagous 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 vs. Jones & Laughlin Steel Corp., 301 U.S. 1; NLRB vs. Mackay Radio & Telegraph, 304 U.S. 333; and, Phelps Dodge Corp. vs. 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. vs. 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 'interpretation 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 MW 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 MW 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 MW 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."

There was no dissent filed to Award 10963 (Dorsey). While the case law at the Board seemed to be stabilized for the first time in many years, the Organizations continued to press their argument that penalty payments should be made by Carrier <u>regardless of proven loss</u>. It provoked Referee Dorsey in Award 13958, decided two years later, to hold:

"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.

"With knowledge that reasonable and learned men may and do disagree, we reaffirm our findings and our understanding of the law as set forth in Award No. 10963. Consequently, we will sustain paragraph (a) of the Claim; and, we will deny paragraph (b) of the Claim." (Emphasis supplied)

and Award 14853 (Dorsey), rendered October 14, 1966, which holds:

"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 pronouncement of the courts are that the monetary damage suffered by each particular employe claimant must be proven."

At or about the same time, December 8, 1965, that the National Board was rendering Award 13958 and Award 14853, the Supreme Court of the United States in Gunther v. San Diego & Arizona Eastern Rwy., 382 U.S. 257 (cited by Dissentor, page 8), considered the case of a railroad employe who had been disqualified from service because of a heart condition without the benefit of a board of doctors, as requested by the Organization, and whose claim had been upheld by the National Railroad Adjustment Board. The Supreme Court dealt specifically with the issue of judicial review, and held that:

"* * * The basic grievance here - that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health - has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court."

On the issue of damages, the Court held:

"IV. There remains the question of further proceedings in this case with respect to the money aspect of the Board's award. The Board did not determine the amount of back pay due petitioner on account of his wrongful removal from service. It merely sustained petitioner's claim for 'reinstatement with pay for all time lost from October 15, 1955.' Though the Board's finding on the merits of the wrongful discharge must be accepted by the District Court, it has power under the Act to determine the size of the money award. The distinction between court review of the merits of a grievance and the size of the money award was drawn in Locomotive Engineers v. Louisville & Nashville R. Co., supra, at pp. 40-41, when it was said that the computation of a time-lost award is 'an issue wholly separable from the merits of the wrongful discharge issue.' On this separable issue the District Court may determine in this action how much time has been lost by reason of the wrongful removal of petitioner from active service, and any proper issues that can be raised with reference to the amount of money necessary to compensate for the time lost. In deciding this issue as to how much money petitioner will be entitled to receive because of lost time, the District Court will bear in mind the fact that the decision on the merits of the wrongful removal issue related to the time when the Board heard and decided the case. Eleven years have elapsed since that time, long enough for many changes to have occurred in connection with Petitioner's health. This would, of course, be relevant in determining the amount of money to be paid him in a lawsuit which can, as the statute provides, proceed on this separable issue 'in all respects as other civil suits' where damages must be determined."

(Emphasis supplied)

The Supreme Court specifically held that determining damages in the interpretation of a collectively bargained agreement which provides for the payment of "time lost", should be handled "'in all respects as other civil suits' where damages must be determined." To now contend as Dissentor does (page 9), that the Court stated "principles of common law . . . were not appropriate guidelines for interpreting collective bargaining agreements.", is directly contrary to the decision of the Court quoted above.

In April, 1965, about eight months prior to the Gunther decision, the United Stated District Court in Colorado considered the second D&RGW case (Award 19389) which had been sustained by the First Division, awarding a penalty. Again, the District Court reached the same conclusion that the claims could not be allowed absent proven damages. The Tenth Circuit Court of Appeals considered this second decision in December, 1966, which was six months following the amendment of the Railway Labor Act, effective June 20, 1966, and held:

> "As we have earlier indicated, this action was pending before us on June 20, 1966, the effective date of Public Law 89-456. It is very clear that the judgment of the district court, regardless of its correctness when entered, must now be given appellate consideration in view of the amendments to the controlling statutes. * * * Our case falls squarely within the compulsion of those rules, for with the repeal of the district court's jurisdiction to review money awards the jurisdictional foundation for its judgment as to the amount of the award no

"longer exists. The judgment in such respect must be set aside, unless, as the appellee railroad contends, the Board order is invalid even within the scope of the amendments or Public Law 89-456 is unconstitutional in inception." (Emphasis supplied)

Thus, regardless of the "correctness" of the District Court's decision in applying the common law rule of damages, the Tenth Circuit found that on judicial review it had no authority to determine the correctness or incorrectness of the Board's decision unless such decision violated one of the three grounds stated for reversal in the amended Railway Labor Act. In short, even though the Board incorrectly allowed a penalty, contrary to common law principle, the Courts were required to enforce the award and could not review its merits on the issue of damages.

Parenthetically, we should note the determination of the issue of damages is as much a part of the interpretation of the contracts as is the resolution of merits of the controversy. On judicial review, the courts were now foreclosed from considering the dispute de novo, with the exceptions spelled out above.

Sometime prior to this, the Third Division rendered Awards 11733 and 12300, Signalmen vs. Southern Railway, sustaining claims for alleged deprivation of work. In Award 11733, the Board reduced the claim from eight hours to three hours and in Award 12300, straight time rather than overtime was allowed. The Carrier refused to comply with the order and suit for enforcement was filed in the United Stated District Court for the Middle District of North Carolina.

On the question of damages, the District Court said:

> "Since the Adjustment Board has 'finally, completely, and irrevocably' settled the grievance that the defendant violated its collective bargaining agreement with the plaintiff by permitting employees other than members of the signal craft to perform maintenance work on the car holders, there remains for consideration the validity and size of the money award. In determining this separable issue, the Court is to proceed 'in all respects as other civil suits' where damages must be determined. 45 USC § 153, First (p); Gunther v. San Diego & A.E.R. Co., supra.
>
> "There was no evidence that the individual claimants suffered any reduction in earnings or loss of wages by reason of the violation of the collective bargaining agreement. Under these circumstances, to award the claimants additional pay would be imposing sanctions or penalties against the defendant. A breach of contract entitles the wronged party only to compensation for any injury he may have suffered. He is not entitled to exact a penalty from the defendant when no injury occurred. Thus, if an employee is wrongfully discharged, he may recover what he would have received had there been no breach, reduced by what he earned or might have earned in other employment. The measure of damages for breach of contract is stated in United Protective Workers of America, Local No. 2, v. Ford Motor Co., 7 Cir., 223 F. 2d 49 (1955), as follows:
>
> > 'The dispute before us arose because the parties interpreted their contract differently, and the principles of law involved had not been clearly settled previously. There was no bad faith or misconduct on either side. Although Ford was subsequently found to have breached the contract, it is not a wrongdoer in the tort sense. There is no justification for an award with even the flavor of punitive damages. The only appropriate measure of damages is compensation.'

"The plaintiff has cited no case, and none has been found, which holds that individual claimants are entitled to anything more than compensation for the injury they suffered. Since they were employed by the defendant and received full pay for the entire period in question, to award anything more than nominal damages would amount to an imposition of a penalty against the defendant. There is no justification, in law or in equity, for such a penalty. 'Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity.' Atlantic Coast Line R. Co. v. Brotherhood of Ry., Etc., 4 Cir., 210 F. 2d 812 (1954).

"The case of 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), decided the identical question now before the Court. There, as here, the Brotherhood failed to establish any financial loss to any of the individual claimants from the violation, and the district court held that recovery was limited to nominal damages. The Court of Appeals, in affirming the trial court, held:

[Opinion cited earlier in this Answer]

"Since it is uncontroverted that the individual claimants suffered no actual monetary loss from the violation of the collective bargaining agreement, it is concluded that plaintiff's recovery is limited to nominal damages." (Emphasis supplied)

We have quoted extensively from this decision for several reasons. The Dissentor persists in challenging Award 22194 on the fictional premise it is "without foundation in the case law of this Board or legal decisions." (page 12) We have already established it is supported by case law of the Board. In recent Award 21602, the Board found that Carrier had cited 112 awards of the Board supporting its position on the question of damages, and the Organization

had cited 57 decisions. While numbers alone do not necessarily control, sound reasoning should, and awards with faulty reasoning should be culled.

One of the fundamental concepts applicable in the Anglo-American legal system where the case law method is utilized, is that of applying sound precedent to future cases involving similar problems. The basic reasoning behind the application of this legal precept is to establish and perpetuate a consistency in law, thereby enabling all men to conduct their daily affairs in accordance with well-defined rules and guidelines without the constant gnawing fear that today's actions will be ruled improper by court decree tomorrow.

However, the basic postulate in the application of the rule is a sound precedent. Whether it is sound can only be determined by the reasoning which accompanies the decision. Furthermore, the rule has application not only to court decisions, but those evolving from Administrative Agencies such as our own. Over 20 years ago, the Supreme Court discussed the duties and obligations of this Board in Slocum v. Delaware, L. & W. R. Co. (339 U.S. 239), and in reference to the Board's decision, said:

> "* * * Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway system."

The import of this holding was to eschew unsound decisions and follow those which could be supported by logical, correct and well developed reasoning.

Thus, the ultimate solution on proffering precedent might be to take a decision from each side which represents the most exhaustive internal examination of the problem and contains the soundest reasoning. The Courts have done this for a millenium. It has come down to us in the form of the common law rule of damages.

In reference to legal decisions, which Dissentor implies support his position, the District Court in the Signalmen case said:

> "The plaintiff has cited no case, and none has been found, which holds that individual claimants are entitled to anything more than compensation for the injury they suffered. * * *"

The Organization, represented by learned counsel, had every opportunity to supply the Court with "legal decisions" upholding their claim to a penalty award (albeit one modified by the Board), but were unable to do so. The Dissentors' failure to cite such authority is the best refutation of their assertion.

On May 1, 1967, the Fourth Circuit in Railroad Signalmen v. Southern, 380 Fed.2d 59, considered the Third Division cases cited supra, which had been upheld by the District Court, although as we indicated heretofore, the damages had been reduced to nominal damages. One of the first points made by the Fourth Circuit was:

> "On June 20, 1966, twelve days after the District Court entered judgments in these cases, there became effective certain amendments to the Railway Labor Act restraining and further restricting the scope of judicial review of Board awards. Brotherhood urges the

"applicability of these amendments to pending appeals, but the view we take of the cases makes it unnecessary to resolve this question."
(Emphasis supplied)

The Court decided that the case must be remanded to the Board for service of notice on all interested parties pursuant to the Supreme Court's decision in TCEU v. Union Pacific (385 U.S. 157). The Court held:

"[Scope of Judicial Review]

1. On their face, the present appeals raise solely a legal question as to the scope of judicial review of Board awards. However, we must first consider the possible effect of the Supreme Court's recent decision in Transportation-Communication Employees Union v. Union Pacific R.R., [54 LC ¶11,586] 385 U.S. 157 (1966), which imposes on the Board the obligation fully to settle jurisdictional disputes in a single proceeding."

The next statement considered relevant is found in Part II of the decision. There the Court decided:

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

Thus, the Court held sequentially that the sole issue before it concerned the question of judicial review, however they did recognize there was a jurisdictional problem involving third

party notice, and until that was resolved, there was no valid legal decision by the Board that could be enforced. Had the Court stopped at this point, there would have been no further problem.

The Court decided the third party notice had not been given in accordance with TCEU v. Union Pacific, and the case would have to be remanded to the Board in compliance with the Supreme Court's decision. It also acknowledged it did not know what the Board's final decision would be on the merits following remand. Consequently, anything the Court said thereafter pertaining to the merits of the case, was ultra vires. Once it found the Board acted without jurisdiction in the premises and it remanded the case back to the Board for final decision, it had no jurisdiction to decide any other matter. In the case of The Burbridge Foundation, Inc. v. Reinholdt & Gardner et al (496 Fed.2d 328) (May 15, 1974), the Eighth Circuit Court held:

> "[3] The Federal District Court's discussion of the constitutional question, as further support for its decision to dismiss, is without any binding effect on the parties. Once the Court determined that it lacked jurisdiction, it was precluded from proceeding any further. See Kansas-Nebraska Natural Gas Co. v. St. Edward, 234 F. 2d 436-441, (8th Circuit 1956)" (Emphasis supplied)

Even if we were to assume arguendo, the Circuit Court could determine whether the District Court exceeded its authority under the principles of judicial review, then it was restricted to that

question alone, which it stated was the only legal question before it. The proper parameters for judicial review following the amended act, were enunciated by the Tenth Circuit. The Fourth Circuit could go no further in deciding that in the absence of one of the three reasons set forth in the amended Act, the Court had no jurisdiction to redetermine the correctness or incorrectness of an award. Its sole function on judicial review was to determine whether the award was enforceable. In fact, the Fourth Circuit itself said:

> "Courts have uniformly held that Gunther precludes judicial re-examination of the merits of a Board award. Thus, beyond question, it is not within our province, or that of the District Court, to reappraise the record and determine independently whether Southern violated its obligations under the collective bargaining agreement when it denied Brotherhood members the opportunity to perform the work in question." (Emphasis supplied)

If the District Court had no right to redetermine the correctness of the award or the damages set out therein, then neither did the Fourth Circuit. The Court reiterated this view when it said:

> "* * * The unequivocal holding of Gunther is that courts have no role to perform in determining whether the Act (sic) [contract] has been violated * * *."

Dissentor concedes as much when he cites the second D&RGW decision (370 Fed. 2d 833), and states that decision holds the Board's formulation of a remedy "was not reviewable." (page 29) This is certainly

good law, and the Fourth Circuit should have followed it. Instead they delivered a homily on the justification for the Board's interpretation of the contract allowing other than compensatory redress. In doing so, the Court injected its opinions as to the correct interpretation of the contract in reference to the common law rule of damages. This review, as expressed by the Court, was quickly embraced by the Organizations and repeatedly cited as a proper interpretation of the contract. The fact that the Court which enunciated this view - admitted it was remanding the case back to the Board because of basic jurisdictional infirmities, or that it conceded it had no office to perform in this area, did little to impress the Dissentors who wished to use the dictum. The sequel to the Fourth Circuit's decision is now well documented. The Dissentors proffered the decision to neutrals as a proper interpretation of the contract and there was an apparent acceptance by some of its legal foundation. Those awards, commencing with Award 15689 (Dorsey) and its progeny, cited the decision without questioning its correctness or reliability. Fortunately, this was not true in every case. In Award 15624 (McGovern), the Third Division held:

> "The second part of the claim, the amount of damages to each of the Claimants must now be resolved. A review of the record indicates that both Claimants were working and on the payroll. This is readily admitted by both sides of this controversy. The question of punitive damages or penalties for contract violations has been discussed in many awards of this Board,

"some of which have permitted damages or penalties even though the contract was conspicuously devoid of a penalty provision and despite the fact that no actual losses were either alleged or shown; other awards have held that damages are limited to the Claimants' actual monetary loss and further that this Board is without authority to impose any sanction other than nominal damages. (Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co., 338 F. 2d-407, Cert. den. 85 S. Ct. 1330.)

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

> [The pertinent sections of that Opinion have been alluded to earlier in the Majority's decision, the Dissentor's answer and our response]

* * *

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

"The Claimants in this case received a full day's pay, and did not suffer any monetary loss. In fact, it is presumed that while the Independent Contractor was placing the poles in the hole, the Claimants were merely onlookers. It is difficult for us to see wherein they lost an opportunity for further earnings in this case. Further, we are constrained to say that the Fourth Circuit, although indisputably stating that we are not bound by common-low (sic) principles governing breach of contract damages, offers little assistance in guiding us toward resolving this knotty problem. The Tenth Circuit's decision (Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co., 338 F-2d-407 Cert.den. 85 S. Ct. 1330), wherein the Court held

"that damages are limited to the Claimants' actual monetary loss and that this Board is without authority to impose any sanction other than nominal damages, appears to us to be the better reasoned decision. Until such time as this issue is decided specifically by the Supreme Court, we will abide by the Tenth Circuit's case. We will for these reasons deny the claim." (Emphasis supplied)

Award 16691 (Dugan):

"Finally, in regard to damages, Carrier's contention is that inasmuch as Claimants did not lose any time from their work and did not suffer any pecuniary loss as a result of contracting out of the signal work, then this Board is without authority to award penalties or windfalls to these Claimants. The Organization is not contending that Claimants herein lost any time from their work or suffered any pecuniary loss as a result of Carrier's contracting out the work in question.

"A large number of Awards of this Board as well as a number of Court decisions have held that where Claimants have not suffered any wage loss as a result of a contract violation, this Board is without authority to make use of penalties, except as limited to nominal damages. See Awards 14920, 14963, 14371, 13236, 15062, Brotherhood of Railroad Trainmen vs. Denver and Rio Grande Western Railroad Company, 338F and 407, cert. den. 85 S.Ct.1330.

"As was said in Award 15062 (Ives): 'Although the arguments advanced in support of penalties as a necessary deterrent to further contract violations are persuasive, we are compelled to follow the late Awards of this Board and recent decisions of the Courts until such time as the Supreme Court considers whether or not we have the statutory power to impose penalties for violations of Agreements. Accordingly, we will deny that part of the claim which relate to damages (Award 13958).'" (Emphasis supplied)

Award 18540 (Rimer):

"It is 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 not 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 repetition 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." (Emphasis supplied)

In some cases, the controlling principle relied upon by Carrier, was not even contested. In Award 17701 (Jones), the Board held:

"The one point in this case in which there appears to be no dispute concerns damages. The general rule is that damages for breach of contract are limited to the pecuniary loss necessarily sustained by the injured party. The Supreme Court has affirmed that rule in Perry vs. U.S., 295 U.S. 330, 354, when it said: 'The Plaintiff can recover no more than the loss he has suffered and of which he may rightfully complain. He is not entitled to be enriched.' Petitioner has not suffered a loss in this case." (Emphasis supplied)

Unfortunately, the neutral who had followed the earlier D&RGW decision with the announcement that only a Supreme Court decision would put the matter finally to rest, completely reversed himself on the strength of the Fourth Circuit Court's decision, a decision which

had no jurisdictional or legal foundation for the subject which it considered, a fact which the Circuit Court itself repeatedly emphasized when addressing itself to the lower District Court. If the District Court had no legal right to determine the correctness or incorrectness of the Board's decision, but only its enforceability, then neither did the Circuit Court. The referees who adopted the "loss of work opportunities" concept enunciated in the Signalmen case as their legal foundation for awarding damages, have done so erroneously and without foundation in law. It is not merely without foundation, but directly contrary to the common law rule of damages which have been applicable to the Board's decisions for many years.

The Dissentor implicitly recognizes this, for the bulk of the Dissent is spent attacking the legal citations of the Majority with no attempt to offer legal precedent for the position they espouse. It simply does not exist under our system of law, and their frustrated attempt to remake the law to permit the assessment of penalties for alleged contract violations could not be accepted by the Majority in this case.

The irony of the situation is apparent. Dissentor in one breath argues the Board is freed "of restraint by the courts in its role of interpreting the bargaining agreements and fashioning

appropriate remedies for violations." (R., p. 29), and yet, when the Board does act, as in this case, free of the restraints allegedly imposed by the Fourth Circuit, the decison and the Referee are sharply and viciously attacked. We would suppose the Dissentor's view of acting free of court restraint could only mean the Board must sustain the claim as presented. It is apparently the Dissentor's opinion, the thousand years of experience gained in contract interpretation generally, plus the many years in which the Courts were privileged to interpret these collectively bargained agreements under the Railway Labor Act must be abandoned, on the theory that with the 1966 amendment, the Board is freed of legal restraints.

This approach is fallacious, for in fact just the opposite is true. With the Courts no longer sitting in judgment over the Board's decisions because the backstop of judicial review is no longer available to correct mistakes in interpretation, the Board must exercise greater vigilance to act judiciously and comport itself in accordance with unassailable principles of contract law. As stated by one noted authority in the arbitration field, the legal principles applicable in the interpretation of collectively bargained agreements are not

> "* * * 'mere technicalities'; they are the product of the best minds of lawyers, scholars and judges through generations. When parties would substitute the so called 'common sense' of an arbitrator for the accumulated wisdom of many men through many years,

"they in fact urge the rule of men as against the rule of law. There is no safe guide to the construction of labor contracts, any more than of commercial contracts, except the law." (Updegraff & McCoy, ARBITRATION OF LABOR DISPUTES, Chapter VI, pages 136-137)
(Emphasis supplied)

For the reasons stated above, we fully endorse the Referee's decision on the question of damages.

W. F. Euker

J. W. Gohmann

R. E. Mason

P. V. Varga

G. H. Vernon

November 2, 1978