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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24038
Docket Number SC-23956

Ida Klaus, Referee

PARTIES TO DISPUTE: { **Brotherhood of Railroad Signalmen**
(Southern Railway Company)

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

On behalf of **Signalman** R. W. Pearson for **12 1/2 hours'** pay account on August 15 and 16, 1979, a crossing **signal** gang performed other than **crossing** signal work." (General **Chairman** file: **SR-134**, Carrier file: SG-411)

OPINION OF BOARD: This claim, brought **in** behalf of **Signalman** R. W. Pearson, asserts that the Carrier violated an **agreement concerning** crossing signal gang work by assigning a **member** of the gang to perform other than crossing **signal** work on August 15 and 16, 1973. The **Organization** seeks pay for Pearson for the **time** spent by the gang **member** on the challenged work.

The essential facts underlying the **violation alleged** are not in dispute. While outside contractor forces and the District Signal Gang were engaged **in** installing highway crossing signal devices, a **member** of the gang was assigned to **operate** the gang trenching machine to assist the Claimant and work along with **him** on a separate signal project involving **installation of electro-codecable**. The other **members of** the gang continued to perform gang work at the **times** in question. The work at issue totalled **12 1/2 hours** over the two days. The Claimant was on duty and **under** pay during those hours.

The **Agreement** was entered into **on** January 24, 1975, and reestablished as of May **13, 1977**. It provides, in relevant part, as **follows**:

"(1)(a) Two new signal gangs (consisting of a foreman and six (6) **men** each), shall be established -- for the purpose of installing automatic or manual electrically operated highway crossing protective **devices**. After each of these gangs has been established, it will be used to perform available work installing such highway **crossing** protective devices; this will **tot** bar the use of these **gangs** to perform other **signal work** when highway crossing projects are unavailable and **when** such work is not being performed by other forces under Section (3) below.

(3) While the work of **installing** automatic or **manual** electrically operated highway crossing protective devices has been recognized as work falling within

the **Scope** of the scheduled **agreement between Southern Railway Company and** affiliated Carriers and the Organization party hereto, highway crossing protective devices that cannot be installed **on** the territory comprised of Southern's Lines East **and** Lines West Seniority Districts by Carriers' **signal** forces during **normal work** hours **(including** gangs established under (1) above) way be installed **on** said territory using other forces represented by Brotherhood of Railroad Signalmen. Carriers shall give preference to the use of the gangs established under (1) above to work projects involving changes to existing crossing protective equipment that involve other Signal Circuits.

(4) There shall be **no reduction in the number** of positions or the **number** of signal gangs on **Southern's** Lines East and **Lines** West Seniority Districts, including the gangs established in accordance with Section (1) of this Agreement while contractors are performing work described **in** Section (3) above. *****"**

It is the Organization's position that the plain language of paragraphs (1) and (3) restricts assignment of any **gang member** exclusively to highway crossing signal work at such times as outside forces are on the property installing highway crossing signals. The Organization **stresses** that the manifest intent of the **Agreement** was to assure that outside forces would not be **used** to **limit** work opportunities of the **Carrier's employees**. It asserts a loss of work opportunity by the Claimant.

.The Carrier makes three principal contentions to defeat the claim:

1. **The** Carrier acted in full accord with the Agreement because the gang as such was engaged in the work specified by the Agreement on the dates **in** question. The one **gang member** and the **trenching machine** were not needed at the time for the gang **work**. The **Organization's** restrictive interpretation has no basis **in the** Agreement, and the **Organization** has pointed to no **specific** language prohibiting the Carrier's action and validating the claim.

2. **There** is **in** any event no valid basis for this claim, as the disputed work had no adverse **impact** on the Claimant. **The Claimant** was, and **remained**, fully employed. The Organization has not shown that he incurred monetary damage through **any** loss of job opportunity.

3. **The** amount of work performed was **de minimis** in any event.

In rebuttal, the Organization does not disagree that the challenged work had no **monetary** or other adverse **impact** on the Claimant. It seeks to support the claim on the basis of an assertedly established Board **policy** of assessing punitive damages where violation of an agreement is found and no loss of wages is shown to have occurred. It cites Board awards **from** the Third Division. It also disputes the **de minimis** characterization. The **Organization** has offered **further justification** for the **claim**

on a separate additional ground. It asserted that **some** unidentified **employee** lost work "along the line somewhere" and that the Claimant is the logical person to wake the claim because he was on the job in which the violation was **committed**.

On a careful reading and analysis, the Board wakes the following interpretation of the Agreement insofar as it is applicable to the facts before US:

1. The signal gangs are to be used exclusively for the sole purpose of installing highway crossing signals. **This is** evident from both the plain language of Section (1)(a) and its express exception which permits other use of **the** gangs **only in** the absence of outside forces.

2. **The size** of each signal gang is to be maintained at a constant level of six members and a foreman. **This** is evident from both the clear language of Section (1)(a) prescribing the **numerical** composition of the gang and the **prohibition in** Section (4) of any reduction in the **number** of positions on the gang. Again an exception is indicated only where no outside forces are present.

3. The total effect of the Agreement language is to restrict the entire gang to highway crossing signal installation work at any time that a contractor is on the property installing highway crossing signals. We see the restriction as a reflection of the plain intent of the parties to protect the Carrier's employees from threats to their work **opportunity by** outside forces.

Applying the essential interpretation to the operative facts presented by this claim, the Board concludes that the Carrier violated the Agreement by assigning a **member** of the gang to work with the Claimant on the electro-code cable installation job. We cannot accept the Carrier's contention that use **of** one member of the gang for the disputed work while the others continued **to** perform the prescribed gang function did not violate the Agreement. As we have stated, a fair reading of the Agreement does not permit diminution of the prescribed **size** of the **gang** while outside forces are present. Any deviation from the **numerical** composition of the gang may reasonably be seen as weakening the basic protection of Carrier employees intended by the Agreement. **It is significant** that the **Agreement** makes no exception **even** for a **gang** member whose services may not be needed at a particular time. Finally, we do not regard **12 1/2** hours of work as **de minimis**.

'Having found a violation, we address the question of appropriate **remedy** on the facts shown by this record. We consider the Carrier's contention that this claim is without valid support, and is hence not properly payable, because the claimant was fully employed and was not shown to have suffered any other adverse economic effect from the prohibited work. As the **factual** basis of this **argument** has been conceded **by** the Organization, we are brought to the issue, raised by the **Organization**, of the Claimant's entitlement to punitive damages as both a penalty for the breach **committed** and a deterrent against similar violations **in the** future. **The issue** arises because the Agreement **does** not specifically prescribe or expressly authorize the **exaction** of a penalty.

Established principle is **against** the **payment** of punitive damages for violation of federal labor relations laws. **Remedial** action is limited to compensatory monetary restitution for actual losses incurred. (See: Electrical Workers v. Foust, 442 U.S. 42(1979); Deboles v. Trans World Airlines, 552 F. 2d 1005, cert. den. 434 U.S. 837(1977)). The prevailing view in arbitration cases appears to point in the **same** direction **where** no specific penalty **provision** is made in the labor agreement.

Decisions **of** this Board, however, do not reflect a uniform sustained position **on** this issue. See, for example, Award **Number 19899** (Sickles), which favors the assessment of punitive damages, and Award **Number 22194** (Wallace), which rejects **it** -- both **from** the Third **Division**. For present purposes, we need not espouse **one or** the other view or attempt to reconcile their differences. **It** is sufficient to state that, even ff this Board could be **said** to have the authority to impose **punitive** damages where no compensatory remedy is applicable, we do not consider that the particular circumstances present here would justify the exercise **of** any **such** authority. Briefly these **circumstances** are:

1. The Claimant, as the occupant of the job in which the prohibited work was performed, was fully employed and was not shown to have lost any work opportunity or suffered any adverse economic effect.

2. As the ultimate **loser, if** any, has not been **identified** or shown to be identifiable, the Claimant's relationship to the ultimate loser must be deemed too **remote** to justify vindication of that employee's loss by payment to the Claimant.

3. There **is** no basis **in** the evidence for finding a **wilful** or repetitive violation on the part of the Carrier.

Accordingly, it is the opinion of the Board that the record does not afford an acceptable basis for sustaining the claim for **monetary** payment as a remedy for the violation found. It is our view that the finding of violation of the Agreement will afford appropriate notice to the Carrier sufficient **in itself** to deter similar conduct **on** its part in the future. We will therefore **deny** the claim for **monetary** payment.

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 Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway labor Act, as approved June 21, **1934**;

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

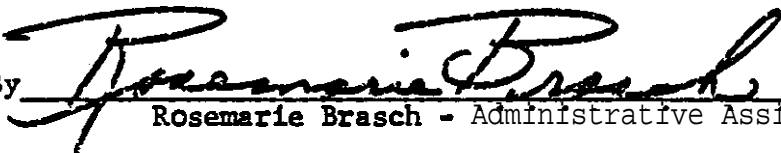
That the Agreement was violated.

A W A R D

The claim is sustained insofar as it alleges a violation of the Agreement. It is denied insofar as it seeks monetary payment.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest : **Acting** Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of November 1982.