Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28889
THIRD DIVISION Docket No. MW-29070
91-3-89-3-509

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

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

(1) The Agreement was violated when the Carrier assigned Rail Gang 520 instead of Rail Gang 101 to perform rail installation work on Inter-Regional Territory No. 1 from June 13 through September 29, 1988 (System Docket MW-29).

(2) As a consequence of the aforesaid violation, the Rail Gang 101 employes listed below* shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the total number of straight time and overtime man-hours expended by Rail Gang 520 employes performing rail laying working on Inter-Regional Territory No. 1 beginning sixty (60) days retroactive from August 15, 1988 and continuing until the violation was corrected.

*V. P. French	E. L. Zalinski
R. R. Ramp	J. A. Seedoe
W. L. Farone	R. G. Shalungo
R. J. Miller	C. C. Derk
C. J. Christion	M. F. McCormick
T. R. Phillips	E. J. Markowski
G. R. Mull	S. P. Stephens
R. J. Minnier	A. V. Mathis
L. R. Bailey	C. L. Bixler
G. J. Sharke	J. J. Smith
R. L. Foulds	W. J. Engle
B. J. Good	C. L. Price
C. W. Kramer	J. L. Ray
W. H. Bailey	L. C. Hoover
R. M. Smoogen	S. J. Willis
R. R. Burns	D. J. Day."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The basis facts are not in dispute. Claimants are 32 employees, most of whom were members of Rail Gang #101, holding seniority on Inter-Regional Seniority District No. 1. Between June 13, 1988 and September 29, 1988, Rail Gang #520, consisting of 29 employees on the roster of Inter-Regional Seniority District No. 4, was assigned to install ribbon rail on the Southern Tier in Inter-Regional Seniority District No. 1. All employees from Inter-Regional Seniority District No. 1 had been recalled from furlough and were gainfully employed during the time Rail Gang #520 was assigned. In addition, Carrier hired 13 new employees. Notwithstanding these actions, however, Rail Gang #101 worked the entire production season an average of 40 employees short. Although Rail Gang #520 ceased working in District No. 1 on September 29, 1988, Rail Gang #101 continued working through December 15, 1988.

The Organization made procedural objections to portions of Carrier's submission. The disputed information did not influence our analysis of the record or these Findings.

Carrier does not directly challenge the Organization's contention the seniority provisions of the Agreement were violated. Carrier asserts as its sole defense, both on the property and in its submission, that no Claimant suffered a monetary loss and, therefore, no Claimant was aggrieved. We agree.

It is undisputed that Carrier exhausted the available supply of employees holding seniority in District No. 1. At this point it became free to add new hires, which it did. Rather than increase the workforce exclusively in this manner, Carrier also imported Rail Gang #520. While the importation of Rail Gang #520 was a technical violation of provisions of the Agreement, there is no evidentiary basis in the record to conclude that Claimants' earnings were adversely affected in a different manner than if Carrier had merely added 29 more new hires and furloughed Rail Gang #520 in its home district.

This Board is aware of the divergence of awards in this difficult area where a violation has been found but no loss has been established. We understand the "emptiness" associated with a violation without a remedy. However, we believe the better reasoned and more jurisdictionally sound line of decisions does not provide for an award of damages where there is no proven cognizable loss causally traceable to the violation of the Agreement. No such loss or losses have been established here. Accordingly, no damages are awarded.

A W A R D

Claim sustained in accordance with the Findings.

Award No. 28889
Docket No. MW-29070
91-3-89-3-509

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of July 1991.

LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
TO
AWARD 28889, DOCKET MW-29070
(Referee Wallin)

The Majority correctly found that the Agreement was violated when the Carrier assigned employes from one seniority district to work on another seniority district. This finding was not difficult to make inasmuch as the Carrier freely admitted to violating the Agreement. However, the Majority's finding that no monetary remedy is warranted for such a violation is both poorly reasoned and an anomaly that diverges from a virtually unbroken string of Third Division awards that allowed monetary claims for so-called fully employed claimants when the carrier violated seniority district rules. Moreover, this award conflicts with well-established precedent on this property concerning a precisely identical situation.

The Majority's first error was its finding that there is a "divergence of awards in this difficult area". That finding is plainly and simply wrong. What is perplexing is how the Majority arrived at this plainly wrong conclusion. There is no precedent cited in the award. However, a review of the record establishes that the following list of awards was cited to the neutral member by the Carrier as precedent on this Carrier's property: Third Division Awards 26137, 26182, 26229, 26381, 26709 and 27185, Awards 5, 25, 29, 40 and 42 of Public Law Board No. 3781 and Awards 2, 4, 5 and 32 of Public Law Board No. 2945. The problem is that not a

single one of these awards dealt with the issue of crossing seniority district lines. The fact is, that every single one of these awards is clearly distinguishable from the instant case. Although we hesitate to burden the record by individually examining each and every one of these awards, we do feel compelled to examine the most glaring examples of the inapposite awards upon which the Majority apparently, but erroneously, relied.

Third Division Award 27185 (Conrail v. BMWE)

This award involved a subcontracting dispute, not a seniority district dispute. Moreover, the claim was made for furloughed claimants and sustained for these same furloughed claimants. Inasmuch as the claimants were furloughed, there was no discussion, argument or award citation concerning pay for fully employed claimants involved in this case. Hence, it has no application to the instant case.

Award 5 of Public Law Board No. 3781 (Conrail v. BMWE)

This award involved the recall of junior furloughed employes instead of senior furloughed employes. The claim was sustained from the beginning of the violation until the violation was corrected, i.e., until the senior employe was recalled. The claim did not involve seniority district violations or so-called fully employed claimants. Consequently, this award has no logical application or precedential value in the instant case.

Award 25 of Public Law Board No. 3781 (Conrail v. BMWE)

Once again, this award does not involve seniority districts or so-called fully employed claimants. This case involved changing of headquarters and a claim for expenses. It is not even remotely applicable in the instant case.

Awards 40 and 42 of Public Law Board No. 3781 (Conrail v. BMWE)

Both of these cases involve the recall of junior employes instead of senior employes. Both cases were sustained. Neither case involved so-called fully employed claimants, nor were any argument or awards concerning the full employment issue raised in the case. These awards are clearly not applicable to the instant case.

Award 2 of Public Law Board No. 2945 (Conrail v. BRAC)

This case involved the arbitrary disqualification of a clerk and a subsequent improper displacement. The claim was sustained. It did not involve seniority districts or the fully employed claimant issue. It clearly has no application to the instant case.

In addition to these inapposite awards involving Conrail, the following awards were cited to the neutral to support the Carrier's theory that this Board has no authority to impose a penalty: Second Division Awards 1638, 3967, 10666, Third Division Awards 10963, 13154, 13958, 14853, 15062, 15624, 16691, 18540, 20921, 25445, 25694, 25696, 26063, 26169 and 28693. There are two problems with attempting to apply these awards to the instant case. First, with the exception of a single award (Third Division Award 18540), none of these awards involve seniority district violations. Second, several of the awards are by Referee Dorsey (Third Division Awards 10963, 13958, 14853) or relied upon precedent set by Referee Dorsey in Third Division Award 13958 (Third Division Awards 15062, 15624, 16691). Of critical importance, is the fact that based upon amendments to the Railway Labor Act and judicial developments in the law, Referee Dorsey subsequently reversed his finding in Award

13958 and held, in Award 15689, that the so-called full employment of claimants is no bar to awarding compensation for Agreement violations. Simply put, much of the precedent upon which the Carrier relied has been reversed by the very referee who wrote the awards.

The fact the seniority district cases are distinguishable from other types of cases is evidence by a review of Third Division Awards 15062 (cited by the Carrier) and 12671. Both of these awards were rendered by Referee Ives. Award 15062 was a subcontracting case and Referee Ives relied upon the earlier Dorsey award (Award 13958, later reversed by Dorsey) to deny a compensatory award based on full employment of the claimants. However, Award 12671 was a seniority district type dispute and Referee Ives sustained the claim for so-called fully employed claimants as follows:

> "The Petitioner's claim (Part 2) prays for an award of money to be paid to each of the particular named B&B employes at his respective straight time rate for the computed time they allegedly would have worked if they had been assigned to perform the number of hours actually worked by the Nashville Terminal B&B employes. The Petitioner primarily relies on numerous awards which have held, under various factual situations, that the full employment of Claimants is not necessarily a valid defense against such monetary claims. Particular emphasis is placed upon two recent awards of this Board by the Petitioner (Awards 11937 and 11938).

"The Carrier contends that the Agreement contains no provisions for so-called punitive damages for contractual violations such as we have found in this case. It argues that the Claimants have not been damaged monetarily and are, at most, entitled to nominal damages. In support of its position, the Carrier cites a number of previous awards and federal court decisions.

After careful review of the entire record in this case, we find that the extent of the monetary damages suffered by the Claimants is a matter of proof. The Petitioner has submitted specific hourly claims on behalf of each individual Claimant, based upon the number of actual hours spent on the disputed work assignment by others, which can be readily translated into specific monetary claims. The Carrier has offered no evidence that the Claimants could not have performed the work by working overtime or that the work could not have been delayed and later performed during regularly scheduled hours of work.

* * *

The Carrier here has erroneously described the monetary claim as a prayer for punitive damages which implies that the Organization seeks the assessment of a penalty over and above the damages suffered by the Claimants. We find that the damages sought by the Petitioner are limited to compensatory damages directly arising out of the Carrier's violation of the Agreement, which would compensate the Claimants by making them whole for work they otherwise would have performed and wages they would have earned. (Awards 11937, 11938 and 11701).

We will sustain the claim."

This distinction recognized by Referee Ives between seniority district violations and other types of violations has been consistently recognized by this Division and Public Law Boards both on this property and within the industry in general. In this connection, see the following awards:

19840	BMWE v. C&NW	(Blackwell - 1973)
20090	BMWE v. SPT	(Lieberman - 1974)
20562	BRS v. B&O	(Blackwell - 1974)
20891	BMWE v. BN	(Edgett - 1975)
21678	BMWE v. BN	(Eischen - 1977)
22374	BMWE v. BN	(Sickles - 1979)
23046	BMWE v. SP	(Roukis - 1980)
Awd 82, PLB 1844	BMWE v. C&NW	(Eischen - 1982)
24576	BMWE v. MOP	(Klaus - 1983)
25964	BMWE v. C&O	(Marx - 1986)
27847	BMWE v. SSW	(Scheinman - 1989)
28524	BMWE v. CSX	(Lieberman - 1990)
Awds 59,60,62&63, PLB 1837	BMWE v. N&W	(Myers - 1990)
28676	BMWE v. GTW	(Marx - 1991)
28852	BMWE v. UP	(Zusman - 1991)
Awd 41, SBA 1016	BMWE v. Conrail	(Blackwell - 1991)

The awards cited above clearly show that over a period of nearly twenty years, eleven different arbitrators have issued twenty-one awards sustaining compensation for so-called fully employed claimants when a Carrier violated seniority district lines, including Award 41 of Special Board of Adjustment No. 1016 on this property. The inexonerable conclusion is that there is no "divergence" of awards on the subject as the Majority suggested in Award 28889. Hence, the first premise upon which Award 28889 is based (i.e., divergence in precedent) is invalid.

The second error inherent in this award is the finding that there was no proven cognizable loss causally traceable to the violation of the Agreement. Contrary to this absolutely unsupported finding, there were two very serious losses. First, there was a definite monetary loss for individual employes. Second, the

critically important rights of seniority that are conferred by the Agreement would be devastatingly diminished if this award were to be given any precedential value.

The monetary loss should be self evident. The work involved in this dispute was laying rail. Once new rail is laid, it remains in place and without need for replacement for a decade or more. Therefore, there can be absolutely no question that the installation of rail on Inter-Regional Territory No. 1 by other than employes holding seniority on that seniority territory deprived the employes on Inter-Regional Territory No. 1 of the opportunity to lay that rail at some point. Under such circumstances, a monetary award is not the equivalent of punitive damages. Instead, it is compensating the Claimants for work they otherwise would have performed and wages they would have earned. That is precisely the theory upon which the vast majority of awards concerning seniority district violations have relied to sustain monetary claims for fully employed claimants. Typical examples from the more than twenty awards cited above are Third Division Award 12671 (quoted supra) and Awards 21678 and 28524, which held:

AWARD 21678:

> "The only question remaining is relative to appropriate remedy. Claimants seek compensation for 64 hours of straight time, the amount of time which the Fargo District gang consumed in performing the disputed work. Carrier resisted payment of damages even if arguendo the

> "Agreement was violated on the grounds that Claimants suffered no loss of earnings and the Board has no authority to award damages. We have dealt authoritatively with similar contentions in prior Awards involving these same parties and concluded that where, as here, Claimants by Carrier's violation lost their rightful opportunity to perform the work then they are entitled to a monetary claim. Nothing on this record persuades us to deviate from those precedents in this case. See Awards 19899, 19924, 20042, 20338, 20412, 20754, 20892." (Underscoring in original)
>
> AWARD 28524:
>
> "With respect to Carrier's position on the nature of a possible remedy, it seems clear that in this dispute the Claimants were deprived of work opportunity and under well-established precedents are entitled to full compensation, rather than the difference in compensation for the two jobs (see, for example, Third Division Awards 14004, 17051 among many others). In sum, therefore, the Claim must be sustained with the limitations specified in Rule 40."

While the specific monetary loss is certainly important, the far more serious damage that will be wrought if this award is afforded even the slightest precedential value, is the diminution of important seniority rights. Seniority rights have no value unless certain work accrues to employes by virtue of those rights. To assign work of one seniority district to employes of another district for all practical purposes nullifies the terms of the negotiated seniority district rules and renders those seniority rights meaningless. A monetary award is therefor justified if for no other reason than to preserve the integrity of the Agreement. Once again, this theory has consistently been applied to seniority

district cases until the adoption of this anomalous award. Typical examples from the twenty-one awards cited above are Third Division Award 19840 and Award 41 of Special Board of Adjustment No. 1016, which held:

AWARD 19840:

"Carrier contends, though, that, even in the event of an Agreement violation, the herein claims for compensation should be denied on the basis that claimants were fully employed during the claim period. We do not concur.

A multiplicity of viewpoints on this question is reflected in our prior Awards and we shall not attempt here to reconcile or explain the bases for the various viewpoints. It suffices to say here that this record presents an obvious loss of work opportunities by claimants who have averred that they were available and would have performed the Roland Branch work if Carrier had assigned them thereto. Carrier's explanation of claimant's non-availability for the Roland work, i.e., that claimants performed other emergency work concurrently with the Roland emergency work, is not supported by the record and Carrier has offered no other evidence to explain why the Roland work was not assigned to claimants. If compensation were not allowed in these circumstances, the result would be that Carrier could with impunity assign employees to cross seniority district lines so long as employees such as claimants are fully employed. The net effect would be that employees would have seniority rights but no effective remedy for the instant violation thereof and, consequently, the Agreement provisions protecting such seniority would be partly nullified. We do not believe it is in the interests of the parties for the Board to encourage that result and we shall therefore follow prior authorities awarding compensation where a violation has occurred in circumstances involving a loss of work opportunities."

AWARD 41 - SBA NO. 1016:

"Important seniority rights are in question in this case, because an Employee whose name is on a seniority

> "roster in an Agreement designated seniority district, owns a vested right to perform work in that seniority district that accrues to his standing and status on the district seniority roster. The Seniority District boundaries established by the parties' Agreement to protect and enforce that right, have been improperly crossed by the Carrier action, resulting in the Claimants loss of work opportunities, and hence the principle that compensation is warranted in order to preserve and protect the integrity of the Agreement, is applicable to this dispute. For similar rulings between these same parties see Award No. 34 of Special Board of Adjustment No. 1016 (07-28-89) and Award No. 7 of Public Law Board No. 3781 (02-12-86)." (Underscoring in original)

The Organization's concern about the integrity of the Agreement is not simply a theoretical or perceived concern. The above-quoted Award 41 of Special Board of Adjustment No. 1016 involved a virtually identical seniority district violation that occurred on this Carrier's property during 1985. Moreover, there are presently at least eight similar seniority district violation cases involving this Carrier and the BMWE pending before this Division or related forums. This Carrier is a blatant and repeated violator of the seniority district rules.

In conclusion, it is clear that the two basic premises upon which this award is based are invalid. That is, there is no "divergence" in awards on seniority district cases and there clearly were losses suffered by the Claimants. Inasmuch as the precedential value of an award is no greater than the reasoning in the award, this award has no precedential value. It is clear that

the award is an anomaly that is in conflict with the consistent and overwhelming majority of awards on this issue. Therefore, I dissent to that part of the award that denies compensation for the violation of the Agreement and resultant loss of work opportunity.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
TO
AWARD 28889, DOCKET MW-29070
(Referee Wallin)

A review of the dissent reveals that the minority in this dispute is simply memorializing the arguments advanced during the discussion of this case, and even if the Majority would have been apprised of Third Division Award 12671 and Award 41 of Special Board of Adjustment No. 1016, it would have done nothing more than strengthen the Majority's Findings (which is obvious to parties familiar with Section 3's resolution of minor disputes) that there is a divergent number of awards in this difficult area. The Majority, as is obvious, opted to follow the better reasoned awards. In fact, the Majority's view of not assessing a penalty is definitely not an anomaly as is further evident by the most recently adopted awards of this Division. See 3/28923, 28936, 28939, 28940, 28942.

Of course, a review of the Concurring and Dissenting Opinion wherein the minority attempts to distinguish the cited non-penalty awards by referencing a number of penalty awards spanning twenty years by eleven different neutrals who have sustained penalty compensation for fully employed claimants when seniority district rules were violated can be viewed as a tacit admission by the minority that in all other cases the fully employed claimant who has not been economically harmed is not to be afforded a windfall.

Robert L Hicks
R. L. Hicks

M W Fingerhut
M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P V Varga
P. V. Varga

James E. Yost
J. E. Yost

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
TO
AWARD 28889, DOCKET MW-29070
(Referee Wallin)

The decision in this award was and is an anomaly with respect to not allowing a monetary remedy. The evidence of such was clearly pointed out by the Carrier Member with the citation of five very recent awards in the Response, i.e., none of the awards cited dealt with a seniority district violation which denied a monetary remedy.

In the second paragraph of the Response, the Carrier Member uses the terms penalty compensation, fully employed, economically harmed and windfall. Windfall is defined as "2. any unexpected financial gain or stroke of luck." Shortly after the claim period ended, the Claimants were no longer fully employed but furloughed. As such, they were economically harmed and their unemployment compensation became their penalty compensation and unexpected financial gain. Such a stroke of luck should fall on no one.

Respectfully submitted,

D. D. Bartholomay
Labor Member