Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36510
Docket No. MW-35728
03-3-99-3-706

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 outside forces (Tomascello Construction) to plow and remove snow from roads and parking facilities at Frontier Yard in Buffalo, New York on December 18, 1997 (System Docket MW-5231).

(2) The Carrier further violated the Agreement when it failed to provide a proper advance notice of its intent to contract out the Maintenance of Way work described in Part (1) hereof.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Machine Operator E. Townsend and Vehicle Operator L. E. Kolb shall now each be compensated for eight (8) hours' pay at their respective straight time rates of pay."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

In this claim, the Organization contends that the Carrier improperly used a contractor to remove snow from the Car Shop area in Frontier Yard, Buffalo, New York, on December 18, 1997. Seven Claimants were initially identified in the claim. However, only the claims of furloughed employees E. Townsend and L. E. Kolb were progressed to the Board. The Organization requests that they be paid eight hours at their straight time rates of pay for the alleged contracting out violation.

The Carrier raises a number of defenses to the claim, among which is the contention that it is procedurally flawed. Specifically, the Carrier argues that this claim pyramids another one listed before the Board for the same Claimants, on the same date.

Based on our review of the record, we agree with the Carrier. Third Division Award 36509 alleged that the Claimants should have been used on a roadbed and ditching construction project from December 15 through 19, 1997. As a remedy, the Organization requested that the Claimants be paid 40 hours at their straight time rate as a result of the alleged improper contracting out.

The Claimants could not have been available, even if recalled from furlough, to perform straight time work involving snow removal and roadbed construction on the same dates. There are many cases, cited by the Carrier, which have recognized that pyramiding, compounding and duplicating claims are actions inconsistent with the Railway Labor Act and, as such, must be dismissed. See, e.g., Third Division Awards 28427, 27456; Second Division Award 12900. We find that the instant case falls under the rubric. Accordingly, the claim is dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of April 2003.

LABOR MEMBER'S DISSENT
TO
AWARD 36510, DOCKET MW-35728
(Referee Kenis)

The decision of the Majority to dismiss this claim, because it allegedly pyramided, compounded or duplicated another claim, was wrongheaded. Hence, a dissent is appropriate.

In this case, the Majority cited Third Division Awards 28427, 27456 and Second Division Award 12900 in support of its decision to dismiss the instant case. A review of those awards reveals that they do not support the Carrier's theory in this case. Third Division Award 28427 involved a case brought by an individual for a violation of the Agreement. The Board disposed of the case without the necessity of a neutral member's decision because the issue had already been decided by Award 25049. Hence, that case was a duplication of an alleged violation involving the same claim date, same rule violation and the same claimant. Clearly, that award disposed of a duplicate or compounded claim. This is not the same set of circumstances that are present in this case.

Award 27456 involved another case brought by an individual represented by the Transportation Communication Union (TCU) for an alleged violation of the Agreement. The TCU was advised of the dispute and filed a submission with the Board. Although the award contained dicta asserting that the Board would not allow pyramiding, compounding or duplicating of claims, the award was denied on the merits. Again, without the necessity of a neutral member's decision, the Board denied the case based on the fact that the action taken by the Carrier, which was challenged by the claimant, was in accordance with the Agreement the Carrier made with the Organization. Because the jurisdiction of the Board is confined to interpreting Agreements made between the Carrier and the Organization representing their employes, and inasmuch as there is no dispute between the contracting parties, the Carrier complied with the Agreement made with the Organization and no violation occurred. Clearly, the findings of that award have absolutely no application to the issues before the Board in the instant case.

Second Division Award 12900 was dismissed because it was identical to the issues decided in Second Division Award 12899. That case involved the same incident, same record of on-property handling and seeks an identical remedy from the Carrier as in Second Division Award 12899. Clearly, that award was a duplication of a prior dispute that had already been decided and is not applicable to the instant dispute. None of the above-cite awards involved a pyramiding of claims.

It is crystal clear that the Carrier raised this defense as an afterthought at the appellate level of handling on the property in an attempt to escape the consequences of its violation of the Agreement. The fact is that the Carrier has raised such a defense because it has systematically reduced its forces to the point that it has disabled itself from performing the work encompassed within the Scope of the Agreement (an aspect of this case on which we will remark in greater detail later). The Carrier has, in the past, used varying terminology to make its defense in this re-

gard from case to case. For example, in one case, the Carrier may call this "duplication" of claims. In another case, the Carrier may call it "pyramiding" of claims. The problem is that the factual situation in this dispute does not comport with the definition of duplication or pyramiding of claims as set forth by this Board. The fact is that claims can only be said to be pyramiding in instances where a carrier would be made to pay twice, such as a claim for bereavement leave pay for a day for which the employe had already been allowed pay (Second Division Award 8700) or a claim is made because an employe is not allowed a displacement, concurrent with a claim which was made because the same employe was theretofore disqualified in the class in which he later attempted to displace (Fourth Division Award 4590). In other words, as interpreted by this Board, pyramiding of claims could only take place when dual payments are claimed arising from a single incident for a single claimant.

Notwithstanding this Board's interpretation of the term pyramiding claims, the fact is that the Carrier may not validly argue that it may escape the consequences of its violations of the Agreement by the simple device of cleverly scheduling contracted out work projects for the same dates. If the Carrier's position in this regard is to be accepted, one must ascribe to the proposition that the Carrier could contract out several projects concerning work encompassed within the Scope of the Agreement, scheduling them all to be performed on the same day or days and escape the consequences of its violations of the Scope Rule for the projects involved. Save those for which there are separate claimants in numbers corresponding to the number of contractor's employes used for the work. The problem here is that such a theory ignores the fact that it is a well-established principle that it is the violation of the Agreement that is important. The remedy requested in connection therewith (man-hours claimed, number of claimants, etc.) is immaterial insofar as the determination of whether or not a violation occurred is concerned. It is merely incidental thereto. To hold otherwise would render the Agreement meaningless and encourage the Carrier to utilize outside concerns to perform all work encompassed within the Scope of the Agreement.

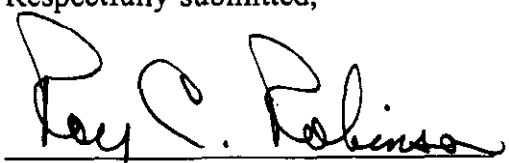
In the case resulting in Award 36509, the Carrier contracted out road building and ditching work in the Seneca Yard, Seneca, New York on December 15 through 19, 1997. The violation in the instant dispute was the contracting out of snow removal work at the Frontier Yard, Buffalo, New York on December 18, 1997. The claimants in each case were furloughed from service. The locations of the work contracted by the Carrier were within five (5) miles of one another. There was no showing by the Carrier that had the claimants been assigned to the road building and ditching work on December 15, 1997, it could have temporarily suspended the road building work for the one day it took to plow snow. This is especially true where, as here, the machinery used in the road building claim is identical to the machinery used to perform snow removal work.

Nevertheless, it should be made perfectly clear that it is not uncommon for the Organization to progress one or more separate and distinct claims on behalf of certain individuals based on the rules violated, specific circumstances, employe entitlement to perform the work, etc. Such action is perfectly in harmony with the intent and purpose of the claim and grievance machinery set up by the Agreement. The Carrier apparently would have the Board believe that such action is improper. We submit, however, that the Carrier's position is erroneous and represents an absurd interpretation of the Agreement. The fallacy in the Carrier's argument is not difficult to perceive. For example, suppose a scenario not unlike the situation at hand wherein a seniority district is comprised of five employes. Using the Carrier's apparent contention, if it violated the Agreement 10 times within a given time frame on said seniority district, it would be immune from the consequences of half of those violations, i.e., immune from the consequences of five violations of the Agreement because the Organization would not be able to file "duplicate" claims on behalf of the aggrieved employes for the violations. The Carrier is clearly wrong. Such an absurd result was clearly never the intent of the parties when they negotiated the Agreement. It is a fundamental rule of contract interpretation that where two interpretations are possible, one well-reasoned and the other absurd, the well-reasoned will be followed and the absurd interpretation will be rejected. There simply cannot be any question but that this Organization has the right and the duty to progress each and every valid claim it develops on behalf of the members it represents. Under the Carrier's interpretation, the Organization would not have that right.

Finally, we are impelled to remind this Board, as we pointed out above, that the Carrier's contention that the Claimants were named on another claim for the same date was occasioned by the fact that the Carrier has systematically disabled itself from performing all of the work within the Scope of the Agreement by the attrition of its forces. May the Carrier erode the bargaining unit through the "attrition" concept to the point that it is unable to perform all of the available work encompassed within the Scope of the Agreement and then use its so-called lack of manpower as an excuse for contracting out work? The problem is that the Carrier's contentions, in this regard, are somewhat reminiscent of the story about the boy who murdered his parents and then begged the court for mercy because he was an orphan. The Carrier has strangled its forces through attrition and refusal to hire and train new employes. Now the Carrier is attempting to persuade the Board that contracting out of the work was justified in this instance simply because the Claimants were engaged in other work during the dates involved here.

Because the Majority based its decision to dismiss this case on a faulty premise, I dissent.

Respectfully submitted,



Roy C. Robinson
Labor Member

Carrier Members' Response
to
Labor Member's Dissent
to
Award 36510 (Docket MW-35728)
Referee Kenis

The Dissentor states:

> **"... that it is not uncommon that it is not uncommon for the Organization to progress one or more separate and distinct claims on behalf of certain individuals..." (page 3).**
>
> **"... this Organization has the right and duty to progress each and every valid claim it develops on behalf of the members it represents." (page 3).**

First, while we do not dispute the Organization's right to progress valid claims, it was pointed out in the record that the Organization was claiming multiple violations for the same Claimants on the same dates and therefore could not be available for all of the asserted violations. The Awards noted in Award 36510 and disparaged in the Dissent are but a few of the Awards that were provided to substantiate that "... pyramiding, compounding and duplicating claims are actions inconsistent with the Railway Labor Act..." (Award page 2). It should be noted that Award 36509sustained the Organization's claim involving the same Claimants and involved dates that included December 18, 1997. The obvious conclusion is that if payment is made for December 18, 1997, the Claimants are not entitled to a duplicate payment for the same date. Otherwise an employee who is a Claimant in multiple claims could receive 2, 3, 4 times the normal daily compensation (depending on the number of claims and the number of different arbitrators that such claims could be directed to) resulting in a windfall for that individual. While the Organization sees nothing wrong with that and has probably been successful at it, such does not obviate the facts or invalidate the argument when what is being done is pointed out.

Second, the Organization's contention that this Carrier has "... systematically disabled itself from performing all of the work within the Scope of the Agreement by the attrition of its forces" (page 3) is an argument that the Organization has made and continues to make in several disputes filed with this Board. The Organization's argument is and has been that the number of employees has substantially diminished so that Claimants in theses cases are now unable, unqualified and do not have the expertise etc. to perform the claimed work. Organization contends that this has been a continuing process since 1982! The fly in the ointment is that other

than a reduction in the names listed on the rosters, there is no evidence submitted (in this case or in the other dockets) that would substantiate the Organization's bare assertion. If such a practice had been on going since 1982, one would expect the Organization to be able to produce evidence of such deliberate actions over the years. Yet, in this matter and in the many other disputes in which this attrition argument has been made, there is no evidence supporting the Organization's assertion. And assertions without evidence to support them are unsubstantiated allegations.

Paul. V. Varga

Bjarne R. Henderson

Martin W. Fingerhut

Michael C. Lesnik