

Award No. 10963

Docket No. MW-8852

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

**John H. Dorsey, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**READING COMPANY**

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

(1) The Carrier violated the Agreement when it removed therefrom, farmed out, or otherwise arranged or assigned the work of constructing a bridge, extending culverts, laying drain pipes, and grading and filling for a new track to gain access to the Cromby Plant of the Philadelphia Electric Company to persons not covered by and who hold no seniority rights under the Carrier's Agreement with its Maintenance of Way employees.

(2) Each employe holding seniority in the Track Department on the Reading Division be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours consumed by outside forces in performing the grading and filling work referred to in Part one (1) of this claim.

(3) Each employe holding seniority in the Bridge and Building Department on the Reading Division be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours consumed by outside forces in performing the bridge construction, culvert extension and drain pipe laying work referred to in Part (1) of this claim.

**EMPLOYEES' STATEMENT OF FACTS:** In 1955, the Carrier constructed approximately two miles of trackage to gain access to the Cromby Plant of the Philadelphia Electric Company.

The work necessitated the extension of four existing culverts; the installation of two drainage pipes, one approximately 100 feet in length, the other approximately 200 feet in length; the necessary excavation and filling to the required grade; and the construction of a steel bridge across the Schuylkill river.

The work of constructing the bridge, (except the installation of the ties, walkway and handrails, and the painting thereof); the extension of the culverts; installation of the drainage pipes; and the necessary exca-

of the management that Carrier's forces are not qualified or sufficiently skilled to perform the bridge work and grading necessary on a project of the size here involved. Carrier does not have the equipment and could not reasonably be expected to acquire the equipment necessary for work of this type. Carrier's forces have never in the past built such a spur and bridge. Therefore, Carrier maintains that the claim of the Brotherhood does not have equity or merit and should be denied in its entirety.

This claim has been discussed in conference and handled by correspondence with representatives of the Brotherhood of Maintenance of Way Employees.

(Exhibits not reproduced.)

**OPINION OF BOARD:** In 1955, Carrier installed a spur track slightly over  $\frac{1}{3}$  of a mile long from its Main Line east of Royersford, Pennsylvania, to the Cromby generating plant of the Philadelphia Electric Company. To reach the generating plant it was necessary to bridge the Schuylkill River. Carrier contracted with outside contractors for the necessary grading, construction of the substructure, fabrication and erection of steel work for the bridge. Other work included in the project was done by Carrier's Maintenance of Way Department, herein referred to as MW. Petitioner, the collective bargaining representative of MW Employees, filed a claim with the Carrier asserting that the work performed by the outside contractors should have been done by MW Employees in fulfillment of the provisions of the existing collective bargaining contract between Petitioner and Carrier.

On September 14, 1955 Carrier denied the claim stating as its sole reason:

"... It is my position that the scope rule of your agreement does not contemplate that employees covered by your agreement have rights to new construction. The scope rule makes no reference to new construction, but, on the contrary, merely describes the class of employees covered by the agreement. In view of no specific reference to construction work in your scope rule, I cannot consider your agreement as covering such work, nor can I agree that such work should be done by Maintenance of Way employees."

Thereafter, Petitioner filed its claim with this Board. The Claim consists of 3 Parts: Part (1) pleads a violation of the Agreement; Parts (2) and (3) pray for a monetary award to Carrier's MW Employees based on an arbitrary formula.

The pertinent provision of the contract is:

**"RULE 1—SCOPE**

"The rules contained herein shall govern the hours of service, working conditions and rates of pay of the following classes in the Maintenance of Way Department, including those employees at Port Richmond, Port Reading and Reading Frog Shop:

"Bridge and Building Foremen, Inspectors, Gang Leaders, Mechanics and their helpers, viz: Carpenters, Painters, Masons, Blacksmiths, Plumbers, Tinsmiths.

"Section, Track, Work Train, Extra Gang Foremen, Assistant Foremen and Sub-Foremen.

"Fence repairmen and all laborers in the Maintenance of Way Department.

"Fire Equipment Inspector, Port Richmond.

"Crossing and other Watchmen, Drawbridge Tenders, Pumpmen, Lampmen, Frog, Switch and Rail Repairmen, Crane and other machine operators, including Chauffeurs."

Before this Board, Carrier argues that the Claim should be denied not only because the Scope Rule does not include new construction but for the following additional reasons: (1) Special skills were needed to perform the work and Carrier's forces were not qualified; (2) Special materials and machines and other equipment were needed; (3) Magnitude of the work involved; (4) Past practice of contracting work; and (5) Claims for unnamed Employees are invalid. Petitioner states that these additional reasons were not advanced by Carrier on the property. The burden of proof to rebut Petitioner's assertion is on the Carrier. Carrier has failed to adduce evidence in the record to support its self-serving declaration, in its Submission, that these defenses were proffered on the property. Consequently, the additional defenses to the Claim, enumerated above, cannot be considered by this Board. As to whether Carrier violated the contract we are confined to the merits of Carrier's sole defense, in the record, that the collective bargaining contract does not encompass "new construction" of any kind.

Carrier advances the argument:

"... the rules of the Agreement govern the hours of service, working conditions and rates of pay of employees specified therein. Nowhere in the Scope Rule is there set forth the class or character of work employees are to perform. Carrier maintains that there is no provision in the Scope Rule or any other rule of the agreement indicating that Carrier has agreed with the Brotherhood that they have any contractual right whatsoever to perform the work here claimed."

Thus, we are asked, by Carrier, to read the Scope provision of the contract in a manner which would serve no function because, in the sense urged, the contract would be literally interpreted without regard to substance.

The Board must apply its wisdom, garnered from experience and relevant aids in the field within the Board's jurisdiction, with the objective of effectuating the public policy enumerated in the Railway Labor Act, as amended, herein called RLA. Of compelling consideration is that the words in a collective bargaining contract acquire scope and function from the history of events which they summarize.

Within a collective bargaining unit composed of MW workers it is a matter of common knowledge that such Employees do some new construction work. Also, it is a matter of common knowledge that carriers often, justifiably, contract out new construction projects. Whether or not a project comes within the scope of the contract is dependent upon the facts in each instance—there is no precise empirical formula which

solves the question with mathematical precision. But, if a carrier contends that a new construction project is beyond the Scope provision of the collective bargaining contract it, should a claim be filed with this Board, bears the burden of disproving the rebuttable presumption that new construction is covered by the contract. We find that Carrier failed to meet this test. Part (1) of the claim, therefore, will be sustained.

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 analogous 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 Employees 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 Employees 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 Employee 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 Employee 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 Employees 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 Employees 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.

Upon the basis of the foregoing findings, reasons and conclusions Parts (2) and (3) of the Claim must be denied.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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; but, Petitioner has not proven its claim for a monetary Award.

AWARD

Part (1) of the Claim is sustained. Parts (2) and (3) of the Claim are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1962.