Award No. 11984
Docket No. MW-11096

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jim A. Rinehart, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement and the understanding in connection therewith, when it assigned the work of constructing a new Diesel Repair Shop Building at Proctor to contract without first handling the matter in writing with the employes' authorized representatives;

(2) Furloughed B. & B. Helpers Kenneth J. Olson, Melvyn L. Benson, Virgil C. Scheper, and James O. Rowe each be allowed eight (8) hours' straight time pay at the B. & B. Helper's rate for each day of unemployment during the period from April 1, 1957, to June 24, 1957, because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Simultaneously with the consummation of the currently effective Agreement (Schedule No. 3), the parties affixed their signatures to the following Supplemental Agreement:

"SUPPLEMENTAL AGREEMENT
between the
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
and the
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Notwithstanding the provisions of Rule 36 of the agreement dated June 1, 1953 between these parties, it is agreed that the following will remain in effect until changed in accordance with the provisions of the Railway Labor Act.

(4) The Board is empowered only to decide the dispute in accordance with the specific provisions of the effective agreement at the time of the alleged violation.

(5) Claim is one for a penalty payment, which, under the effective agreement the Board does not have the authority to grant.

For all the reasons given, the claim should be dismissed and if not dismissed, the claim should be denied in its entirety.

All relevant facts and arguments involved in this dispute have heretofore been made known to the Employes' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization contends that the agreement and understanding between it and the Carrier was violated when Carrier on December 4, 1956 let a contract to a General Contractor for the construction of a building to house and service Diesel locomotives, without first notifying the General Chairman in writing of the decision to do so, affording the General Chairman an opportunity to discuss the matter in conference with Carrier's representatives.

We must first determine the existence, date and extent of the "understanding." Claimant says the date was March 7, 1956 that it was then oral, then put into effect, but later, September 24, 1958, reduced to writing and signed by the parties.

The record shows on July 11, 1955 the General Chairman gave notice under the Railway Labor Act as amended, of a desire to confer on an agreement that "all work covered by Schedule 3, effective June 1, 1953 shall be performed by employes covered by that agreement,".

A copy of the Notice and "Appendix A" thereto is as follows:

"BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

"July 11, 1955

"Mr. R. E. Hastings, Director of Personnel
Duluth, Missabe and Iron Range Railway Co.
Wolvin Building
Duluth, Minnesota

"Dear Sir:

"Kindly be referred to Supplemental Agreement between the Duluth, Missabe and Iron Range Railway Company and the Brotherhood of Maintenance of Way Employes signed June 1, 1953, which continued Addenda to Agreement between the Duluth, Missabe and Iron Range Railway Company and the Brotherhood of Maintenance of Way Employes effective September 16, 1942, covering the contracting of work in the Maintenance of Way and Structures Department.

"Please consider this letter as the usual and customary thirty days notice under the Railway Labor Act, as amended, of our desire

to amend this Supplemental Agreement effective August 11, 1955, as per Appendix A attached.

"It is our desire that conferences on this notice be held at the earliest possible date and in any event prior to July 28, 1955, and that you, within ten (10) days after the receipt of this notice, set a date, time and place for conference.

"Very truly yours,

"/s/ Louis Emerson
General Chairman"

"Appendix A referred to in the second paragraph of the aforequoted letter reads as follows:

"APPENDIX A
"SUPPLEMENTAL AGREEMENT
"Between
"DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
"and the
"BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

"IT IS HEREBY AGREED:

"That that certain agreement signed at Duluth, Minnesota, June 1, 1953, covering the right of the Railway Company to contract work in the Maintenance of Way and Structures Department, be amended, effective August 1, 1955, to read as follows:

'IT IS AGREED:

'That all work covered by Schedule No. 3, effective June 1, 1953, shall be performed by employes covered by that agreement, except where, by mutual agreement between the General Chairman and the designated representative of Management, it is agreed that certain jobs may be contracted to outside parties on account of the inability of the Railroad, due to lack of equipment or qualified help, to perform such work with its own forces.'

"For the BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES

"General Chairman

"For the DULUTH, MISSABE AND IRON RANGE
RAILWAY COMPANY

"Director of Personnel

"Signed at Duluth, Minnesota"

Following the conference above referred to the following correspondence occurred:

"DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
"Department of Personnel

"Duluth 2, Minnesota

"September 20, 1955

"Dear Sir:

"Confirming conference held in room 506 Wolvin Building on September 12, 1955 at which discussion was continued concerning your formal notice to modify the present supplemental agreement dated June 1, 1953 covering the contracting of work in the Maintenance of Way Department:

"In the light of the record which indicates that the contracting of work has been substantially reduced during the past two or three years, plus the further fact that the number of employes in the Bridge and Building Department has been increased approximately one-third since 1942, we informed you that in our opinion the drastic changes desired by the Organization were not justified.

"You were also informed that the Company would make every reasonable effort to perform all maintenance work with our employes and in consideration of this you were urged to hold your notice of July 11, 1955 in abeyance with the understanding that should you desire at a later date to again press for the change requested you would be at liberty to do so.

"Mr. Vogland, your Grand Lodge representative, expressed his pleasure concerning the attitude of the Company in the matter and stated that he realized it would take some time to affect a change in policy such as indicated by the Company, and, therefore, concurred in our request to hold the matter in abeyance to which you agreed.

"Please acknowledge receipt.

"Yours very truly,

/s/ R. E. Hastings
Director of Personnel

"Mr. Louis Emerson, General Chairman
Brotherhood of Maintenance of Way Employes
918 - 9th Avenue, Two Harbors, Minnesota"

The General Chairman's response is as follows:

"BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

"October 10, 1955

"Mr. R. E. Hastings, Director of Personnel
Duluth, Missabe & Iron Range Railway Co.
Wolvin Building
Duluth 2, Minnesota

"Dear Sir:

"This will acknowledge your letter of September 20th in which you refer to conference held in Room 506 Wolvin Building on Septem-

ber 12, 1955, at which discussion was continued concerning our formal notice to amend the Supplemental Agreement dated June 1, 1953, covering the contract of work in the Maintenance of Way and Structures Department.

"The third paragraph of your letter reads as follows:

> 'You were also informed that the Company would make every reasonable effort to perform all maintenance work with our employes and in consideration of this you were urged to hold your notice of July 11, 1955 in abeyance with the understanding that should you desire at a later date to again press for the change requested you would be at liberty to do so.'

"We note that you use the words 'maintenance work'. If you have in mind 'maintenance and repair work' only, and exclude 'new work' we cannot agree to your suggestion. We were talking about all work in the 'Maintenance of Way and Structures Department' as covered in Scope Rule 1 of Schedule No. 3 which became effective June 1, 1953.

"It is true that Mr. Vogland, Vice President, and I, as General Chairman, recognize that it may take some time to effect a change in policy such as proposed and we are willing to hold our notice of July 11, 1955 in abeyance a reasonable length of time in order that you may do this, dependent upon management curtailing the contracting of work to outsiders, except in cases where they are not equipped to carry out such work. In fact, that is what we have in mind in proposing amendment to the Supplemental Agreement referred to in your letter.

"Very truly yours,

/s/ Louis Emerson
Louis Emerson
General Chairman."

Correspondence continued between the parties relative to the "understanding" between the parties until it was reduced to a written agreement on September 24, 1958:

"DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY
"DULUTH, MINN.

"September 24, 1958

Mr. Louis Emerson, General Chairman
Brotherhood of Maintenance of Way Employes
524 - 10th Avenue
Two Harbors, Minnesota

Dear Sir:

"Please refer to your letter of September 5, 1958 and our conference September 22, 1958 on the subject of re-establishing the understandings reached as a result of your July 11, 1955 notice regarding

contracting of work in the Maintenance of Way and Structures Department.

"As a result of this conference it is our understanding that it is agreed that the following will be observed by the Railway Company for as long as your Organization continues to hold in abeyance its notice of July 11, 1955:

1. The Railway Company will make every reasonable effort to perform all maintenance work in the Maintenance of Way and Structures Department with its own forces.

2. Consistent with the skills available in the Bridge and Building Department and the equipment owned by the Company, the Railway Company will make every reasonable effort to hold to a minimum the amount of new construction work contracted.

3. Except in emergency cases where the need for prompt action precludes following such procedure, whenever work is to be contracted, the Carrier shall so notify the General Chairman in writing, describe the work to be contracted, state the reason or reasons therefore, and afford the General Chairman the opportunity of discussing the matter in conference with Carrier representatives. In emergency cases, the Carrier will attempt to reach an understanding with the General Chairman in conference, by telephone if necessary, and in each case confirm such conference in writing.

"If the foregoing is in accordance with your understanding, please sign all copies in the place provided, retaining the original and one copy for your files and returning the remaining copies to this office.

Yours very truly

/s/ H. W. Kosak
H. W. Kosak
Director of Personnel

(whc)

"Accepted for the

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

/s/ Louis Emerson
General Chairman"

In addition the record shows letters from Carrier's Chief Engineer H. A. Smith to Mr. Louis Emerson, General Chairman notifying him of the desire of Carrier to contract out numerous construction jobs. Letters were dated March 15, 1956, one April 10, 1956, June 11, 1956, June 15, 1956, June 20, 1956, June 26, 1956, December 26, 1956 most of them asking and receiving concurrence of the General Chairman.

In our opinion the correspondence and acts of the parties conclusively establishes the understanding; that it was effective and in practice for a substantial length of time prior to the letting of the contract December 4, 1956. Such understanding and its acceptance by the parties was not postponed until 1958. Why the understanding was disregarded by the Carrier in this instance is not shown. Carrier simply asserts there was no such contractual provisions shown to exist at the time they let the contract December 4, 1956, or that Claimants could not have worked for the contractor. No basis of fact is shown in the record to support those assertions.

Carrier and Claimant both make various contentions that matters set forth in the record were not brought up on the property. The basic question of the existence, date and extent of the "understanding" was brought up on the property, and in our opinion it was established by the evidence there. It was also agreed that the understanding, "will be observed by the railroad company for as long as your organization continues to hold in abeyance its notice of July 11, 1955;". It is admitted that Carrier did not notify the General Chairman of Carrier's intention to farm out the work in question, as required by the understanding. The agreement was therefore violated. Award 7060 — Carter; 6199 — Begley; 3215 — Carter; 5041 — Carter; 6645 — Bakke.

Carrier says that to allow part 2 of the claim is to inflict a penalty upon the Carrier without a showing of loss on part of Claimants to justify it. We hold that to allow the claim for monetary relief is not a penalty. It is merely the consequences of the violation. See Award 11701 — Engelstein.

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 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

That the Agreement was violated.

AWARD

Claim sustained (1)

Claim sustained (2)

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11984
DOCKET MW-11096

This Award is palpably wrong. There is no competent evidence in the record to support the conclusions upon which the Award is based. There is

no showing that Claimants would have been entitled to damages even if the alleged breach of contract had occurred.

The specific claim submitted to the Board is that on December 4, 1956, Carrier violated the "effective Agreement" when it assigned a $1,900,000 new building construction project to a private contractor "without first handling the matter in writing with the employes' authorized representatives." Carrier denies that the "effective Agreement" contains any provision requiring it to first handle the matter with the Employes' representatives. The Award states:

> "In our opinion the correspondence and acts of the parties conclusively establishes the understanding; that it was effective and in practice for a substantial length of time prior to the letting of the contract December 4, 1956. Such understanding and its acceptance by the parties was not postponed until 1958. . . .
>
> ". . . It is admitted that Carrier did not notify the General Chairman of Carrier's intention to farm out the work in question, as required by the understanding. The agreement was therefore violated . . ."

Let us examine the matters in the record which are cited as the basis for this conclusion that the alleged understanding was "effective and in practice for a substantial length of time" prior to December 4, 1956.

First, reference is made to Carrier's letter to the General Chairman dated September 20, 1955. In this letter Carrier concedes that the employes' representative had been:

> ". . . informed that the Company would make every reasonable effort to perform all **maintenance** work with our employes . . ." (Emphasis ours.)

This letter said nothing of new construction, and nothing of handling any matter with the employes' representatives in writing. The terms of that letter agreement cannot be varied by parol evidence. Awards 5059 (Kelliher), 9545 (Bernstein), 10442 (Gray). The Referee next considers the General Chairman's reply of October 10, 1955, to the cited letter of Carrier, in which the General Chairman also said nothing about handling anything in writing with the employes, but did protest that new construction as well as "maintenance work" should be included in the work that Carrier was to "make every reasonable effort to perform" with its own employes. Significantly, the employes did not place in evidence the Carrier's response to this letter of the General Chairman, and this leaves us with the necessary inference that such response was unfavorable to their claim. The employes themselves have not contended in their initial submission that Carrier's letter of September 20 and the General Chairman's reply of October 10, 1955, evidenced any understanding that Carrier would not contract out any type of work without first handling the matter with the employes in writing. They assert in their Statement of Facts:

> ". . . Carrier assigned the work of constructing a new Diesel Repair Shop Building at Proctor to contract without first handling the matter with the General Chairman in writing **as the Carrier had agreed to do in the conferences of March 7, 1956, and March 28,** 1956." (Emphasis ours.)

This brings us to a consideration of the employes' evidence that there was an oral understanding reached on March 7 and 28, 1956.

There is nothing in the record to support the employes' contention that the alleged agreement was made in the conferences held March 7 and 28. They cite the uncorroborated statements of the General Chairman in his own personal memorandum of the conference. The officer of Carrier who participated in the conference emphatically denied that any such understanding was made. The uncorroborated statements of either Carrier or employe representatives, which are denied by the representatives of the other side, are not accepted as evidence by this Board. "The Board feels that the mere statement of the Division Chairman is not evidence." **Award 8486** (Vokoun), also **Awards 9261** (Hornbeck), **9788** (Fleming), **10067** (Weston), **10390** (Dugan), **11118** (Sheridan), **11280** (Rose). The employes submitted no corroborating evidence in their initial submission; in fact, they did not even allege that any such evidence existed.

This brings us to the final matters in the record cited to establish that the alleged understanding was made and became a part of the effective Agreement prior to the letting of the contract on December 4, 1956, namely, the alleged letters cited in the third from last paragraph of the Opinion of Board. All of these alleged copies of letters were attached to the rebuttal statement submitted by the employes. These letters would not establish the existence of the alleged agreement in any event, but we cannot consider them because our rules and our uniform decisions require that all such evidence must be included in the initial submission, along with a showing that it has been submitted on the property — Circular No. 1, **Awards 11878** (Christian), **11128** (Boyd, **11081** (Ray), **10985** (Hall), **10740** (Miller), **10385** (Dugan), **10067** (Weston).

There is absolutely nothing in the record to support the conclusion that prior to December 4, 1956, Carrier had entered into a binding Agreement that it would not contract out a $1,900,000 new construction project without first handling the matter with the employes in writing.

The statement with respect to damages in the last paragraph of the Opinion reveals an unfortunate failure to comprehend the law of damages and Carrier's position with respect to the application thereof in this case. Both the law and Carrier's position on this point are crystal clear. In a recent case dealing with this issue in an enforcement proceeding, the law has been clearly stated by the United States District Court for Colorado to be:

> "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 its 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." (**Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R. Co.**, No. 7348, U.S.D.C., Dist. of Colorado, 1963.)

Carrier's position is equally clear. Carrier recognizes the "make whole theory" for "employes adversely affected", but argues that no employe was adversely affected here. It is obvious from the record that Carrier is correct.

The employes have not even attempted to establish a casual connection between Carrier's alleged violation of the Agreement in failing to negotiate before letting the contract, and any loss whatever on the part of any of the Claimants. To the contrary, they have advanced the obviously erroneous argument that the Board has authority to award a penalty.

It is clear that Part 2 of the claim would not have been valid even if the violation erroneously alleged in Part 1 of the claim had actually occurred.

We dissent.

G. L. Naylor

W. M. Roberts

R. E. Black

W. F. Euker

R. A. DeRossett