Award No. 12024
Docket No. SG-11418

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Kieran P. O'Gallagher, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Pennsylvania Railroad Company that:

(a) The Carrier violated the scope of the current T. & S. Agreement when commencing on June 7, 1958, it allowed persons (1 Foreman, 6 Linemen and 2 Helpers of the Frank Kubiak Electric Company of Sharon Road, Robbinsville, N.J.) other than those coming within the classification of the Agreement to perform recognized T & T work on the 4150 volt line in Coalport Yards, Trenton, N. J.

(b) A comparable number of the T & S Department employes of the Trenton Gang including the Foreman be paid a comparable amount of time, straight and overtime included, for each and every hour that the persons (employes of the Frank Kubiak Electric Company) not covered by the T & S Agreement were allowed to perform the work mentioned in claim (a) from June 7, 1958 up to and including such time as the practice is discontinued. [Docket No. 77 — New York Region Case No. 8/58]

EMPLOYES' STATEMENT OF FACTS: During June, 1958, the Carrier allowed and/or permitted employes of the Frank Kubiak Electric Company of Sharon Road, Robbinsville, New Jersey, to perform work on the 4150 volt line in Coalport Yards, Trenton, New Jersey. As employes covered by the Signalmen's Agreement had installed, maintained and repaired that line, and employes of the Frank Kubiak Electric Company hold no seniority or other rights under the Signalmen's Agreement, **Mr. W. R. Edwards, Sr., Local Chairman,** presented a claim, dated **June 7, 1958, to Mr. O. M. Wiland, Engineer, Communications and Signals,** as follows:

"The undersigned in accordance with the Agreement, have the following claims to present on behalf of the employes involved:

(a) Claim that the Carrier violated the scope of the current T.&S. Agreement when commencing on June 7, 1958, it allowed per-

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out "of grievances or out of the interpretations or application of Agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties thereto. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that no proper basis exists for allowing the payments requested in paragraph (b) of the Employes' claim, and, therefore, respectfully submits that your Honorable Board should decline to enter any award requiring settlement of the claim as therein requested.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Employes, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a proper record of all of the same.

All data contained herein have been presented to the employes involved or to their duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in the instant claim bear out the contention of the Organization that the Scope Rule was violated when the Carrier employed persons not coming within the classification of the Agreement to perform recognized T & T work on a certain 4150 volt line in Coalport Yards, Trenton, New Jersey on the dates of the claim. The issue therefore is whether the Claimants are to be compensated at a pro rata or at an overtime rate.

We cannot agree with the Carrier's contention that to pay the Claimants at an overtime rate for June 7, 8 and 14, 1958, constitutes the exaction of a penalty. The Scope Rule having been violated the employes were deprived of work that should accrue to them; and applying the principle of law that the party injured by a breach of contract shall be made whole, the Board finds that had the Carrier refrained from employing the outside contractor to perform the service complained of on these dates, the Claimants would have performed such service. The Board further finds that the outside contractor referred to performed service on days which were rest days and the Claimants, had they worked on those days, would have been paid at the overtime rate. Therefore, that part of the claim shall be sustained and the Carrier shall pay the Claimants at the overtime rate for June 7, 8, and 14, 1958.

While the Carrier also breached the Agreement as of June 9, 1958, the evidence shows the Claimants actually worked on that date and there is no showing the Claimants were monetarily damaged. To assess damages under these circumstances would lead us into the realm of the speculative, and this

we have no authority to do under the contract. Therefore, that portion of the claim shall be denied.

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 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1963.

CONCURRENCE WITH AND EXCEPTION TO AWARD NO. 12024, DOCKET NO. SG-11418

Award No. 12024 correctly holds and properly reasons the principle pertaining to and the amount of damages to be allowed in the claim of the Petitioner insofar as it deals with the violation of June 7, 8 and 14, 1958. However, after rendering this very able decision, it departs from its holding that "the party injured by the breach of a contract shall be made whole."

After finding that the contract was also breached on June 9, 1958, to hold that, because the claimants worked on that day:

> "To assess damages under these circumstances would lead us into the realm of the speculative * * *."

is unwarranted. The record before the Board contained the Carrier's acknowledgement, and the Referee found and held, that the subject work was reserved to the claimant employes; the amount of work involved was clearly set out and not disputed. How, then, could the awarding of damages have been speculative?

Railroad labor agreements are executed between a Carrier (or Carriers) and its (their) employes collectively (as opposed to individually) through the employes' Organization and reserve all work within their scope, except as specifically excepted, to the contracting employes. Therefore, if work within an agreement's scope is allotted to persons other than the contracting employes, those employes have been collectively damaged to the extent of the

breach of the agreement. Hence, whether an individual employe lost wages on a specific date or not is not determinative of damages; such damages must be determined upon the basis of the collective loss, i.e., the employment and wage earning opportunity of which the employes as a group have been deprived.

Except as it sustains the claim, Award 12024 is clearly contrary to Board precedent and I register my exception.

W. W. Altus
Labor Member