Award No. 13092
Docket No. SG-12600

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Illinois Central Railroad Company:

On behalf of Signal Foreman L. C. Smith, Signalman M. D. Burns, Assistant Signalmen C. F. Brewer, L. D. Smith, E. L. Smith, H. E. Smith, and Signal Helper J. A. Durdin, employes of Tennessee Division Signal Gang No. 311, for compensation for all time a St. Louis Division Signal Gang performed work on the Tennessee Division beginning on or about October 5, 1959.
[Carrier's File: 135-842-102; Case No. 111 Sig.]

EMPLOYES' STATEMENT OF FACTS: This dispute involves two seniority districts, referred to herein as the Tennessee Division and the St. Louis Division. Rule 404 of the current Signalmen's Agreement provides that employes will hold seniority on one seniority district. Rule 418 provides that employes will not be temporarily transferred from one seniority district to another except under emergency conditions such as flood, snow, storm, hurricane, earthquake or fire. Rule 418 further provides that the Carrier may temporarily transfer a signal gang from its seniority district to another seniority district to assist in a large construction program, but the majority of the gang must agree in writing to such temporary transfer, and the Signal Supervisor must furnish the General Chairman a copy of that agreement.

As shown by the Statement of Claim, the employes of a Tennessee Division Signal Gang claim compensation for all time a St. Louis Division Signal Gang performed work on the Tennessee Division beginning on or about October 5, 1959.

The employes of a St. Louis Division Signal Gang signed a statement, dated September 24, 1959, agreeing to work on the Tennessee Division in replacing the existing interlocking at Rives, Tennessee, with an automatic type. The Signal Supervisor did not give a copy of that agreement to the General Chairman. The General Chairman did not receive a copy until one was handed to him during conference on August 24, 1960, which was eleven (11) months later.

"Our decision does not seem inequitable in light of the fact that the complainant, Lutz, **was fully employed throughout the time in question and that there is no evidence in the record of his or anyone having lost compensation or any other advantage or opportunity.** (Emphasis ours.)

(See Awards Nos. 1498, 1802, 4828 and 6221.)"

In Third Division Award 6391, this Board stated in its opinion:

"Insofar as this Board is concerned, however, it is not always essential to determine whether a change arises to the height of a change in working conditions or whether it is merely a change in methods of operation, for even a change in methods of operation may give rise to a legitimate grievance or grievances within the jurisdiction of this Board, unless the change and the Carrier's method of putting it into effect have been agreed to by the employes' representative, if (1) the change is clearly prohibited by some rule of the agreement, or (2) if the Carrier's method of putting the change into effect trespasses upon seniority or other contractual rights of specific employes. In other words, either a unilateral change in working conditions or such a change in methods of operation may give rise to legitimate grievances on the part of specifically identified employes. **But any employe allegedly injured must be specifically identified and it must be shown just how this employe's contractual rights have been invaded,** for a given change may invade contractual rights of only some, all, or none of the employes covered by the applicable agreement.

Thus, the Employes have a burden in coming before this Board of showing either **some rule of the agreement clearly prohibiting the change made by the Carrier or of showing by specifically identifying injured individuals that the Carrier's method of putting a change not specifically prohibited by the agreement into effect trespassed upon the seniority or other contractual rights of the employes so identified.** . . ." (Emphasis ours.)

The evidence in the record will substantiate that in the instant dispute none of the employes named as Claimants were adversely affected in any way. They worked every day of the claim period performing duties attaching to their assignments. Carrier's action did not invade the contractual right of any of the employes involved as the agreement supports what was done here. This Board has stated in its awards that it is fundamental that one making a claim must substantiate it and show facts which constitute a violation of his rights (Third Division Awards 8084 and 6391). The claim before the Board is entirely lacking in merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 5, 1959 a St. Louis Division Signal Gang was transferred and commenced work in the Seniority District of the Tennessee Division Signal Gang. It continued to work in said district until on or about November 13, 1959. During such time it worked on projects separate from the Tennessee gang.

The Claimants, members of the Tennessee gang, file this claim for all the time worked by the St. Louis gang in their district. It is their contention that the transfer across seniority lines was in violation of the Agreement.

Carrier contends that such transfer was authorized in this case by the second sentence of Rule 418. This provision reads:

> "However, during a large signal construction program a signal gang may be temporarily transferred from its seniority district to the district on which the work is in progress to assist in the construction program when a majority of the employes in such gang agree in writing to such temporary transfer, copy of which will be furnished the General Chairman by the Signal Supervisor."

Claimants contend that the circumstances contemplated by the Agreement are not present in this case. It is their position that the above provision only applies "during a large construction program" and as such restricts Carrier's right to transfer across distict lines. They also contend that such a program was not "in progress" and that they were not "being assisted" by the St. Louis gang.

"During a large signal construction program" certainly contains some restrictions upon Carrier's right to transfer across district lines. It at least contemplates transfer only when there is work other than routine construction or a slightly increased construction program. However, nothing in the language indicates whether the program intended to be covered could or could not be made up of several separate construction projects. Furthermore no awards appear to cast any light upon the matter to facilitate a proper interpretation. The importance of the interpretation is increased by the fact that it provides the basis for a decision on whether the St. Louis gang was "assisting" the Tennessee gang in the construction program although it was admittedly working on separate projects. Further, the interpretation has a very direct bearing on interpreting the provision with regard to whether the construction program was "in progress." Thus, we are mindful that if we interpret the several projects to be a part and parcel of "a large signal construction program" within the meaning of Rule 418, then it may well follow that one signal gang is "assisting" another in a district where the program is "in progress" even though they work on entirely separate projects within this construction program. Conversely, if the separate projects are not considered to be a part of the large construction program, then it follows that there is no "assisting" unless both are working on the same project. It further follows that the construction is not "in progress" by reason of work on a separate project unless that project is deemed to be a part of the "construction program."

In examining the record, we find very little to help us in properly interpreting this provision of Rule 418. Claimants assert that this was not a "large construction program" because there were several separate projects. They also insist that the program was not "in progress" because the work on the interlocking plant at Rives had never been started before the arrival of the St. Louis gang, while admitting that they were working on a separate project. They contend that they were not "assisted" by the St. Louis gang because they worked on separate projects.

The Carrier counters with the argument that each of these separate projects were part of a "large construction program" which was already "in progress" by reason of work on some of the separate projects and that the St. Louis gang was "assisting" in such program by working on separate projects which were a part of the overall program.

Although the assertions by both parties are unequivocal, little or no evidence is offered to support either position. The Claimants point that each

of the separate projects has a separate authority for expenditure (AFE) number. The Carrier counters by showing that each Authorization for Expenditure was a subhead of AFR 3645, or some other part of the claimed construction program. This evidence merely points up the issue to be decided but does not aid us in reaching a decision.

We have repeatedly held that the complaining party must shoulder the burden of proving that the Agreement has been violated.

The record before us in this case does not present evidence which could prove to us that the separate projects were not a part of a "large construction program." Neither does it prove to us that the Claimants were not "assisted" in a program of construction "in progress."

Claimants argue that Rule 418 was also violated in that the General Chairman was not furnished a copy of the Agreement to be transferred until approximately eleven (11) months after such Agreement was signed. It will be noted that the above rule requires that the General Chairman be furnished a copy, but does not specify a time limit within which this may be done. Even though no specific time limit is spelled out, it certainly appears that the copy should have been furnished with reasonable promptness. It is equally clear that such was not done in this case. In fact it was not delivered until long after complaint had been made regarding this matter. We are therefore of the opinion that such failure on the part of the Carrier violates the above quoted Rule 418.

Perhaps the most perplexing problem of all is in fixing the proper remedy for such a violation. Carrier takes the position that such a violation, if any, was merely technical and resulted in no damage to Claimants. It argues that the failure to promptly furnish the Agreement in no way affected the rights of any of the Claimants and that no penalty should be assessed against Carrier.

Claimant's insist that the Agreement be enforced and that violations be punished. They are unable to explain the purpose of the rule violated and offer no evidence that Carrier's failure to furnish the Agreement within a reasonable time actually resulted in any detriment to their position. In short, they merely ask that the claim be sustained because the Agreement was violated.

We are of the opinion that such a penalty is not warranted in this case. It would appear that some awards of this Board have deviated from strict rules of the law of damages with regard to contract breaches. Apparently some referees are of the opinion that punitive damages can and should be assessed for breaches of the Agreement by the Carrier in order to effectuate intent and purpose of the Railway Labor Act. They feel this is necessary to insure against Carrier's indifference toward violations where the fact or quantum of damages are difficult of proof. Although we are in Agreement with the policy of discouraging any Agreement violation, we do not feel that the violation involved herein would warrant the assessment of damages such as are claimed in this matter. There is no casual connection between the violation and the damages claimed. We are not inclined, in this case at least, to assess the claimed damages, or any other large amount, as punitive damages. There is no evidence that the failure to promptly send a copy of the Agreement was intended, or had the effect of depriving any employe of his rights. So, without ruling on the propriety of imposing punitive damages for breach of contract in all cases, we hold that punitive damages are not

warranted in the case before us. We are of the opinion that the awarding of nominal damages in this case will serve to prevent a recurrence of the violation involved herein.

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 has been violated.

AWARD

Claimants awarded nominal damages in the total amount of $1.00.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1964.

SPECIAL CONCURRENCE TO AWARD NO. 13092
DOCKET SG-12600

Award 13092, insofar as it finds that the Carrier violated the controlling Agreement in not furnishing the General Chairman a copy of the Agreement of the St. Louis Division gang to temporarily work on the Tennessee Division, is correct, to have held otherwise would have placed us in the position of rewriting the parties' Agreement. We do not, however, support the Referee's holding that the Docket contained insufficient evidence to support the claim; nor do we agree that the awarding of nominal damages adequately disposes of the damages sustained.

The Referee states that "There is no evidence that the failure to promptly send a copy of the Agreement was intended * * *," thus implying good faith on the part of the Carrier. Such holdings overlook the Board's often repeated position that the Carrier must be presumed to know the terms of the Agreement and what it can and cannnot do thereunder. That the Carrier here knew the terms of the Agreement is evidenced by the fact that written agreement was obtained from St. Louis Division employes, yet the Carrier failed to reasonably furnish a copy to the employes' General Chairman. We do not consider such failure to be evidence of good faith.

W. W. Altus
For Labor Members