Award No. 13200
Docket No. CL-13377

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Arnold Zack, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5165) that:

(a) The Carrier violated the provisions of the Agreement between the parties June 21 and 28, 1961, when it did not permit Mail Handler Gary DuBois to perform the work attached to the position to which assigned, and;

(b) The Carrier shall pay Gary DuBois a day's pay at the Mail Handler rate for June 21 and 28, 1961, as reparation for the violations claimed in paragraph (a).

EMPLOYES' STATEMENT OF FACTS: On the dates of the violations charged, Gary DuBois held the position of Vacation Relief Mail Handler as per attached Exhibits A, B and C, which he had obtained by exercising seniority displacement rights under the provisions of Rule 14, quoted hereinafter.

As to the facts on June 21, 1961. The facts on that date as understood by DuBois at the time claim was filed July 14, 1961, (see our Exhibit F) were that DuBois had no assignment to relieve an employe on vacation. Under these circumstances the controlling agreement provides that the Vacation Relief position or employe becomes a Utility position and is used to fill short vacancies. DuBois held that he should, as a Utility employe, have been assigned to a position open and pending bulletining and assignment vacated by Josephine Baker in place of one K. J. Mushaney, an extra board employe. However, as the record will show, DuBois was assigned on paper to fill the position of vacationing Mary Messer but was not told that such was his assignment. As a result he was used as an extra employe without any specific assignment.

As to the facts June 28. As on June 21, DuBois' assigned position was Vacation Relief Employe. As such he was informed that he was to fill the vacancy of one Mary Messer who was on vacation. DuBois was not allowed to

wagons on June 28, 1961 we are unable to agree that an additional eight hours compensation for that day is in order.

DuBois had already been paid for his services on that day. The cases are clear, as Referee Shake points out in Award 5243 that while a penalty may be justified if work is improperly denied to a member of the Brotherhood, a double penalty whereby an employe is twice compensated for the same work, is not. This is not a case where the Claimant is seeking recovery for damages or to be made whole for earnings denied him by the Carrier. This Board has held that it is not empowered to provide damages for inconvenience (12250).

The Brotherhood cites many cases wherein the Board has ordered money payments along the lines set forth in Award No. 1646 i.e., where someone was denied work by virtue of the Carriers improper personnel assignment. But the cases cited by the Brotherhood are silent on a situation such as this where a penalty of a day's pay is sought by the Claimant. There is nothing in our reading of the parties' Memorandum of Agreement which justifies a double penalty payment for performing tasks on one job that are at variance from those in another job in the same classification. Certainly there is no provision requiring an extra eight hours pay for violations of Article I, Paragraph (h).

> "In the absence of express and explicit language, we are left with no alternative other than to assume that the intention of the Contractual parties was that no penalty was to attach for a violation of this kind. It is a well established principle as enunciated in previous awards of this Board that a penalty cannot be assessed in the absence of specific language imposing such a penalty. This Board does not possess the authority to alter in any way the specific language of the contract signed by both parties. We must therefore deny the claim." (12824, Referee McGovern.

The Carrier had paid the days proper rate to DuBois, the employe properly assigned to this position; no evidence of damage or loss is shown, and accordingly the claim for additional compensation must 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 in the claim for June 21, 1961 the Carrier did not violate the Agreement; and

That in the claim for June 28, 1961 the Carrier did violate the Agreement.

AWARD

The claim for June 21, 1961 is dismissed.

The claim for June 28, 1961 is denied in accordance with the opinion above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of January 1965.

LABOR MEMBER'S DISSENT TO AWARD 13200, DOCKET CL-13377

In this case the Referee clearly found, insofar as the claim for June 28, 1961 was concerned, that the Carrier violated the Agreement in the manner and to the extent as charged by the Employes.

The Referee then proceeded to excuse Carrier from paying any penalty because of the violation, thus joining too many other Referees who seem to consider it their duty to find a way to deny or dismiss whatever claims may come before them. By such action the only means for the Employes to enforce the Agreements they have made is being wrongfully taken from them.

A study of the Railway Labor Act will show that this Board was created by Congress for the purpose of removing causes of stress. The Referee's refusal to order redress for violations of written agreements, which are required under the Act, especially when it is Carrier's duty to properly apply same, works at cross purposes to the very reason for which this Board was created. Moreover, the soundness of the doctrine is quite questionable; and the vast majority of decisions emanating from this Board does not indicate any reluctance, nor recognize any prohibition, against imposing a penalty for violation of an agreement.

In Award 1524, Referee Richards said:

"* * * In Third Division Award 292, * * * the Board recognized and stated that the purpose of such a public agency as this Board is to remove causes of stress, * * *. The general principle stated in Award 292 rests on no unstable foundation. For it is a fact recognized by this Board that collective bargaining agreements have a distinct attribute that is not incident to contracts entered into in the ordinary walks of life, in that, in the Railway Labor Act as amended, such agreements were provided for and intended by Congress as important instrumentalities for accomplishment of the purposes of the Act. So it was logical that in Award 292, instead of proceeding to make a decision as if Rule 27 had been an agreement between two ordinary business men, the Board paused for "reflection upon the purpose for which the Act created the Board, namely the removing of causes of stress, and for reflection upon results that would follow strict application of the rule, namely, the making of the rule unworkable and improperly defeating redress for violations. And, in the Opinion of the Board, the adoption of the middle ground in Award 292 reflected a consciousness that an instrumentality such as a collective bargaining agreement cannot be rightly evaluated apart from the purposes for which it was favored by Congress, and exists,

and should not be implimented for thwarting those purposes. * * *." (Emphasis ours.)

Many other Awards followed, including 4082, 9811, 10033, 10635, 11937, 12114 and 12227.

Relieving Carriers of any consequences for an established violation of an agreement cannot remove "causes of stress" inasmuch as the burden is upon the Carrier to police and properly apply the agreement in the first instance. Awards 3590, 4468, 5057, 5266, 5269, 6267. The Organizations' only recourse is to file claims because of the violations. Awards 4461, 6324.

In Award 4461, Referee Carter ruled:

> "The Organization has the authority to police the Agreement. It is authorized to correct violation and to see that the Agreement is carried out in accordance with its terms. In so doing, it acts on behalf of all the employes who are Members of the Organization. Individual Members are not permitted to contract with the Carrier contrary to the provisions of the collective agreement and thereby make the collective agreement nugatory. Neither can such a result be secured by indirect action. The Carrier will not be permitted to protect itself against its own violations of the Agreement by securing waivers, disclaimers, releases, or other formal documents having the effect of excusing its contract violations. Such methods, carried to the extreme, would ultimately result in the destruction of the collective Agreement. * * *.
>
> * * * **Unless penalties and wage losses can be asserted by the Organization, its primary method of compelling enforcement of the agreement is gone.**" (Emphasis ours).

If this were not true, Carrier could be relieved of its obligation to make reparations for violations of the Agreement by prevailing upon the individual employe, who had the preferred right to the work, to refrain from making claim therefor, or waive the amount due after claim was asserted by the Organization. The same end result obtains when a Referee adopts the position that this Board will not impose a penalty.

Experience has shown that if rules are to be effective there must be adequate penalties for violations.

For all the above and the additional reason that Carrier did not raise such defense on the property, I most vigorously dissent to this highly improper "remedy".

D. E. Watkins

D. E. Watkins, Labor Member
1-20-65

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 13200 DOCKET CL-13377 (Referee Zack)

The Dissenter is surely entitled to his own personal opinions as to the intent and purpose of the Railway Labor Act and the powers of this Board,

but a decent respect for the judiciary of the United States should have restrained him from accusing referees of improper motives and conduct merely because they have followed uniform rulings of the Federal judiciary and rejected the Dissenter's opinions which are irreconcilable with those rulings. Every Federal court that has considered the matter has consistently ruled that this Board does not have the power to validly sustain a penalty claim such as that presented here. On the point that the Board's powers are limited in this regard to interpreting existing agreements in accordance with established rules of contract law, see **Priebe & Sons v. United States**, 332 U.S. 407, 413; **Hunter v. Atchison, T. & S. F. Ry. Co.**, 171 F.2d 594 (7th Cir. 1948); **New York, Chicago & St. Louis R. Co.**, 185 F.2d 614 (5th Cir.); **Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company** (10th Cir. 1964); **Hanson v. The Chesapeake and Ohio**, 236 Fed. Supp. —, Case No. 1061, DC, S.D. West, Va., 1964; **Crowley v. Delaware & H. R.**, 63 F. Supp. 164, N.D., New York, 1945. On the point that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned or reasonably could have earned, see **Atlantic Coast Line R.R. v. Brotherhood of Ry. Clerks**, 4 Cir., 812, 815; **United Protective Workers v. Ford Motor Co.**, 7 Cir., 223 F2 49, 53-54; **Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company** (10th Cir 1964); **Bear Cat Min. Co. v. Grasselli Chemical Co.** (C. C. A. 8th) 247 F. 286, L.R.A. 1918C, 907; **Buckbee v. P. Hohenadel Jr. Co.** (C. C. A. 7th) 224 F. 14, L.R.A. 1916C, 1001, Ann. Cas. 1918B, 88; **Campfield v. Sauer** (C. C. A. 6th) 189 F. 576, 38 L.R.S.(N.S.). On the general point of damages in contract cases, see **Chesapeake & O. R. Co. v. Kelly**, 241 U. S. 485, 60 L. ed. 1117, 36 S. Ct., 630, L.R.A.1917F, 367.

True it is that some of the referees who have served as neutral members of this board, particularly in the early years of the Board when the limits of its powers were not yet judicially determined, have held such "penalties" to be allowable even in the absence of any provision for the same in the controlling agreement. There was a time when such awards could be explained as a result of ignorance of the law rather than an attempt to usurp power which the Board plainly does not possess. But now, to the extent that the limits of the powers of the Board are well defined by the Federal judiciary, all members, including the Dissenter, are legally and morally bound to observe those limits. As stated in **Award 2433** (Carter) where it was discovered that this Board's prior decisions on a given point were contrary to subsequent rulings in the Federal courts.

> "We consequently are obliged to overrule * * * [certain prior awards] and adhere to the result herein announced as the correct interpretation of the legal point involved in view of the controlling decisions of the Supreme Court of the United States."

Like the Dissenter, we believe that the purpose of this Board is to eliminate stress; but we also believe that one of the most obvious and disturbing causes of stress in recent years has been the scent of penalties and unearned enrichment that has been in the air because of a few ill-conceived and clearly erroneous awards that purported to allow penalties that were not provided for in the controlling agreements. The claim we have here is a case in point; it is frivolous and doubtlessly never would have been heard of had the claimant not picked up the scent of a penalty. Absent the expectations of enrichment by the illegal penalty claimed, claimant had no interest whatever in the outcome of this claim. He admittedly sustained no injury or loss, and the unique circumstances on which the claim is based had vanished and

presented no threat of loss or inconvenience to claimant or other employes. Furthermore, the employes as a class had no interest in the claim and cannot be benefitted by a decision either way. The entire tone of their submission is apologetic. They offer no reason why this able-bodied claimant should have been accorded the special considerations accorded a lady. They merely refer to the "letter of the agreement" and state that claimant "has his reasons" for filling such a claim. The only reason that is apparent is the possibility of unjust enrichment by the penalty claimed. Probably the greatest step toward eliminating stress in this industry that we can take at this time is to eradicate completely the false notion that his Board has the power to allow any true penalty, or any liquidated sum that is not provided for in the controlling agreement.

The Dissenter is quite wrong in contending that by refusing to allow "penalties" not provided for in the controlling Agreement this Board is wrongfully taking from the employes any means they have for enforcing their agreement. The employes have all of the means which Congress intended they should have under the Railway Labor Act. Wherever there is a valid interest in the enforcement of the letter of the agreement without showing a specific monetary loss, a reasonable liquidated damage provision may be and usually is negotiated into the agreement. Such provisions are common in railway labor agreements, and when those at the conference table who are charged with the responsibility of negotiating an agreement fail to attach such a provision to any rule, they have necessarily made a decision that such rule does not create or protect any interest that is worthy of enforcement by monetary sanctions other than provable losses. Congress did not confer upon this Board the power nor the means to properly pass judgment on such a conference table decision. Our powers are limited to interpreting the agreements actually made, applying established rules of contract law, and our means are limited to the facts presented within the confines of the record in each case. The correct rule is recognized and succinctly stated in the following extracts from First Division Awards 14997 (Boyd) and 15868 (O'Malley):

> "* * * Article 18 of the effective agreement provides that unassigned men shall 'run first-in first-out on their respective divisions.' No provision of the contract has been cited showing any agreed upon penalty for violation of this rule. While the record discloses that the Carrier did not abide by Article 18, in the absence of a penalty provision, or a showing of loss sustained by the employe resulting from the breach, no affirmative award may be made * * * Claim denied." (Award 14997).

> "In this claim we are requested to impose a penalty for a violation of the double header rule. No loss is shown by the claimants and the contract provides no penalty. The parties made this contract, and by it each must be bound. We cannot write a penalty clause into the contract * * * Claim denied." (Award 15868).

The sound considerations of principle and policy and the broad area of facts that would and should control the decision at the conference table are beyond our reach. In refusing to make an excursion into the rule-making functions by allowing a penalty for which there is no basis in the agreement or in law, the referee in this case respected the rights of the parties on both sides.

If the referee committed any error in this case, it was that of being too much obsessed with the literal interpretation of the words used in the agree-

ment and too little impressed with the manifest intention of the parties. Certainly in writing this agreement the parties did not intend that an able-bodied man should have the special privileges accorded to a lady worker solely because of her sex.

/s/ G. L. Naylor

/s/ R. A. DeRossett

/s/ W. F. Euker

/s/ C. H. Manoogian

/s/ W. M. Roberts