Award No. 13845
Docket No. MW-14671

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY
(System Lines)

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

(1) The Carrier violated the Agreement when, without benefit of "mutual agreement between the General Chairman and designated Representative of Management", it "contracted to outside parties" the work of installing two catch basins and approximately 300 feet of drain pipe, together with all excavating, truck driving and back filling work relating thereto, at the Carrier's piggyback trailer lot at Portland, Oregon. (Work was performed by the Anderson Excavation Company between December 31, 1962 and January 5, 1963.) (Carrier's File 356-a. Case MW-137.)

(2) Each employe assigned to B&B Gang No. 1* on the dates referred to in Part (1) of this claim be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man hours consumed by outside forces in installing the catch basins and drain pipes.

(3) Machine Operator D. LaGore be allowed pay at his straight time rate for the total number of man hours consumed by the contractor's machine operator in performing the excavating work.

(4) Machine Operator L. L. Brown be allowed pay at his straight time rate for the total number of man hours consumed by the contractor's machine operator in performing the back filling work.

(5) Truck Driver S. Suckow be allowed pay at his straight time rate for the total number of man hours consumed by the contractor's truck driver in performing the truck driving work.

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*Foreman Pat Fogarty, Assistant Foreman Henry Schraeder, Carpenters K. M. Morrison, K. Bonstien, J. Goers, M. C. Nimmo, J. E. Cox, H. C. Carley, H. W. Dietrich, H. D. Katzberg, O. S. Friswold, L. A. Eckstrom, M. A. Holm, W. I. Root, E. DeAngelis.

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 Employe 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 Employes 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 Employes 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."

Respondent submits that the claim in this docket must be denied and so requests your Honorable Board.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a "contracting out" dispute. The project in question is described with substantial accuracy in part (1) of the Petitioner's claim, above set forth. It is also undisputed that the work was contracted to the outside party without specific "mutual agreement between the General Chairman and designated Representative of Managament" as provided by Rule 40 of the parties' collective agreement.

Carrier's basic position is that Rule 40 did not apply because, for all practical purposes, the work projected was not, as the Rule provides, "as classified in this Agreement, shall be performed by employes covered by this Agreement." More particularly, Carrier contends that by local law the job required the services, in part, of a licensed plumber, work not "classified" as within the orbit of the Agreement and which the covered employes were qualified to perform.

While Petitioner challenges the contention that a licensed plumber was needed on the job, it maintains that whether or not this was so, the consent of its General Chairman as a condition precedent to such an outside contract was no less required by Rule 40 of the Agreement. In light of prior decisions by this Division concerning the selfsame Agreement on this property and also involving a measure of plumbing work, as well as the repeated instances in the past where this Carrier sought the antecedent consent of Petitioner before retaining independent contractors on jobs which, at least in part, required licensed plumbers, it would seem that Petitioner's position on this aspect of its claim is well taken. See Awards 4920, 4921 (Boyd), 7060 (Carter). Moreover, in view of the apposite work history on this property it may be expected that if the Carrier had taken up the nature of the subject job with Petitioner before it engaged the services of an outside contractor, the issue as to whether or not a licensed plumber was required by local law could have been quickly resolved by communication with the city authorities, if necessary. We hold that, in all the circumstances, the omission of the Carrier to obtain the agreement or consent of the General Chairman of Petitioner to the outside contract in issue was a violation of Rule 40 of the Agreement.

Carrier also contends that, in any event, the Claimants sustained no loss by reason of its action and, therefore, Items 2 through 5 of the claim should be denied. This contention is chiefly predicated on the undisputed fact that while the job in question was in progress, "each claimant was on duty elsewhere, fulfilling his regular assignment on a full time basis." Accordingly, Carrier argues that the reparation claimed would, if allowed, constitute a "windfall" to the Claimants and an unauthorized penalty against the Carrier, citing, among others, the leading case of **Brotherhood of Railroad Trainmen et al v. The Denver and Rio Grande Western Railroad Company**, CA-10, 338 F. 2d 407, cert. den. 85 S. Ct. 1330.

The **Denver and Rio Grande** case stands for the proposition that in awarding an employe monetary damages for violation of an agreement under the Railway Labor Act "one injured by breach of employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned." The quoted language is thus a paraphrase for the so-called "make whole" concept of damages, a yardstick studiously followed by this Division since the Court's pronouncement in **Denver and Rio Grande**, i.e., Awards 12824, 12937, 12961, 13171, 13477, 13478, 13480, 13663.

But it is also to be observed in **Denver and Rio Grande** that the appellate court, in affirming the District Court's award of merely "nominal" damages, was careful to note that the contract violation there found resulted in no tangible loss to the affected employes. As the appellate court put it, "The change required the same number of crew members, called for the same rate of pay, and maintained the same length of assignment", and further that, "the parties have stipulated that the aggrieved employes have suffered no actual monetary loss or hardship from the contract violation."

In the case at hand, Petitioner has made no such stipulation. On the contrary, it maintains, and **prima facie** has proved, that the work entailed on the job in dispute (with the possible exception of that work, if any, performed by a licensed plumber or plumbers) could have been performed by the Claimants and, therefore, was irretrievably lost to them. To this extent the Claimants have shown damages within the meaning of the "make whole" concept and not incompatible with the holding in **Denver and Rio**

Grande. And this showing was not sufficiently rebutted by the Carrier, nor is it overcome by the mere fact that while the disputed work was being done Claimants were working on their regular assignments. As was succinctly stated in Award 1803 (Carter), Second Division: "There can be only one recovery for the breach and it may not be defeated because carrier kept its employes working on other work during the time the contracted work was performed." Or, as it was more recently expressed in Award 13349 (Hutchins), Third Division (Supplemental):

> "The burden is upon the employe to show what his loss has been. But, upon showing that he has sustained a loss of certain work and what that work was, he has overcome the burden. If the Carrier wishes to show in mitigation that the employe received other income, the burden of proof is upon the Carrier. Further, in a case such as this where the employe could have done the work at more than one time, the Carrier must show that the employe was employed at all times when he could reasonably have done the work."

See also Awards 11937 (Dorsey), 11450 (Coburn), 7836 (Bailer), 4921 (cited supra).

For all the reasons stated we will sustain the claim, except for so much of it as may include the work time, if any, spent by a licensed plumber or plumbers on the project at issue.

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 Carrier violated the Agreement.

AWARD

Claim sustained to the extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of September 1965.