Award Number 13958
Docket No. CL-14884

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5568) that:

(a) The Carrier violated the Agreement between the parties when it failed to call extra Mail Handler, Peter Gusman, for work on the 12:01 A. M. shift, Wednesday, September 4, 1963; and,

(b) The Carrier pay Peter Gusman at the applicable rate of Mail Handler for 8 hours for its violation of the Agreement.

EMPLOYES' STATEMENT OF FACTS: The facts in this case are not in dispute. Claimant Peter Gusman is an extra Mail Handler whose assignment to daily work for the Carrier is controlled by and subject to a procedure established by a Memorandum Agreement between the parties signed April 25, 1957, and amended October 1, 1959, copy of which is attached and marked Employes' Exhibit No. 1. The Agreement is also identifiable and marked Employes' Exhibit No. 1. The Agreement is also identifiable as Appendix H of the printed Agreement between the parties of October 1, 1942, as revised effective June 1, 1961, copies of which have been furnished the Board.

The procedure in effect for calling employes on the extra board is to begin each day to call employes in seniority order beginning with the 12:01 A. M. to 8:30 A. M. shift. Thereafter employes are called progressively in seniority order for assignments to shifts having 5:00 A. M.; 6:00 A. M.; 7:00 A. M.; 3:30 P. M; 5:00 P. M. and 7:00 P. M shifts.

On the date of the claim, Wednesday, September 4, 1963, Gusman stood for a call seniority wise on the 12:01 A. M. shift. The Foreman in charge of calling the extra board overlooked Gusman in calling men for the 12:01 A. M. to 8:30 A. M. shift, but called him for the 6:00 A. M. to 1:30 P. M. shift. A junior employe, one Colonel Gregory was called for the 12:01 A. M. to 8:30 A. M. assignment.

The Employes cite Article III, Paragraph (e) of the extra board agreement, Employes' Exhibit No. 1, reading:

OPINION OF BOARD: Claimant is an extra Mail Handler whose assignment to daily work for Carrier is controlled by and subject to a procedure established by a Memorandum Agreement. The Agreement provides for calling extra Mail Handlers each day in seniority order beginning with the 12:01 A. M. to 8:30 A. M. shift. Thereafter employes are called progressively in seniority order for assignments to shifts with starting times of 5:00 A. M.; 6:00 A. M.; 7:00 A. M.; 3:30 P. M.; 5:00 P. M.; and 7:00 P. M. Further, Article III (f) of the Agreement provides:

> "(f) Extra employes will be called for short vacancies on any shift, but will not be used for more than one shift having a starting time in a calendar day. The present shift midnight to 8:30 A. M. shall be considered as having a straight time of 12:01 A. M. for the purpose of this paragraph."

On September 4, 1963, Claimant, seniority-wise, stood for a call on the 12:01 A. M. shift. The Foreman in charge of calling the extra board overlooked Claimant and called a junior employe. When the Foreman's error became known, Claimant was called to the 6:00 A. M. shift of the same calendar day.

Carrier admits that the failure to call Claimant for the 12:01 A. M. shift violated the Agreement; but, it denied paragraph (b) of the Claim for the given reason that Claimant suffered no monetary damages.

It is Clerks' position that since the Agreement was violated Carrier should be penalized to deter future like violations; and, Carrier should not be permitted to violate the Agreement with impunity.

Claimant suffered no loss of wages for the calendar day involved inasmuch as Article III (f) of the Agreement prescribes that "Extra employes will not be used for more that one shift having a starting time in a calendar day." Consequently, we are confronted with the issue whether this Board has jurisdiction to impose penalties for breach of an agreement. Throughout the history of the Board this issue has brought forth a host of conflicting Awards.

In Award No. 10963, the Board, with the Referee herein sitting as a member, held the Board to be without jurisdiction to assess a penalty. Subsequently the United States Court of Appeals for the Tenth Circuit; in **Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co.**, 338 F. 2d 407; cert. den. 85 S. Ct. 1330, held the Board to be without jurisdiction to assess a penalty but found "nominal damages" were in order — an unusual holding in a contract action. Thereafter, in a number of Awards, in some of which this Referee participated, nominal damages were awarded where a violation of an agreement was found but there was no proof of loss of earnings.

Upon reflection we are of the opinion that the holdings in the **Trainmen** case are contradictory. Labelling a monetary award as "nominal damages," where such damages have not been proved, makes such an award no less a **de facto** and **de jure** penalty.

It is a common practice for Federal quasi-judicial bodies not to change their opinions as to their jurisdiction unless and until reversed by the Supreme Court. The denial of certiorari in the **Trainmen** case cannot be construed as an affirmance of the Tenth Circuit's holdings therein; only that the questions, as presented in the petition for certiorari, were not deemed of sufficient importance to merit consideration by the Court.

There appears no way to resolve the conflicts in our Awards concerning the subject of penalties short of a Supreme Court finding: — whether we have the statutory power to impose penalties for violation of agreements as to which we are charged with interpretation and application. The resolution of the issue is of great importance to the orderly administration and decisional consistency of the National Railroad Adjustment Board; and, the effectuation of the public policy enunciated in the Railway Labor Act as intended by the Congress.

With knowledge that reasonable and learned men may and do disagree, we reaffirm our findings and our understanding of the law as set forth in Award No. 10963. Consequently, we will sustain paragraph (a) of the Claim; and, we will deny paragraph (b) of the Claim.

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 Carrier violated the Agreement.

AWARD

Paragraph (a) of the Claim is sustained.

Paragraph (b) of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. N. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of November 1965.