Award No. 14623
Docket No. MW-12786

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned and used Bridge and Building employes to perform work of relaying rail on Section No. 68 on December 7, 8, 9, 10, 11, 14 and 15, 1959.

(2) Each employe holding seniority on and assigned to Section No. 68 during December of 1959 be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man-hours consumed by B&B employes in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On December 7, 8, 9, 10, 11, 14 and 15, 1959, the Carrier assigned its Bridge and Building employes to assist the Claimant Track Sub-department employes in relaying 4.79 miles of rail.

Bridge and Building employes and Track employes hold seniority in separate and distinct sub-departments and are carried on separate seniority rosters.

The Agreement violation was protested and the subject claim filed in behalf of the claimants. The claim was handled in the usual and customary manner on the property, but was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated September 1, 1934, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: In December 1959, Carrier assembled all available track forces on Supervisor C. R. Carroll's territory, St. Louis Division North, to relay 4.79 miles of rail within the Lowes Section near Lowes, Kentucky.

Because of the lack of a sufficient number of track employes available on the Supervisor's territory to organize an efficient raily laying gang, the Carrier augmented the force by temporarily transferring nine employes from the B&B sub-department, who are covered by the Maintenance of Way Agreement.

On February 3, 1960, the Organization progressed a claim in behalf of the section gang with assigned headquarters at Lowes, Kentucky, for December 7, 8, 9, 10, 11, 14 and 15, 1959, alleging that the use of B&B employes deprived those employes of work to which they were entitled. Carrier declined the claim.

The agreement between the parties dated September 1, 1934, as amended, is by reference made a part of this Statement of Facts.

OPINION OF BOARD: On Dcember 7, 8, 9, 10, 11, 14, and 15, 1959, Carrier assigned nine Bridge and Building sub-department employes to assist Track sub-department employes in laying 4.79 miles of rail on Section No. 68, Lowes, Kentucky.

On behalf of the employes holding seniority on and assigned to Section No. 68 during December, 1959, the Brotherhood claims a violation of Rule 2 of the Agreement. It takes the position that since seniority rights of employes are confined to the sub-department of their employment, that the work within a specific sub-department is also restricted to the employes holding seniority. The Bridge and Building employes did not hold seniority as laborers in the Track sub-department, and therefore should not have been assigned to lay rail.

Carrier requests that the claim be barred because of a procedural defect, the failure of the Brotherhood to identify the specific Claimants within the 60-day period as required by provisions of Article V, Paragraph 1 (a), of the August 21, 1954 National Agreement.

On the merits of the case, Carrier contends that in the absence of a sufficient number of employes on the supervising territory to complete the rail laying gang, it had the right to transfer men temporarily from the Bridge and Building sub-department in order to complete a gang of efficient size for the job.

Carrier also maintains that in order to get its work done, it retains the right to the management prerogatives of determining when the work is to be performed, the size of the gang necessary, and when the gang must be augmented. It cites Rule 9, Temporary Service, in support of this position.

According to Carrier the use of employes from the Bridge and Building sub-department was in the best interest of the craft as a whole and did not result in any loss whatsoever to Claimants. If the Bridge and Building employes had not been used, it would have been necessary to hire new employes to set up an extra gang, or transfer men from another section, either one of which actions would have resulted in these Claimants receiving or performing no more work.

With respect to Carrier's contention that Claimants were not properly identified and that the Brotherhood had failed to furnish the names of the

Claimants within the time limit provision of Article V, we find that identity could be ascertained from the location, section number, and dates involved. Although the list of names of Claimants was submitted subsequent to the time limit, Claimants were actually sufficiently identified within the time limit. Hence, claim is properly before the Board.

Rule 2 restricts seniority rights of employes to their particular sub-departments, among which are Track, and Bridge and Building. Since the work of laying and relaying track is the work of the Track sub-department, employes on the seniority roster of that sub-department have the right to perform the work falling within the scope or purpose for which that roster was created. In using Bridge and Building employes to perform work which belongs within the scope of the Track sub-department, the crossing of sub-department lines constitutes a violation of the Agreement despite Carrier's belief that it was serving the best interest of the employes as a whole.

As a consequence of violation of the Agreement, Claimants are entitled to compensation as requested in Paragraph 2 of the Statement of Claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 29th day of June, 1966.

**CARRIER MEMBERS' DISSENT TO AWARD 14623,
DOCKET MW-12786 (Referee Engelstein)**

The provisions of Award 14623 clearly exceed the jurisdiction of this Board by adding to the seniority rules of the Agreement a restriction which does not appear therein, and by ordering Carrier to pay a penalty for which the Agreement does not provide.

I.

As to the merits of the claim, there was a single controlling issue, namely, do the seniority rules of the Agreement prohibit Carrier from augmenting section forces by temporarily transferring available B&B employes instead of hiring new employes.

Nowhere in the record did the Employes challenge Carrier's right to augment forces in this case. In the absence of any rule to the contrary, the right clearly exists.

> "It is firmly established that it is within discretion of management to determine **how many men and when those men will perform a given function** in the absence of a rule in the contract prohibiting management's determination in this regard. The seniority rules do not establish when or how many men will perform a given job."[1]
> **(Awards 13346, 13525, 13692, 13692.)**

Furthermore, the Employes' rebuttal contains no denial of the statement on page 7 of Carrier's initial submission that:

> "**There were no other section employes available on the Supervisor's territory involved in this dispute,** and Carrier had no alternative but to temporarily transfer employes of another sub-department to accomplish the work, or hire new employes temporarily."
>
> (Emphasis herein by Carrier.)

Neither did the Employes deny similar statements made by Carrier during handling of the claim on the property. The Employes conceded the full employment of Track Sub-department employes on this seniority district. They conceded the right of Carrier to augment the track forces. They cited only seniority rules to support this claim.

We believe it is a serious reflection on both the intelligence and the sincerity of the parties to the controlling labor Agreement to say that they intended to prohibit Carrier from transferring unneeded MofW employes in one seniority group to temporarily augment MofW forces in another seniority group, in lieu of temporarily hiring new employes. Hiring new employes in one sub-department while employes in another sub-department lack sufficient work obviously promotes instability in employment, the very condition against which the petitioning MofW Organization has been crusading. In recent nationwide negotiations this Organization sought various rules for the express purpose of promoting stabilization of employment.

Hiring new employes for a short period of time in lieu of temporarily transferring employes not needed in another sub-department of the same craft is so patently contrary to the best interests of both employes and management that it would require the clearest of language in the Agreement to establish that the parties intended such a result. It is elementary that the language of an Agreement will not be given an interpretation that produces an unreasonable result wherever the language is susceptible of a more reasonable interpretation.

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[1](Emphasis ours, unless otherwise indicated.)

The controlling Agreement in this case contains no language that could reasonably be construed as imposing on Carrier the restriction found in this award. The fact is that all sections of this Agreement concerning the transferring of employes are free of any expressed or implied restriction prohibiting Carrier from temporarily transferring employes not needed in one sub-department to avoid hiring temporary new employes in another sub-department.

The only rule mentioned in support of the decision is Rule 2 which provides:

> "Seniority rights of all employes are confined to the sub-departments in which employed. Sub-departments are defined as follows:
>
> 1. Track Department
> 2. Bridge and Building Department
> 3. Paint Department
> 4. Pumpers
> 5. Watchmen, and Gatemen or Signalmen."

While it is clear that Rule 2 limits the right of an employe so that he cannot demand work in a different sub-department (just as Rule 3 restricts rights of men within a sub-department to various supervisory districts), there is nothing in it that can sensibly be construed as prohibiting Carrier from permitting employes in one sub-department where services are not required to temporarily transfer to another sub-department where additional employes are temporaraily required, in lieu of hiring temporary new employes.

In our recent **Award 12304** this same Organization relied on a seniority rule that was in every material respect identical with Rule 2 (confining seniority rights to sub-department) to support a claim that the Agreement had been violated when Carrier temporarily transferred B&B employes to do track work in the Track Sub-department. The claim was properly denied, and the principle recognized in that case should have been recognized as controlling in the instant case.

Furthermore, the records of this Board **(Award 3095)** establish that in past years the petitioning Organization here and the employes they represent have recognized this Carrier's right to transfer men temporarily between the Track Department and the B&B Sub-department, as was done here.

Since the award is expressly based on a finding that Rule 2 restricts Carrier from temporarily transferring the B&B employes to augment the track gang, and since the record is so conclusive in establishing that no such restriction is either expressly or impliedly contained in Rule 2, it is manifest that the award on the merits is "wholly baseless and completely without reason." The award, therefore, exceeds the jurisdiction of this Board. It is a patent attempt to add a new rule to the Agreement. **Gunther v. SD&AE,** 328 U. S. 257 (December 1965).

II.

On the question of damages, the issue presented in this case is simply whether the Board has the power to create a penalty in favor of Claimants who have sustained no injury from an alleged violation of the labor agreement.

It is true that in their initial submission the Employes made the unsupported assertion that:

> ". . . Had the Carrier not used B&B employes, the rail relaying would have taken more time and the claimants would not have been furloughed so early."

The record, however, shows conclusively that these Claimants sustained no loss, for new employes would have been temporarily hired to fill the gang out to the strength which Carrier had determined was necessary. The award contains no finding that any of the Claimants sustained any loss, and on the record before us, such a finding would have been patently wrong.

The Employes were fully aware of the fact that these individual Claimants sustained no loss and in their submission to the Board as well as in their memorandum to the Referee they contended that this Board has power to sustain the monetary claim presented even though the individual Claimants sustained no loss and the Agreement contains no provision for such a payment.

In his memorandum to the Referee and in the panel discussion, the Labor Member placed great stress on **Award 11701** wherein the Referee who served in the instant case revealed his attitude toward recognized rules of damages in contract cases by stating:

> ". . . It is not enough to recognize the breach without expecting the violator to accept the consequences for its act. **We, therefore, cannot sustain Carrier's position that Claimant must show that he 'was in some manner adversely affected by the action of the Carrier's for this factor is irrelevant** and distracts attention from the real issue of the admitted violation of the Agreement."

Although there are some erroneous awards applying such reasoning to cases of admitted violation such as occurred in **Award 11701**, those awards do not support the proposition that a penalty may be imposed in cases such as this, where the Carrier acted in good faith and in accordance with prior application of the Agreement. Even under the erroneous interpretation of the Agreement found in this award, Carrier could have fully complied with the Agreement by augmenting forces with employes from other seniority districts in the Track Sub-department or new employes, with the result that Claimants would have received no more in any event. Under these circumstances, Claimants were entitled to nothing under the law of damages. The vast majority of our recent awards have recognized that the Board must follow the law of damages and dismiss or deny claims on behalf of claimants who have failed to prove a reasonably certain loss. **Awards 13376, 13171, 13200, 13096, 12937, 12824, 12464, 12345, 12250, 11107, 10984, 10964, 10932, 12131 and 6391** among many others.

Sanctions other than reasonably definite losses proved to be sustained by individual claimants can never be justified under an agreement unless they are both reasonable in effect and are so definitely expressed in the agreement that the basis for invoking them and the full implications thereof are clear. In addition to awards cited above, see **15 Am. Jur. Damages, Section 43, page 442; Miller v. Robertson**, 266 U. S. 243, 69 L. ed. 265, 45 S. Ct. 73; **Perry v. United States**, 294 U. S. 330, 79 L. ed. 912, 55 S. Ct. 432, 95 A.L.R. 1335; **Louisville & N. R. Co. v. Wells**, 289 Ky. 700, 160 S. W. 2d 16 (1942); **Schlenk v. Lehigh Valley R. R. Co.**, 74 F. Supp. 569 (D.M.J., 1947); **Buster v. Chicago, M., St.**

P. & P. R. Co., 195 F.2d 73 (C.A.7, 1952); Russell v. Ogden Union Ry. & Depot Co., 122 Utah 107, 247 P.2d 257 (1952); Cook v. Des Moines Union Ry. Co., 16 F. Supp. 810 (S. D. Iowa, 1936); Atlantic Coast Line R. Co. v. Brotherhood of Railway Clerks, 210 F.2d 812 (C.A.4, 1954; Shipley v. Pittsburgh & L. E. RR Co., 68 F. Supp. 395, 400 (W. D. Penn. 1946).

From the standpoint of law, it is contrary to every rule of damages to read into the Agreement a restriction that goes beyond the express terms thereof, as well as beyond the past application thereof, and then retroactively impose a penalty for failure to observe that restriction.

From the standpoint of decent labor relations, allowing such a penalty tends only to hinder and disrupt. The leaders of both labor and management know from sad experience that the scent of penalties in the air invariably hinders orderly negotiations in the best interests of both labor and management.

It would be entirely wrong for this Board to create a penalty of the type here involved, even if it were empowered to do so. We do not believe that the Board has such power. We believe that the part of the award requiring Carrier to pay again for work for which payment has already been made and to give this duplicate payment to individuals who clearly did not sustain any monetary loss is "wholly baseless and completely without reason" and therefore exceeds the jurisdiction of this Board under the Railway Labor Act, as amended.

The record does not show that any provision of the controlling Agreement was violated or that the Employes properly invoked the jurisdiction of this Board; therefore the claim should have been dismissed or denied.

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