

Award No. 15343
Docket No. MW-16080

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Claude S. Woody, 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, on February 20, 1964, it assigned a store department employe to operate Crane X-40 which was being used to assist in the work of cleaning the oil sumps and the separators at the diesel shop and at the roundhouse at Vancouver, Washington. (System Case No. MW-152.)

(2) Machine Operator Ivan G. Larsen be allowed pay at the Diesel Crane Operator's rate for a number of hours equal to that consumed by the store department employe in performing the work referred to in Part (1) of this claim.

EMPLOYES STATEMENT OF FACTS: The facts in this case were fully set forth in the General Chairman's letter of claim presentation, reading:

"April 18, 1964

Mr. W. P. Gibson, Master Carpenter
Spokane, Portland & Seattle Railway Co.
1101 N. W. Hoyt Street
Portland 7, Oregon

Dear Mr. Gibson:

Claim presented as follows:

1. That the Spokane, Portland & Seattle Railway Co., hereinafter referred to as Carrier, violated the effective Agreement February 20, 1964 when Store Department employe John Goedert was permitted to operate Crane X-40 when cleaning Diesel Shop and Round House Oil Sumps and Separators in Vancouver, Washington.

Stores Department facilities. These three facilities are embraced within the same general area, commonly referred to as the "shop area." For use within this shop area, and confined thereto, Respondent maintains an on-track self-propelled crane operated by a Stores Department employe holding seniority on the clerks' roster.

Within this shop area the crane has, over the years, been used to perform any service for which a crane or clam shell is required. One of the tasks for which this machine has frequently been used is to clean the settling tanks or sumps which are part of the waste drainage system of the shop area. This is accomplished by casting the sludge, sand, etc. from the sumps to open-top — gondola-type cars for disposal outside the area.

In checking over a ten-year period, records indicate that one or more of the sumps have been cleaned on fifteen different dates, with the Stores Department crane, manned by Stores Department employes, being used to perform the work on eleven dates and a crane from the maintenance of Way and Structures Department, manned by employes of that department, being used to perform the work on four dates, all is indicated below:

July 20, 21, 1953	Stores Department
March 29, 1954	Stores Department
November 9, 1954	MW&S Department
August 10, 1955	MW&S Department
August 27, 28, 1956	Stores Department
May 19, 1957	MW&S Department
December 12, 1957	Stores Department
August 1, 1958	MW&S Department
June 29, 1959	Stores Department
May 18, 1960	Stores Department
October 3, 1960	Stores Department
February 17, 1961	Stores Department
May 11, 1961	Stores Department
July 13, 14, 1961	Stores Department
March 2, 1962	Stores Department

On February 20, 1964 Stores Department Crane X-40 operated by John Goedert, a Stores Department employe who is regularly assigned as its crane engineer, consumed eight hours cleaning two of these sumps. On this date Claimant Machine Operator Ivan C. Larsen worked and was paid for eight hours as Machine Operator on the R-14, his regular assignment.

OPINION OF BOARD: The facts of the instant case are not in dispute.

Performance of the work in question is reserved exclusively to Maintenance of Way Employes under and by virtue of the Agreement between the parties, as amended. See Awards 13517, 14004, and 14982. Therefore, the Carrier has violated the Agreement by permitting a store department employe to perform the subject work.

Carrier argues that, because Claimant was regularly employed on the day the work in question was performed, Claimant, suffered no monetary loss

resulting from the violation and an award of damages would constitute a penalty against the Carrier.

In Award 11937 (Dorsey), we considered this argument and stated the following:

"... When a Carrier violates the scope rule of an Agreement the covered employees have been damaged de jure; but, the extent of the monetary damages, if any, is a matter of proof. Where, as here, the violation has been established, the Claimants have made a prima facie case of damages as claimed and the burden to rebut, by factual evidence, shifts to the Carrier. ...

Carrier confuses 'damages' and 'penalties.' While monetary 'damages' awarded are sometimes loosely referred to as 'penalties' the terms are technically distinct. Technically, in contract law, monetary 'damages' make whole a person injured by violation of an agreement; 'penalties' are the assessment of a fine over and above damages suffered. Monetary 'penalties' are imposed as punishment for a violation of a contract with the objective of deterring like future conduct. Therefore, the making whole of Claimants herein for work they would have performed and wages they would have earned, absent Carrier's violation of the Agreement, is the award of compensatory 'damages'; not a 'penalty'."

The foregoing award was cited and followed by this Board in Awards 14004 and 14982, cases involving the parties to the instant case. We are not at liberty to depart from such precedent.

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 Employees involved in this dispute are respectively Carrier and Employees 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 and the claim for damages should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of February 1967.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.