Award No. 16693
Docket No. MW-17013

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ERIE-LACKAWANNA RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted other than its Track Sub-department employes to perform the work of welding rails into continuous lengths at Scranton, Pennsylvania. (Carrier's File 155.1-4, Item 164.)

(2) Each of the hereinafter named Track Sub-department employes be given a wage adjustment to provide them with pay for the same number of hours and at the same rate of pay as they would have received had they been permitted to fill higher rated positions, perform work during overtime hours, or had been recalled to service as is contemplated by existing agreements and that all of the named claimants who were deprived of fringe benefits such as Railroad Retirement Credits, Travelers Insurance Policies, Vacations With Pay, etc., be credited with such fringe benefits beginning as of September 21, 1965 and continuing until the violation referred to in Part (1) of this claim is corrected.

W. Bentler
G. Billick
A. Heater
E. Ingraham
S. Klecha
W. Shelosky
A. Chermauskas
J. Evans
J. Foley
G. Linko
R. Shaylor
J. Skosko
M. Petrunich
L. Kuigowski
S. Salerno
M. J. Jarzembowski
R. Naughton
B. Babbitt
A. Salerno
H. Janicki
S. Nardone
P. Georgevich

The records indicate that claimants Bentler, Evans, S. Salerno, Billick, Foley, Jarzembowski, Heater, Naughton, Ingram, Shaylor, Babbitt, Klecha worked continuously during period of claim, that G. Lenko worked continuously except for the period January 1, 1966 through January 22, 1966, and that Skosko worked continuously through November 30, 1965. Concerning claimants A. Salerno, Sholosky, Petrunich, Janicki, Chermauska, Kuligowski, Nardone and Georgevich, these claimants have not worked for Carrier since merger (October 17, 1960) and have either moved from the Scranton Area, are working for other concerns or their whereabouts are unknown.

(Exhibits not reproduced.)

OPINION OF BOARD: On September 21, 1965 Carrier contracted with The National Cylinder Gas Company to weld new and relayer rail in continuous strings of approximately 1,500 feet in length.

The Carrier before this Board argues that inasmuch as Erie Railroad and the Delaware, Lackawanna and Western Railroad merged, although thereafter the separate agreements were retained, and the work in question was performed on the Erie Railroad, then the "Lackawanna" agreement does not apply to this dispute. The Organization points out that this contention was not raised on the property in this instant dispute.

A close review of the record clearly shows that such a contention as raised by Carrier was not raised on the property, and since this Board has held on numerous occasions that charges or contentions not raised during the handling on the property, cannot be considered by this Board, then Carrier's contention that the work was performed on the Erie Railroad and was therefore under the Erie Agreement rather than the "Lackawanna Agreement" cannot be considered by this Board in the determination of this dispute.

The Organization's position is that the work belongs to Petitioner's under the Agreement; that Rule 26 (a) was violated when Carrier did not agree with the Organization upon the contracting of such work.

Rule 26 (a) provides:

"RULE 26.

GENERAL CONTRACT

(a) Unless otherwise agreed to between representatives of the Management and the General Chairman, all work of maintaining the Bridges and Buildings; Tracks and such other facilities as come under the jurisdiction of the Sub-departments specified in the scope rules, will be performed by employes covered by this agreement.

When special work is to be performed which may necessitate the employment of contractors, because of lack of equipment with which to perform this work or in order to secure certain guarantees which cannot be secured in any other way, a meeting will be arranged between the representatives of the Railroad and the Brotherhood for the purpose of giving consideration to and agreeing upon the contracting of such work."

In support of its position that Carrier violated Rule 26 (a) by unilaterally and arbitrarily contracting such work to the private contractor, the Organization cites a letter from Carrier's Chief Engineer, R. F. Bush, dated August 2, 1965, which reads as follows:

"August 2, 1965

Mr. R. A. Flanagan, General Chairman
Brotherhood of M. of W. Employes
218 Adams Street
Scranton, Pa.

Dear Mr. Flanagan:

We intend to weld new and relayer rail in continuous strings of approximately 1,500 ft. long at the end of August. The National Cylinder Gas, Division of Chemetron Corporation, will furnish all of the equipment necessary to pressure weld the rail.

The mobile plant will be set up at the former Receiving Yard at Hampton on land which the National Cylinder Gas is leasing from the Railroad Company.

The Railroad will deliver new or unable rail in gondola cars to the plant site. The National Cylinder Gas Company will unload, crop the rail if necessary, weld it into strings and load it on our welded rail trains. The only personnel we will have at the welded plant site will be an Inspector each trick (the plant will work two 8-hour tricks), and this Inspector will be a Supervisor.

In accordance with Rule 26, Paragraph A of the Agreement between the former D. L. & W. Railroad and the Brotherhood of Maintenance of Way Employes, I would like to have your approval to contract this welding work as we do not have the equipment required for the work and it is of a specialized nature performed by a company that has the technically trained personnel to do the work.

Very truly yours,

/s/ R. F. Bush
Chief Engineer"

The Organization's General Chairman, R. A. Flanagan, replied to the above letter as follows:

"August 5, 1965

Mr. R. F. Bush, Chief Engineer
Erie Lackawanna Railroad Company
Midland Building
Cleveland, Ohio 44115

Dear Sir:

This has reference to your letter of August 2, 1965 and our telephone conversations concerning the welding of new and relay rail at former Receiving Yard at Hampton.

I have carefully considered this matter and especially your letter requesting my approval for contracting of work described therein.

Much of the work to which you refer is of a type which is usually and regularly performed by employes we represent and in my opinion should be performed by the same employes who have heretofore been so assigned.

There is a possibility that the operation of certain equipment owned by the National Cylinder Gas Company could properly be performed by its own employes, however, all of the other work described in your letter should in my opinion be performed by the people we represent.

As you know, we have arranged to meet with Mr. Diegtel on Tuesday and Wednesday of next week and should you so desire, I would be more than happy to meet with you on either of these days for the purpose of further discussing this matter.

Very truly yours,

/s/ R. A. Flanagan
General Chairman"

The Organization therefore argues that inasmuch as the Carrier did not agree with the Organization in regard to the contracting of such work, then Carrier must be found guilty of violating Rule 26 (a) which makes it mandatory upon Carrier to obtain the approval of the Organization prior to the contracting out of said work.

With this contention of the Organization, we agree. It was mandatory under the provisions of Rule 26 (a) for the Carrier to attempt to secure an Agreement with the General Chairman in regard to the contracting out of the work here in question.

As was said in Award 7060 (Carter):

". . . It contends that special skills and equipment were required and for this reason Carrier could properly contract the work. We point out, however, that under the controlling rule in the present Agreement, Carrier was required to give the work to its own employes unless an agreement with the General Chairman is obtained permitting the contracting of the work 'due to lack of equipment, qualified forces or other reasons.' No attempt was made to secure such an agreement and the controlling rule was therefore violated. Awards 3215, 6199. We do not intend to imply that the General Chairman could arbitrarily refuse to permit the contracting of work in a proper case. We do state that the failure to negotiate with the General Chairman precludes any contention under the rule before us that the Carrier could properly proceed to farm out the work. The rule provision is clear and unambiguous. The Carrier cannot be excused from complying with its plain provisions. See Awards 4920, 4921."

In the instant dispute, the General Chairman did not outright refuse to permit the contracting of the work here in question. In fact the General Chairman indicated to Carrier that there was a possibility that the operation

of certain equipment could be performed by the outside contractors employes. Yet, the record is void of any evidence that Carrier attempted to secure an agreement with the General Chairman in regard to the contracting out of this work. Therefore, it is the opinion of this Board that Carrier violated the Agreement.

In regard to the question of damages, it is undisputed that some of Claimants were working every day and suffered no pecuniary loss, while some of the Claimants were furloughed. It is Carrier's contention that a number of Claimants were furloughed, but that Carrier could not locate them. No evidence was adduced by Carrier to show that these Claimants could not be located and therefore this contention must be rejected.

In regard to the claim for benefits under Travelers Insurance Policies, the record is lacking in evidence that the Claimants suffered any such loss and therefore this part of the claim must be denied. See Award 16269 (Perelson).

Therefore the following named furloughed Claimants are entitled to damages sufficient to make them whole, or in other words they are entitled to receive what they would have earned under the Agreement had there been no violation less such sums as they in fact earned. (See Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western R. Co., 338 F. 2d 407): A. Salerno, W. Shelosky, M. Petrunich, H. Janicki, A. Chermauskas, L. Kuigowski, S. Nardone, and P. Georgevich.

Further, the record shows that Claimant G. Linko was off work from January 1, through January 22, 1966, and he also is entitled to damages for only that period, sufficient to make him whole. The record also shows that Claimant J. Skosko was furloughed on November 30, 1965 and he too is entitled after that date to damages sufficient to make him whole.

In regard to the remaining Claimants, the record shows that they did not suffer any pecuniary loss. This Board has on numerous occasions been faced with the perplexing problem of a situation where the Agreement has been violated by Carrier, but the Claimant has been working and thus suffered no pecuniary loss. Many Awards are in conflict in an attempt to finally resolve this problem.

There are a number of conflicting court decisions in regard to this question, and we adhere to the principle that damages shall be limited to Claimants' actual monetary loss arising out of the Agreement violation and that this Board is without authority to employ sanctions or penalties not authorized by the controlling Agreement, except to the extent of nominal damages See Awards 14920, 14693, 14371 and 13236; Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co., 338 F. 2d 407, cert. den. 85 S. Ct. 1330. See also Award 15624 (McGovern).

Until the United States Supreme Court decides otherwise, we are compelled to deny in regards to damages the claims of those Claimants who were not furloughed and thus did not suffer any pecuniary loss.

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 Agreement was violated.

AWARD

Paragraph (1) of the Claim is sustained.

Paragraph (2) of the Claim is sustained in accordance with the Opinion as to the following named Claimants: A. Salerno, W. Shelosky, M. Petrunich, H. Janicki, A. Chermauskas, L. Kuigowski, S. Nardone, P. Georgevich, and G. Linko and J. Skosko; Claim as to damages denied as to following named Claimants: W. Bentler, G. Billick, A. Heater, R. Shaylor, J. Evans, J. Foley, R. Naughton, G. Babbitt, S. Salerno, M. J. Jarzembowski, E. Ingraham and S. Klecha.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1968.

DISSENT TO AWARD NO. 16693, DOCKET NO. MW-17013
(Referee P. C. Dugan)

The claim here was based on there having been a violation of the Agreement covering employes on the former DL&W Railroad, but the record disclosed that the work covered by the claim was in connection with the welding of rail which was used on the former Erie Railroad and on which there is a separate Agreement covering employes represented by the petitioning Organization. The Agreement on the former DL&W does not apply on or to the former Erie and this Division's refusal to consider this resulted in jurisdictional error. In finding that the DL&W Agreement was violated, coverage of that Agreement was thereby expanded, notwithstanding the Division's lack of authority to add to, take from, amend or make agreements. In a somewhat analogous situation, this Division, in Award 14981, held:

> "It is agreed between the parties to this dispute that the work performed on the Minneapolis Industrial Railroad (M.I.R.) is outside the agreement, but Claimants contend that this issue was never raised on the property and therefore cannot be considered by this Board. However, by making claim for work performed outside the agreement, Claimants are asking this Board to write an agreement between the Organization and the M.I.R. This the Board cannot do. The function of this Board is to interpret existing contracts. Here

the Claimants have no agreement to interpret and therefore no valid claim for work performed on the M.I.R."

It is clear that in the instant case the Division exceeded its authority and, having done so, the award is ultra vires.

For these and other reasons we dissent.

J. R. Mathieu
R. A. DeRossett
C. H. Manoogian
C. L. Melberg
H. S. Tansley

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