Award No. 17048
Docket No. CL-17261

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jan Eric Cartwright, Referee

PARTIES TO DISPUTE:

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

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6310) that:

(a) Carrier violated Rules of the Clerks' Agreement at Memphis, Tennessee, when on August 16, 1965, it removed certain industry track checking duties from Illinois Central Clerical Employes and assigned such duties to Louisville and Nashville Railroad Company Clerical Employes.

(b) Carrier shall return the involved duties to its clerical employes subject to the current Clerks' Working Conditions Agreement.

(c) Carrier shall compensate Clerk (Extra) B. J. Jones a day's pay at pro rata rate ($21.32 per day) on August 16, 1965, and each day thereafter until the violation for which the claim is filed is corrected.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties are on file at the Board and by this reference thereto are made a part hereof. There is an area approximately four miles in length and one hundred yards to one-half mile wide extending along the east side of Memphis, in which there are one hundred thirteen (113) industries served jointly by Illinois Central and Louisville and Nashville Railroads. Historically, from 1907 to August 16, 1965, L&N and IC clerical employes checked all cars placed by both Carriers in these facilities. Being unable to determine which Carrier had placed the cars, the clerical employes of both Carriers checked all cars in each facility in order to determine which Carrier had the responsibility for assessing demurrage, etc.

By mutual agreement between the Agents representing the L&N and the IC, the area was zoned and the territorial checking duties divided among IC and L&N employes. Thirty-one (31) facilities in the extreme northern part of the area were assigned to an Illinois Central employe. This repre-

can be shown and as the Board has no statutory authority to dictate work procedures to the company even if a violation can be found.

(Exhibits not reproduced.)

OPINION OF BOARD: At the certain Memphis, Tennessee area involved herein, beginning in 1907 and until August 16, 1965, the physical check of railroad cars serving industries located on the Illinois Central Railroad and also industries served by both the Illinois Central Railroad and the Louisville and Nashville Railroad was made by Illinois Central clerks and by Louisville and Nashville clerks. It was necessary in the checking process for Illinois Central clerks to check their employer's cars and also those of the Louisville and Nashville in order to determine whether the Illinois Central had placed the cars and prepare proper records.

On August 16, 1965, by an agreement between the two Carriers, the Memphis area in question was zoned. Thereafter, the Clerks of each Carrier checked the cars of both Carriers, but only in their assigned zones, and the check records were then exchanged between the Carriers.

The Organization contends that the work of checking cars switched into industries by the Illinois Central belongs to Illinois Central clerks and the assignment of this work to Louisville and Nashville clerks constitutes a violation of the Scope Rule and the seniority rights of the Illinois Central clerks subject to the Agreement. The Carrier contends that it has similar operations involving joint industrial areas along its line; that the zoning of industry checking and an exchange of records in an area served jointly by it and the Louisville and Nashville eliminated unnecessary checking by both Carriers' clerks; and that there was no transfer of or loss of work involved, but only a change in procedure.

The evidence clearly shows that for over 50 years the Illinois Central clerks and the Louisville and Nashville clerks both conducted the "checking process" in the entire Memphis area involved herein, but each clerk prepared records only for his Carrier, thus establishing a custom and practice within a general scope rule. The Carrier's Agreement to zone the area had the result of assigning work of Illinois Central clerks to outside forces. The Board must therefore find that the Agreement has been violated and the claim be allowed.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17048, DOCKET CL-17261

The majority's decision to sustain the claim presented on behalf of Clerk B. J. Jones has no sound basis in fact or logic. It is, therefore, a complete nullity, without any force or effect whatsoever.

Under the Railway Labor Act, as amended, this Board's authority is limited to interpreting collective bargaining agreements between the parties to disputes brought before it. The courts, in applying the Act, have consistently recognized (1) that the Board does not have license to issue awards based on its own sense of equity or justice, and (2) that its awards are legitimate only insofar as they are soundly grounded in the collective bargaining agreements between the disputants. One of the earlier judicial pronouncements on the limits of the Board's authority under the Act is found in **Shipley v. Pittsburgh & L.E.R.**, 83 F. Supp. 722, 759, (D.C. Pa. 1949):

> "An award before the National Railroad Adjustment Board which alters, changes or amends a collective bargaining agreement is an usurpation of the power granted the Board under the Railway Labor Act to interpret such agreement. Hunter v. Atchison, T. & S. F. Ry. Co., 7 Cir. 171 F. 2d 594."

Even the Supreme Court's relatively recent opinion in **Gunther v. San Diego & Arizona Eastern Railway Company**, 382 U.S. 257 (1965), which narrowed the scope of judicial review of Adjustment Board awards and led to the 1966 amendments to the Act, clearly indicates the Board still is not at liberty to issue awards based on interpretations of agreements that are "wholly baseless and completely without reason."

Countless awards of this Board, including the following, have echoed and emphasized the validity and importance of this most basic principle:

Third Division **Award No. 12818**, ORT v. SR, Referee Louis Yagoda:

> "* * * This Board does not have the power to rewrite or modify a rule by interpretation. If the rule does not accomplish the purpose intended, the remedy lies not with this Board, but in the field of negotiation."

Third Division Award No. 13491, ORT v. SP, Referee John H. Dorsey:

"The Board is a statutory body of limited jurisdiction. It may only interpret and apply collective bargaining agreements negotiated and executed by the disputants. It may not insert in such agreements its sense of equity or economic and labor relations predilections. Where the parties to an agreement, or one of them, find it wanting, recourse lies in the collective bargaining procedures prescribed in the Railway Labor Act."

Third Division Award No. 15533, TCEU v. SAL, Referee John J. McGovern:

"The mileage claimed and remaining unrefuted in the record as being connected with Carrier's business, poses a question of equity. Whatever we may think about the fairness of the Claim, we are constrained to say that we neither possess the authority nor the power to impose our sense of equity on the parties to the agreement. (See Awards 10068, Weston and 10245, Gray, among others.)

Superimposed on the above is the fact that the Petitioner has not cited a rule specifically as having been violated; further, a review of the record convinces us that there is no rule to support the claim, and, in the absence of such a rule, the Board is powerless to supply one. This principle has been well enunciated in numerous awards of this Board. We cite one of the many in Third Division Award 10994 (Hall), wherein it was held:

'This Board has no authority to supply rules where none exist. . . . Consequently, there being no rule, there could have been violation of same.'"

The Majority's opinion in the instant case cites no language in the parties' collective bargaining agreements which even remotely suggests the parties mutually intended to preclude the Carrier from assigning the yard checking duties in question to anyone other than members of the petitioning Clerks' Organization. If there is some such language in existence, it seems only reasonable and fair to expect that the Majority would cite it, for what other basis could there be for the Majority's finding "that the Agreement has been violated." Moreover, how can the Carrier be expected to know what parts of the Agreement it has violated if those who have so found do not know or will not tell?

The parties' Scope Rule, Rule 1, which the Majority passively mentions and characterizes as a "general scope rule", is no more than just that: a general scope rule. Absent the addition of more language by the parties it cannot logically have any application in the instant case because it merely lists the classes of employes covered by the Agreement; it does not define, describe or grant rights to any work:

"RULE 1. SCOPE

These rules shall govern the hours of service and working conditions of the following employes, subject to the Exceptions noted below:

(1) Clerks —

(a) Clerical workers;

(b) Machine operators.

(2) Other office and station employes — such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employes, train and engine crew callers, operators of certain office or station appliances and devices, telephone switchboard operators, elevator operators, office, station and warehouse watchmen and janitors.

(3) Laborers employed in and around stations, storehouses and warehouses."

This rule has been considered and interpreted by this and other adjustment boards established under the Railway Labor Act on several occasions and has consistently been found to be lacking in language giving covered employes the exclusive right to perform any work. See, e.g., Third Division **Awards 11793,** CL v. IC, Referee Bernard J. Seff; **13255,** CL v. IC, Referee Levi M. Hall; **13580,** CL v. IC, Referee Benjamin H. Wolf; and **13859,** CL v. IC, Referee Herbert J. Mesigh; **Award No. 41** of Special Board of Adjustment No. 170, CL v. IC, Referee Edward M. Sharpe; and **Award No. 19** of Special Board of Adjustment No. 605, CL v. IC, decided without a referee. Three of these awards — Third Division **Award 13255, Award No. 41** of SBA No. 170 and **Award No. 19** of SBA No. 605 — reject the Organization's contention that its members have the exclusive right to perform yard checking duties on the Carrier's property. The latter of these three awards, **Award No. 19** of SBA No. 605, as previously noted, was decided without a referee; it is signed by C. L. Dennis, International President of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, the same indiivdual whose signature appears on the so-called "letter of intent" on page 1 of the record in the instant case.

The awards cited in the preceding paragraph are consistent with hundreds of other awards of this and other adjustment boards which hold that general scope rules similar or identical to the instant parties' Rule 1 cannot support claims to specific work by clerical employes absent a showing, by a preponderance of competent evidence, that such work belongs exclusively to them by tradition, custom and practice. In Third Division **Award No. 15596,** CL v. SP, Referee George S. Ives, for example, the Board states:

"The Scope Rule of the Agreement between the parties does not purport to describe the work encompassed but merely lists the classifications covered. Under such a general Scope Rule, Petitioner has the burden of establishing through probative evidence that the work of transporting train and engine crews was exclusively reserved to the clerks by reason of tradition, custom and historical practice.

* * * * *

Examination of the record reveals that the disputed work has been performed by others as well as clerks, and Petitioner's evidence shows only that the work of transporting train and engine crews

between Sparks and Fernley, Nevada, has been regularly assigned and performed by Clerks. Therefore, it is apparent that Petitioner has failed to establish the exclusiveness of such assignments, a necessary element, without which the Claim cannot be sustained."

Similarly, in Third Division **Award No. 14327**, CL v. N&W, Referee John H. Dorsey, the Board's opinion reads:

"This is a Scope Rule case. The Rule in the Agreement before us is general in nature. Therefore, to prevail, Clerks have the burden of proving, by a preponderance of evidence of record, that traditional custom and practices on the property establish its exclusive right to perform the work which was, admittedly, transferred to Telegraphers. The principle is so firmly established that we find no need to cite the multitude of Awards that support it.

Clerks failed to satisfy its burden of proof relative to exclusivity of right to the work involved. We, therefore, are compelled to deny the claim."

See also Third Division **Awards 15920**, CL v. SP, Referee Edward A. Lynch; **15394**, CL v. SLSF, Referee Don Hamilton; **14064**, CL v. CMStP&P, Referee Murray M. Rohman; **13914**, CL v. UP, Referee Nathan Engelstein; **12476**, CL v. TTR, Referee Joseph S. Kane; **12360**, CL v. CMStP&P, Referee John H. Dorsey; **10164**, CL v. SR, Referee Walter L. Gray, and many others.

It matters not one iota in this case that members of the petitioning Organization may have checked cars in the geographical area in question for 50 or more years, for, as this Board has held in at least two earlier awards involving these same parties, the scope rule has system-wide application, and the exclusive right to perform specific items or types of work thereunder can only be established by proving the existence of a systemwide practice, custom and tradition of covered employes performing that work to the exclusion of all others:

Third Division **Award No. 13580, supra:**

"The increasing incidence of crime and the fact that there is very valuable IBM equipment in the building persuaded the Carrier that it needed the protection of patrolmen, rather than of watchmen. It accordingly abolished the watchmen's position and established the patrolmen's positions.

The Organization argued that incumbents of the new positions performed the identical class of work as those of the old and that under the Scope Rule the positions belonged to the Organization. **The Scope Rule of the subject Agreement is general in nature in that duties of the positions named are not defined. This Board has frequently held that where the Scope Rule is general in nature, the right to specified work will be reserved exclusively to the Organization if the work was by history, custom and tradition performed exclusively by its members.** Awards 11755, 11643, 11334, and many others, too numerous to mention.

We have also held that the resort to history, custom and tradition must be system-wide, rather than that of the particular position

where the Agreement, as in this case, is system-wide. Awards 13048, 11526 and others.

The record indicates that patrolmen have performed the duties of watchmen either as their principal duty or as incidental to their principal duties at 26 other locations of the system. It follows that the Scope Rule does not support the claim." (Emphasis ours.)

Third Division **Award 13859, supra:**

"The Employes allege the Carrier violated the Clerks' Agreement on 'January 16, 1961, the date on which the Station Master Clerk positions were abolished the clerical duties attaching thereto other than gateman duties were reassigned to other clerical positions. Those duties incidental to operating the gates, checking passengers' tickets and directing passengers to trains were reassigned to employes of Carrier's Special Police Department employes of another craft or class, who hold no rights under the Clerks' Agreement.' That such reassignment of gateman duties violates Rule 1, Scope, wherein 'gateman' listed therein reserves the work to them and that said duties have been exclusively performed by Clerks.

Carrier denies that the work in question was reassigned to others outside the Scope; that the Special Police are now performing the same duties which they have traditionally performed; that Carrier abolished the position when the work which necessitated the assignment of gateman had been eliminated.

* * * * *

The merit of the claim before this Board rests upon the interpretation and application of the Scope Rule of the Agreement. The Scope Rule of the Agreement is general in terms, and the term 'gateman' does not specify the work reserved to such employes. **The mere listing of positions in the Scope Rule does not create an exclusive right to the work. This Board has interpreted the Scope Rule between these same parties in Awards 13580, 13255, 12331, 11793, holding to the principle established by prior awards of this Division. That principle established: when general in form, the Petitioner has the burden of proving that the work involved has been historically, customarily and exclusively performed by employes covered by the Agreement; and where the Agreement is system wide, the employes must also show the work involved is performed exclusively by them throughout the system. Performance alone does not give the Claimants exclusive right to the work.**" (Emphasis ours.)

Hundreds of other awards of this Board, including the following, deny similar claims by clerical employes on other properties for the same reason:

Third Division **Award No. 16550,** CL v. NYC, Referee John H. Dorsey:

"The case law of this Board makes axiomatic the following principles in interpreting and applying a general in nature Scope Rule relative to an organization's claim to exclusive right to certain work:

When the Agreement is system-wide, the Organization when challenged, has the burden of proving that the work involved has been performed, historically and customarily, system-wide by employes covered by the Agreement. Proof that it had been performed accordingly at an isolated situs does not satisfy the principle. See, for example, Award Nos. 12360, 12462, 13914, 13605, 13580, 13400, 13284, 13280, 13195, 12356, 12897, 12787, 12381, 12109, 11605, 12415.

As we have so often said, the burden which a Petitioner bears to satisfy the principles is harsh. However, the many years' ancestry of the principles must be honored in the interest of uniformity and stabilization throughout the industry. Be there any who find the principles repugnant — and we know there are some — their remedy lies in collective bargaining.

In the instant case Petitioner failed to adduce evidence that the work involved had been performed system-wide exclusively, historically and customarily, by employes covered by the Agreement. We, therefore, by adherence to the principles enunciated, supra, dismiss the Claim for lack of proof."

Third Division Award No. 16356, CL v. SLSF, Referee Arnold Zack:

"The Organization contends that the claimants have an exclusive right to this work, and have been the only ones to perform it at Fort Scott. It points out that the system-wide exclusivity doctrine must bear in mind the custom, practice and tradition at the particular point under consideration, which, when as clear as here, would require sustaining the claim.

The Carrier acknowledges that exclusivity has been shown regarding the work in dispute, at this location, but argues that the well established principle of this Board has been to require a system wide showing of exclusivity, which has not been the practice in work of this type.

This Board has in many cases considered the question of whether exclusivity should be applied on system wide or an individual location basis. We have examined the several awards cited to support the latter view, but find them unconvincing in the light of the majority of awards by this Board embracing the concept of system wide exclusivity.

Referee Dorsey, in Award 15695, between these same parties, stated:

> 'The Scope Rule in the Clerks' Agreement is general in nature. Therefore, to prevail, Petitioner has the burden of proof that the work claimed has been traditionally and customarily performed on a system-wide basis by employes covered by its Agreement. See Awards Nos. 14944 and 15394, involving the same parties and Agreement.'

We see no reason to overturn that reasoning. Inasmuch as the Organization has been unable to demonstrate system-wide exclusivity in the handling of U. S. Mail, the claim must be denied."

See also Third Division **Awards 16832**, CL v. EL, Referee Arthur W. Devine; **14751**, CL v. PRR, Referee Bernard E. Perelson; **14050**, CL v. FEC, Referee Lloyd H. Bailer; and, many others.

These awards are consistent with the many other awards of this Board which recognize and apply the very sound principle that a carrier does not lose or waive its inherent right to assign or reassign certain work just because at some time in the past it chose to assign such work to one group of employes or another, at one point or another. Probably the clearest and most concise statement of this principle is found in Third Division **Award No. 7031**, CL v. SAL, Referee Edward F. Carter:

Award No. 7031:

> "There is no position listed or described in the scope rule of the Clerks' Agreement which makes the work of testing water and the reports incidental thereto the exclusive work of Clerks. The record shows that this work is performed by other crafts (Machinists, Laborers, Machinist Helpers, Electricians, Roundhouse Foremen and Supervisors) at other points on this Carrier. It appears clear to us that the work was not the exclusive work of any craft. **Where work may properly be assigned to two or more crafts, an assignment to one does not have the effect of making it the exclusive work of that craft in the absence of a plain language indicating such an intent. Nor is the fact that work at one point is assigned to one craft for a long period of time of controlling importance when it appears that such work was assigned to different crafts at different points within the scope of the agreement.** We conclude that the work here in question was not the exclusive work of Clerks on this Carrier. It was not a violation of the agreement to require Machinist Helpers to continue to do the work while the treating plant was being rehabilitated for service after the fire. Controlling awards sustaining this view are: Awards 4827, 4889, 5702, 6409, Third Division. Award 1626, Second Division." (Emphasis ours.)

Similarly, in Third Division **Award No. 10014**, CL v. L&N, Referee Harold M. Weston, the Board states:

> "In considering the past practice of the parties as bearing upon the issues of the present case, emphasis has been directed to the fact that Lift Truck Operators at Radnor have been covered by the Clerks' Agreement for a period of seventeen years. However, the Agreement is system-wide, and it is uncontroverted that at Carrier's South Louisville, Kentucky Stores Department, which is also covered by the rules of that Agreement, Lift Truck Operators are not Clerks, but Shop employes. In this factual setting it cannot validly be stated that the duties of the disputed position belong exclusively to employes within the scope of the Clerks' Agreement. We agree with Awards 7031 and 7784 that the fact that work at one point is assigned to one craft for a long period of time is not of controlling significance 'when it appears that such work has been assigned to different crafts at different points within the scope of the agreement.'
>
> In view of the foregoing considerations, **it is our opinion that** lift truck operations are not reserved by either express language or

tradition and custom to the positions covered by the Clerks' Agreement. The claim will be denied."

Although the Majority chose to disregard the evidence of record in this case, it is clearly established that clerical employes have never performed, nor are they presently performing, all yard checking work required by the Carrier. On record page 68, for instance, the Organization " * * * readily concede[s] that cars are being checked by various methods and crafts on Carrier's property." Moreover, the Carrier states, without contradiction or other challenge by the Organization, that the yard checking procedures in question are " * * * analogous to the arrangement that has been in effect on Presidents' Island and other locations on the Memphis Terminal for a great many years." See Carrier's Exhibits B and D and record page 38.

Because of these admitted and undisputed facts, and the various awards and principles discussed above, there simply is no logical basis for the Majority's conclusion that the Carrier's actions were violative of the parties' agreement. Fifty years, admittedly, is a long time to assign certain work to certain employes at a certain point, but in this case at least, in light of all the other facts, it just doesn't afford a sound basis for finding the Carrier has contractually restricted its right to change the manner in which the work will be done in the future.

If the instant claim had been submitted under a provision in the parties' Agreement which stated in no uncertain terms that Clerical employes have the exclusive right to perform all yard checking work required by the Carrier, and the evidence showed that for 50 or more years the Carrier had been assigning such work to other than clerical employes, would the Majority be prepared to issue a denial award? Hardly, but this is exactly what it would have to do if it desired to be consistent and follow the same line of reasoning it apparently has followed here.

As if to add insult to injury, the Majority summarily concludes that the monetary damages sought by the Organization on Claimant Jones' behalf in part (c) of the "Statement of Claim" should be sustained. It reaches this conclusion despite the fact that the parties specifically agreed during the handling of the claim on the property that the Carrier's liability, if any, "will not extend beyond November 2, 1966." (Employes' Exhibits 3-H, 3-K and 3-L); despite the fact that the parties' collective bargaining agreement does not contain a liquidated damages clause or a provision for the payment of punitive damages; and, despite the fact that there is no evidence in the record which shows the Claimant has been adversely affected by the Carrier's action to the tune of a full day's pay ($21.32) each day since August 16, 1965.

Accordingly, the award of any compensation at all to Claimant Jones constitutes nothing less than the imposition of a penalty, which, as many awards of the Board recognize, is beyond the Board's authority under the Railway Labor Act. Two of these awards read, in part, as follows:

Second Division Award No. 3967, CM v. D&RGW, Referee Howard A. Johnson:

> "No pecuniary loss or damage to Claimants is shown, and the Agreement does not provide for any arbitrary or penalty for this violation.

It is a well settled rule of statutory construction that a penalty is not to be readily implied, and that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it. Tiffany v. National Bank of Missouri, 85 U.S. 409; Keppel v. Tiffin Savings Bank, 197 U.S. 356.

The rule is equally applicable to the construction of contracts; for the parties can readily agree upon penalty provisions if they so intend, and the absence of such provisions negatives that intent.

The Supreme Court of the United States said in L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, that to construe a statute as imposing a penalty where none is expressed would be to amend the Act and create a penalty by judicial action; that it would further necessitate judicial legislation to prescribe the nature and size of the penalty to be imposed.

Similarly, for this Board to construe an agreement as imposing a penalty where none is expressed, would be to amend the contract, first, by authorizing a penalty, and, second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide those matters; they are the only ones entitled to decide them. Consequently, there have been many awards refusing to impose penalties not provided in the agreements. Among them are: Awards 1638, 2722 and 3672 of this Division; Awards 6758, 8251 and 15865 of the First Division; and 7212 and 8527 of the Third Division."

Third Division **Award No. 15914**, TCEU v. SR, Referee John J. McGovern:

"It is our judgment that the messages in question were train orders coming within the purview of Rule 31. Although there was no record made of these messages, they did direct the movement of trains. We find, therefore, that the Carrier was in violation of Rule 31 insofar as all claims as submitted are concerned.

On November 3, 9 and 17, 1961, at Chamblee, inasmuch as the claimant was on duty and under pay, we shall award him nominal damages of $1.00. To allow the claim as submitted in these instances would be tantamount to imposing a penalty. We have found in many other awards that this Board lacks authority so to do. Claims on October 20 and December 7, 1961 at Duluth and Norcross shall be paid as submitted to those claimants who were off duty at the time the orders were issued."

These awards are consistent with the holding of the United States Court of Appeals, Tenth Circuit, in **Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western R. Co.**, 338 F. 2d 407 (1964) cert. den. 85 S. Ct. 1330 (1965):

"The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The Board has no specific power to employ sanctions, and such power cannot be inferred as a corollary to the Railway Labor Act. See Priebe & Sons v. United States, 332 U.S. 407, 413. And if, as

counsel for the Brotherhood contends, there exists within the industry a long established and accepted custom to pay what would amount to a windfall for contract violations such as here occurred, such custom was not established by finding, nor requested as a finding, in the procedures before either the Board or the District Court. We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach of an employment contract is limited to the amount he would have earned under the contract, less such sums as he in fact earned. Atlantic Coast Line RR v. Brotherhood of Railway Clerks, 4 Cir., 210 F. 2d 812, 815; United Protective Workers v. Ford Motor Co., 7 Cir., 223 F. 2d 49, 53–54. Absent actual loss, recovery is properly limited to nominal damages. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 10 Cir., 113 F. 2d 308; Norwood Lumber Corp. v. McKean, 3 Cir., 153 F. 2d 753; 5 Williston, Contracts (rev. ed.) Section 1339A."

A more recent judicial pronouncement on the issue of damages under collective bargaining agreements in the railroad industry is found in **Brotherhood of Railway Trainmen, et al v. Central of Georgia Railway,** Civil Action No. 1720, United States District Court for the Middle District of Georgia, Macon Division, decided in December, 1967. (The District Court's decision also covers **Brotherhood of Locomotive Engineers, et al v. Central of Georgia Railway,** Civil Action No. 1721.) Therein, the District Court held:

"The carrier contends that since the 'Schedule[s] of Wages, Rules and Regulations' and the latter agreement provide for and contemplate no damages for the violation under consideration, and contemplate no claims for damages, as distinguished from a grievance procedure to require compliance with the agreement, the First Division has failed in the language of the amendment to the Act 'to conform, or confine itself, to matters within the scope of the Division's jurisdiction', and that for that reason the award should not be enforced, and, on the contrary, should be set aside by this court, except only as to the few small awards under Claims 1, 2 and 4, which either do not involve the principle contended for under Claim 3, or are of such small amounts as not to justify opposition. It contends also that the awards under Claim 3 are, in the language of the Senate Committee Report, 'actually and indisputedly without foundation in reason or fact', and that, for that reason, this court must 'have the power to decline to enforce' it. This court agrees with those contentions. Whether we regard the Board as primarily an administrative tribunal, or as primarily a board of arbitration (it partakes of the nature of both), it must act responsibly, and if it, as an admintrative tribunal, in construing and interpreting an agreement its interpretation must find some basis in an agreement its interpretation must find some basis in the language of the written agreement, or in the conduct of parties under the language, or in some uniform custom and practice concurred in by the parties. No such basis exists here. If it acts as a board of arbitration and is arbitrating a dispute, it must act within the scope of the submission:

'An award must be made on matters included within the agreement for submission and must not exceed the powers granted by the submission. In general, an award on mat-

ters not included in the submission is void, and is always open to attack on the ground that the arbitrators exceed their powers.' 5 Am. Jr. 2d, Arbitration and Award, Section 137, page 619.

And the carrier has never voluntarily agreed that the Board should decide whether the agreement calls for damages, much less penalty payments, as distinguished from an award ordering a restoration of the original home terminal.

* * * * *

Thus the order of the First Division insofar as it relates to Claim 3 must be set aside for failure of the Division to comply with the requirements of the Act and for failure of the order and award to confine itself to matters within the scope of the Division's jurisdiction. It should be set aside rather than remanded to the Division. The Division has held this controversy on its dockets from February 6, 1954 until January 20, 1959, 4 years, 11 months and 14 days. We know that dockets are crowded, but the carrier is not responsible for this controversy's remaining undecided by the First Division for such a long period of time. Perhaps precedence should be given to grievances arising under contracts and agreements which do not provide for either compensatory or penalty payments. This case, therefore, now stands for decision by this court rather than by the First Division. While the Adjustment Board, in properly handling a controversy, if there by no failure of the Division to comply with the requirements of the Act, and no failure of the order to conform or confine itself to matters within the scope of the Division's jurisdiction, may not be bound by common-law principles where its interpretation of a contract is not 'wholly baseless and completely without reason' (Gunther, supra, at page 261), nevertheless, when, because of the Board's failure to comply with the requirements of the Act and failure of its order to conform or confine itself to matters within the Division's jurisdiction, its award must be set aside and the controversy determined by a court, the court is then bound by common-law principles. This means that the award as it relates to all three of the claimants in Claim 3 cannot stand, and must be set aside because the letter agreement contemplated no such awards, but only grievance procedures or complaints to compel compliance therewith; and the award as it relates to Avera and Nunn cannot stand, and must be set aside for the additional reasons that there must be applied the general law of damages relating to contracts: 'that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. **Atlantic Coast R. Co. v. Brotherhood of Ry., etc.**, 210 F. 2d 812, 815 (4th Cir., 1954) . . .'; **Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.**, 338 F. 2d 407, 409 (10th Cir., 1964)."

The "return of the involved duties to [the Carrier's] clerical employes", sought by the Organization in part (b) of the "Statement of Claim", cannot legitimately be ordered by this Board because the Board has neither injunctive nor equitable powers and cannot direct the parties' future actions. Second Division Awards 4974, CM v. SR, Referee Howard A. Johnson; 5410, EW v.

SR, Referee William H. Coburn; and 5421, EW v. SR, Referee Gene T. Ritter; and Third Division Awards 13773, CL v. CMStP&P, Referee Kiernan P. O'Gallagher; and 15485, CL v. TC, Referee David L. Kabaker.

Accordingly, the Majority's opinion in this case does not support a sustaining award, and we register a most emphatic dissent.

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