Award No. 18773
Docket No. MW-19066

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Edgett, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

NORFOLK AND WESTERN RAILWAY COMPANY (Western Region)

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

(1) The Carrier violated the Agreement when, without prior notice to General Chairman E. C. Marquis as required by Article IV of the May 17, 1968 National Agreement, it assigned the work of installing one hundred sixty (160) rods of right-of-way fence near Salem, Illinois to outside forces. (System File MW-JAX-61-1)

F. Hull be allowed pay at the fence gang foreman's straight time rate of pay and Section Laborers L. Cheek, R. E. Fusselman and W. T. Booker each be allowed pay at section laborer's straight time rates for an equal proportionate share of the total number of man hours expended by outside forces in performing the work referred to in Part (1) of this claim.

(3) The Carrier shall also pay the claimants six percent (6%) interest per annum on the monetary allowances accruing from the initial claim date until paid.

EMPLOYES' STATEMENT OF FACTS: The Carrier entered into a contract with an outside concern to perform the work of installing one hundred and sixty (160) rods of right-of-way fence near Salem, Illinois. The work was preformed during April and May, 1969. Such work comes within the scope of the schedule agreement under the provisions of Rule 1 which, insofar as it is pertinent hereto, reads:

"These rules govern the rates of pay, hours of service and working conditions of all employes in the track sub-department and bridge and building sub-department of the Maintenance of Way and Structures Department listed in this rule, and other employes performing similar work recognized as belonging to and coming under the jurisdiction of the track and bridge and building sub-departments of the Maintenance of Way and Structures Department, do not apply to supervisory forces above the rank of foreman.

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrer's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated December 1, 1963, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The instant dispute involves the interpretation and application of the working agreement effective December 1, 1963 made by the Wabash Railroad Company and the Brotherhood of Maintenance of Way Employes which agreement covers this Carrier's employes on lines of former Wabash in the Carrier's Western Region.

In keeping with a practice of many years standing, the Carrier, on March 15, 1969, engaged a contractor to erect 160 rods of right-of-way fence near New Salem, Illinois, for a fixed sum of money. No record is available as to the number of man hours expended by the contractor or the dates on which the work was performed.

The claimants are four of the laborer members of the local section gang headquartered at Baylis, Illinois. They were fully engaged in their regular and usual work during this period and lost no time. The claim contemplates that the senior section laborer claimant be paid at fence gang foreman's rate and the others at section laborer's rate for time not worked in an amount equal to that expended by the contractor's forces in performing the work in question. The claim further contemplates that compounded interest at the rate of 6 per cent be added to such payments.

Attached, marked Carrier's Exhibit "A" through "G," are copies of correspondence reflecting the handling given the case on the property.

(Exhibits not produced.)

OPINION OF BOARD: Claimants contend that Carrier violated Article IV of the May 17, 1968 National Agreement, when, without notice to the General Chairman, as specified in said Agreement, it assigned the installation of certain right-of-way fence to outside forces.

A principal defense of Carrier to this claim is that notice is not required in this case because the Organization has not shown that the work in question belongs to their craft to the exclusion of all others. This Board has decided that contention, adversely to Carrier's position, in a recent award (No. 18305, Paul C. Dugan). There it was said:

> "The first paragraph of said Article IV deals with the contracting out of work 'within the scope of the applicable schedule agreement.' It does not say the contracting out of work reserved exclusively to a craft by history, custom and tradition. This Board is not empowered to add to, subtract from, or alter an existing agreement. We therefore conclude that inasmuch as Maintenance of Way Employes have in the past performed such work as is in dispute here, then said work being within the scope of the applicable Agreement before us Carrier violated the terms thereof by failing to notify the General Chairman within 15 days prior to the contracting out of said

work. In reaching this conclusion, we are not asserting that the work here in question cannot be contracted out later after the giving of th required notice. We are only saying that since the work in question came within the scope of the Maintenance of Way Agreement, Carrier was obligated to give said advance notice. Failing to do so, Carrier violated the terms of Article IV of the May 17, 1968 National Agreement governing the parties to this dispute."

Carrier members ask for dismissal of Part (1) of the claim "because this Board has no jurisdiction to enforce agreements to negotiate." Award 14595 (Ives) is cited in support of this contention, along with Award 15715 (Harr) which followed it.

Both awards must be distinguished from the present case. In both 14595 and 15715 a claim was made for a percentage of ticket sales for employes who were required to sell tickets for other carriers. The applicable agreements were silent on this question and the Board found that the claim amounted to a request to establish a rate of pay. It properly held that such a request must be handled through the negotiation and mediation procedures contained in Section 6 of the RLA. Here the Board is dealing with the meaning of a contractual provision, Article IV. It is not dealing with a question upon which the parties have not reached agreement but, instead, is dealing with the meaning of an agreement which the parties have reached. Thus the assertion that Awards No. 14595 and 15715 are authority for the proposition that this claim must be dismissed is misplaced.

It is further urged that the claim should be dismissed because Article IV is simply an agreement to negotiate or agree. This is an interesting, but unpersuasive, argument. It fails principally because Article IV is more than an agreement to negotiate. Article IV sets forth a requirement of notice which this Board has ruled must be given where required. It requires a meeting, if requested; permits Carrier to contract out if no understanding is reached; and provides that a claim with respect to such contracting may be filed upon failure to reach agreement.

Carrier's failure to give notice and to meet has denied the Organization a contractual right to meet and discuss the question of contracting out the work of installing certain fencing. It has put the Organization in the position of being unable to bring its claim before this Board after a full record of discussion and objection as contemplated by Article IV. This has made it impossible for this Board to deal with the claim in the procedural manner contemplated by Article IV.

Despite this, based upon the whole record in this case, this Board has determined that money damages have not been proven. However, it does not believe that future cases should be pre-judged. This is what Carrier has, in effect, asked in its argument for dismissal.

Carrier argues that the question of notice is moot since "it is irrelevant to a claim to the work or any monetary loss for alleged loss of work." The asserted irrelevance is grounded upon the claim that "this Board cannot enforce the giving of the notice nor the negotiations that should follow."

This Board has found here, as it did in Award 18305, that Carrier violated the Agreement by failing to give notice, as required by Article IV when it

contracted to have certain work performed by outside forces. There is a real controversey to be determined and a determination of that controversey has been made by this Board. The fact that an award of money damages has been denied does not make this case moot.

It would be an improper use of this Board's adjudicatory function to declare, in this case, that in no other case could it provide a remedy for Carrier's failure to give the notice required by Article IV. Questions should be determined by the Board on a case by case basis and not by broad general pronouncements. In other words the Board should decide the case actually before it. It should not attempt to lay down rules or propositions as to possible or probable issues, for the guidance of parites not before it, on issues which may arise in the future under a different state of facts.

For the reasons stated the Board has decided not to dismiss part 1 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 the Agreement was violated, as discussed in Opinion.

AWARD

Paragraph 1 of the Statement of Claim is sustained.

Paragraphs 2 and 3 of the Statement of Claim are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 8th day of October 1971.

CONCURRING OPINION OF CARRIER MEMBERS — AWARD 18773, DOCKET MW-19066

(Referee Edgett)

I

THE AWARD IS SUBSTANTIALLY CORRECT BUT IT MISREPRESENTS THE POSITION TAKEN ON BEHALF OF CARRIER.

The Carrier Members of the Board are in complete agreement with this award on the following points:

1. "* * * money damages have not been proven" and hence paragraphs 2 and 3 of the claim must be denied; the record affirmatively shows that under the existing agreement the work contracted out was not reserved to the Employes;

2. Questions should be determined by the Board on a case by case basis * * * In other words the Board should decide the case actually before it; and

3. The fact that an award of money damages has been denied dos not make this case moot."

To the extent the award suggests that either Carrier or Carrier Members have disagreed with these propositions, it is gravely in error and simply reflects the failure of the referee to examine and understand the position actually taken in the record on behalf of Carrier. We believe that the rapidly growing number of claims of this type now being filed with the Board warrants a complete and frank statement herein of the position actually taken on behalf of Carrier with regard to notice, damages, and moot questions; hence, we will present that position below, taking the essential material directly from the record presented to the referee. Before doing so, however, we feel obligated to comment on the new and erroneous observation injected into the case by the referee in the sixth paragraph of the opinion. The referee there states that "Carrier's failure to give notice * * * has put the Organization in the position of being unable to bring its claim before this Board after a full record of discussion and objection as contemplated by Article IV." Our careful search of the Employes' Ex Parte submission discloses no such argument, and the reason for the Employes' failure to advance such an argument is perfectly obvious. Article IV has no effect whatever upon the established agreement procedures for processing a claim. The moment Carrier contracted out the involved work the Employes were fully aware of it and had full and complete opportunity to present and process their claim in accordance with the agreement procedures. The fact that they were not invited, through notice, to come in before the contract was let and attempt to negotiate new rights to the work is totally irrelevant to any work rights they might have had under the agreement as well as to the processing of any claim for alleged violation of those rights. Had the referee confined himself to the issues raised by the Employes in their Ex Parte submission, he would not have fallen into the error of assuming that pre-contract negotiation for new rights was in some way involved with the processing of a claim. On the point that a referee should confine himself to the issues properly framed in the record, see Awards 10789 (Ray) and 14641 (Brown), among many others.

II

AN AWARD RULING THAT ARTICLE IV IMPOSES A CONDITION PRECEDENT UPON CARRIER'S ESTABLISHED RIGHT TO CONTRACT OUT WOULD MANIFEST A LACK OF FIDELITY TO OUR OBLIGATION TO APPLY THE CLEAR TERMS OF ARTICLE IV AS WRITTEN: THIS BOARD HAS REFUSED TO MAKE SUCH AN AWARD IN EACH CASE THAT HAS COME BEFORE IT.

A. Our awards must be consistent with the plain provisions of the parties' agreement, and Article IV expressly provides that nothing therein shall be construed as having any effect on Carrier's right to contract out:

The sense of the argument advanced by Petitioner to support the instant claim is simply that the notice provision in Article IV should be construed as imposing a condition precedent upon Carrier's right to contract out, actually destroying the right when notice is not given. To so construe that provision in Article IV would clearly manifest a complete lack of fidelity to our duty to apply the following clear provisions of Article IV as written:

> **"Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose** is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative **to discuss and if possible reach an understanding in connection therewith."** (Emphasis ours.)

This paragraph establishes two facts with perfect clarity. The first is that nothing whatever in this agreement is to be given an interpretation or application that affects in any way the existing rights of either party in connection with contracting out; and the second is that this agreement is an agreement to attempt to agree in the future—nothing more.

In direct contravention of the portion of the agreement which says that Article IV shall not affect Carrier's existing rights to contract out, Petitioner contends that if Carrier fails for any reason to comply with the notice provision in Article IV, it thereby becomes liable to the Employes for the full amount of the work contracted out. To give the notice provision the interpretation which Petitioner thus attributes to it would be to permit that provision to have a tremendous effect on Carrier's right to contract out, where such right was previously unrestricted. Such an interpretation would have the effect of destroying the right completely in each case where notice is for any reason not given, for in such cases Carrier would be required to answer in damages to the same extent as if it were absolutely prohibited from contracting out.

An award to the effect that Article IV creates a condition precedent to Carrier's right to contract out would be invalid for the Board's jurisdiction is limited to the interpretation of existing agreements, and in exercising that jurisdiction the Board must be governed by the clear provisions in the agreement. **United Steelworkers of Amer. V. Enterprise Wheel & Car Corp.,** 363 U. S. 593, at 597 (1960); **BRT v. Central of Ga. Ry.,** 415 F. 2d 403 (5th Cir. 1969); **Edwards v. St. Louis-San Francisco Ry.,** 361 F. 2d 946 (7th Cir. 1966). **Awards** 7166 (Carter), 8538 (Coburn), 8838 (McMahon), 10585 (Russell), 10980 (Moore), 11257 (without referee), 12818 (Yagoda), 14531 (Perelson), 15380 (Ives), 15533 (McGovern), 16373 (Zack), 16552 (Dorsey), 17519 (Rohman), 17762 (Kabaker), 17950 (Dolnick), 18280 (Devine).

The following from Award 12818 (Yagoda) is typical of the rulings of this Board to be found in the above-cited awards:

> **"* * * 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."** (Emphasis ours.)

It is now settled that the Board partakes of the aspects of an arbitration board as well as of an administrative agency. In defining the limits of an arbitrator's power, the U. S. Supreme Court has said:

"**Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement;** he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet **his award is legitimate only so long as it draws its essence from the collective bargaining agreement.** When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (Emphasis ours.) **United Steelworkers of Amer. v. Enterprise Wheel & Car Corp.,** 363 U. S. 593, at 597 (1960)

B. In prior awards the Board has consistently refused to imposed the condition precedent sought by the Petitioner herein:

Following adoption of Article IV, many carriers quite reasonably construed the phrase "work within the scope of the applicable schedule agreement" which appears in the first paragraph of Article IV to mean only work reserved to Employees by their agreement. Petitioner took a contrary view, contending that any work that is from time to time assigned to Maintenance of Way Employes, even though not reserved to them by their agreement, should be considered work within the scope of the applicable schedule agreement since it is work sometimes performed under the agreement. Further, as we have already noted, Petitioner took the position that Article IV created a condition precedent to Carrier's existing rights to contract out work not reserved to the Employes. The first case involving this same matter came before Referee Dugan and in Award 18305 he ruled that:

"**While it is true that the scope of the Agreement is general in nature and that therefore work can be contracted out unless reserved exclusively by custom, tradition and practice to Maintenance of Way Employes, and finding that said work in dispute herein is not reserved 'exclusively' to Maintenance of Way Employes and can be contracted out by Carrier as was done in this instance, nevertheless, we are here solely concerned with the application of Article IV of the May 17, 1968 Agreement.**

The first paragraph of said Article IV deals with the contracting out of work 'within the scope of the applicable schedule agreement.' It does not say the contracting out of work reserved exclusively to a craft by history, custom and tradition. This Board is not empowered to add to, subtract from, or alter an existing agreement. We therefore conclude that **inasmuch as Maintenance of Way Employes have in the past performed such work** as is in dispute here, then **said work being within the scope of the applicable Agreement** before us, Carrier violated the terms thereof by failing to notify the General Chairman within 15 days prior to the contracting out of said work. In reaching this conclusion, we are not asserting that the work here in question cannot be contracted out later after the giving of the required notice. We are only saying that since the work in question came within the scope of the Maintenance of Way Agreement, Carrier was obligated to give said advance notice. Failing to do so, Carrier violated the terms of Article IV of the May 17, 1968 National Agreement governing the parties to this dispute.

"**In regard to damages, 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 not authorized to use sanctions or assess penalties unless provided for in the controlling Agreement. Since Claimants suffered no pecuniary loss in this instance, we will deny paragraph 2 of the Statement of Claim." (Underscore ours.)

Awards 18306 (Dugan), **18687** (Rimer), **18714, 18716** (Devine), all reached the same conclusions, including the conclusion that Carrier's pre-existing rights to contract out remained totally unaffected by the notice provision, making the specific finding that where the only violation proved was simply the failure to give the General Chairman notice as required by Article IV, there was no pecuniary loss and hence no valid basis for this Board to sustain a monetary claim.

III

IT WOULD BE APPROPRIATE FOR THE BOARD TO DISMISS THE PORTION OF THE CLAIM THAT ALLEGES VIOLATION OF THE NOTICE PROVISION WHERE THE EMPLOYES HAVE NOT ASSERTED THAT THERE IS AN AGREEMENT PROVIDING FOR LIQUIDATED DAMAGES.

A. Article IV is simply an agreement to attempt to agree:

Article IV of the May 17, 1968 National Agreement is a classical example of an agreement to attempt to agree in the future.

It is the outgrowth of an impasse that has existed for decades between most of the nation's rail carriers and their Maintenance of Way Employes with respect to contracting out construction work. With the utmost persistence the Employes have attempted to negotiate contracts that would reserve all construction and related work to carrier employes, thereby prohibiting any contracting out. With equal persistence most carriers have refused to agree, as their operations are geared to furnishing transportation services and it is neither economical nor feasible for them to acquire the construction employes and equipment that would be required to perform work which they have traditionally contracted out.

Over the years the negotiations on this issue have been handled alternately at the local level and at the national level. In 1968 the Employes and carriers again passed the issue down from the national level to the local level; but in doing so they adopted an agreement to attempt to agree locally with respect to individual contracts. This agreement appears as Article IV of the national agreement dated May 17, 1968.

Paragraph 3 of Article IV is quoted above, and, as we have noted, this paragraph establishes with perfect clarity that Article IV is an agreement to attempt to agree in the future — nothing more. The notice required of Carrier is expressly for the purpose of opening the door for the Employes to come in and negotiate for rights which they do not have under their existing agreements; no other purpose is indicated, and all existing rights are expressly reserved to them.

It is elementary that agreements to agree and, **a fortiori,** agreements to attempt to agree, are nugatory insofar as enforceable contract rights are

concerned. **We would violate some of the most basic rules of contract law should we purport to find in such an agreement a valid basis for monetary damages.** As the U. S. Court of Appeals for the Ninth Circuit recently put it:

> "Adverting to first principles and Hornbook law, we recall that a contract is a legally enforceable agreement between two or more parties. The essential elements necessary to transform an agreement into a legally enforceable contract include, among other things, * * * mutuality of agreement, and mutuality of obligation * * * the minds of the parties must meet as to every essential term of the proposed contract, * * * **As long as any substantial or material matters are left open for further negotiation or consideration on an essential and necessary element of a proposed contract, * * * the agreement, if there has been such, is not enforceable * * * Now, those are all Hornbook propositions that every one of us has heard since our first year of law school.** * * *" (Emphasis ours.)
>
> [**Joseph v. Donover Company**, 261 F. 2d 812, 820]

The Supreme Court of Minnesota states:

> "But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. **An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action** * * *" (Emphasis ours.)
>
> [**Shepard v. Carpenter**, 54 Minn. 153, N. W. 906]

The Supreme Court of California states:

> "An agreement to agree in the future cannot be made the basis of a cause of action, and neither law nor equity provides a remedy for breach of such an agreement."
>
> [**Autry v. Republic Productions**, 180 P. 2d 888, 30 C. 2d 144]

The United States Supreme Court states:

> "* * * **A lack of certainty** as to terms of contract obligations of either party, or measure of damages for breach, **is simply the misfortune of him who seeks to recover** in case of a breach thereof * * *" (Emphasis ours.)
>
> [**Troy Laundry Mach. Co. v. Dolph**, 138 U. S. 617, 34 L.Ed. 1083, 11 S. Ct. 412]

In American Jurisprudence we find that:

> "* * * unless an agreement to make a future contract is definite and certain upon all the subjects to be embraced, it is nugatory. To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations * * * If any essential term is left open for future consideration, there is no binding contract, and **an agreement to reach an agreement imposes no obligation on the parties thereto.**" (Emphasis ours.) 17 Am Jur 2d, Contracts §26

This Board has consistently refused to act where the agreement has required further agreement of the parties.

Award 10814 (Moore):

"The Carrier refused to negotiate, as provided by Rule 2 (b) * * * The Carrier acted in bad faith when it refused to negotiate.

* * * * *

* * * We could find that they failed to negotiate as required by the Agreement. However this is not the claim."

Award 12724 (Coburn):

"* * * this Board may not properly require the parties to agree on a bargainable issue * * *"

Award 13131 (Hamilton):

"It seems to us that the critical language to be interpreted is, **'shall by agreement be increased.'** We are of the opinion that by using this language, it was intended that disputes of this nature would be settled by agreement of the parties to the contract. The construction used, takes this matter out of the hands of this Board." (Emphasis ours.)

Award 18687 (Rimer):

"* * * this Board is without authority to enforce the negotiations required by Article IV."

Also see Award 12672 (Ives), which quotes Award 10814 as a controlling precedent, as well as our numerous other awards on the point.

In the foregoing awards, except 18687, the parties had a definite agreement that they would negotiate and agree to additional pay rights. Here and in Award 18687 the parties had a definite agreement that they would negotiate and attempt to agree to additional work rights. Certainly the distinction that the rights involved in some cases are new rights to work instead of new rights to pay is a distinction without a difference insofar as the jurisdiction of this Board is concerned, hence all of the foregoing awards indicate the Board has no jurisdiction to enforce Article IV.

We also find in American Jurisprudence that:

"* * * the damages must be susceptible of ascertainment in some manner other than mere speculation, conjecture or surmise * * *"

[22 Am Jur 2d, Damages §25]

Obviously, it would be surmise — sheer speculation and conjecture — to assume that the Employes would have talked Carrier into doing this work with Carrier employes rather than contracting it out; and in view of the history of past negotiations between these parties in connection with other cases, it would be totally unrealistic speculation and conjecture.

Thus, when the parties wrote into Article IV some new notice and conference provisions for negotiating new work rights on individual projects, which notice and conference provisions were more favorable to the Employes than the minimum notice and conference rights established by Section 6 of the Railway Labor Act, then went on to say that nothing whatever in that article should affect the existing rights of the parties with respect to contracting out and also that the sole purpose of Article IV was to encourage the parties to attempt to agree in the future, they unequivocally indicated an intention to not create any binding obligation on either side with respect to contracting out, but only to create an obligation to negotiate on the liberal basis provided for therein. They simply terminated their national negotiations and returned the conflict once again to the individual carriers, along with a notice and conference arrangement which is more favorable to the Employes than the rights they previously had under the law.

If the Employes actually wish to compel Carrier to discuss proposed contracts with them against its will, this Board is not the forum to which they must turn for assistance. It is elementary that this Board's jurisdiction is limited to interpretation of existing contracts. See the authorities cited above. The U. S. Supreme Court has recently ruled that jurisdiction to enforce the obligation to negotiate under the Railway Labor Act lies with the Federal courts. See **C&NW vs. UTU**, 91 S.Ct. 1731.

B. Carrier Members believe that in this particular case the notice question is moot and should be dismissed:

We believe that what has been said above unassailably establishes the soundness of the following conclusions:

1. The National Railroad Adjustment Board's jurisdiction is limited to the interpretation and application of existing agreements; it has no jurisdiction whatever over the negotiation of agreements and cannot enforce bare agreements to negotiate or agree. The enforcement of such agreements is placed by law in the hands of other tribunals.

2. The Claimants in the instant case cannot rely on Article IV as a basis for claiming their rights were violated when work was contracted out, for Article IV expressly states that it shall have no effect whatever on the parties' existing rights with respect to contracting out; Article IV further states that the notice provision therein is intended solely to open the door for negotiation and possible agreement.

3. In these circumstances, the giving or failing to give notice is irrelevant to a claim to the work or any monetary loss for alleged loss of work, and hence whether or not is given becomes a moot question insofar as the claim to compensation for loss of work is concerned.

According to our interpretation of the record, no attempt has been made by Petitioner to establish that the parties have agreed to a liquidated damage provision to be applied in cases of failure to give notice under Article IV. If we are correct and there is no issue presented regarding the existence of a liquidated damage provision, then the giving or failing to give a notice under Article IV is a moot question in this case and the portion of the claim alleging a violation of the notice provision should be dismissed.

Irrespective of whether this Board has jurisdiction to make a determination of the issues in a particular case, the Board has rather consistently followed the Federal court practice of refusing to make any determination of an issue which has become moot or is merely an abstract proposition or would simply amount to declaring a principle which cannot be given effect through a decision which can be made effective in the particular case. The United States Supreme Court has given us this clear statement of the rule as applied in the Federal courts:

> "Because that injunction has long since 'expired by its own terms,' we cannot escape the conclusion that there remain for this Court no 'actual matters in controversy essential to the decision of the particular case before it.' **United States v. Alaska S.S. Co.**, 253 U.S. 113, 116. Whatever the practice in the courts of Missouri, the duty of this Court 'is **to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue in the case before it.' Mills v. Green**, 159 U.S. 651, 653. See **Bus Employes v. Wisconsin Board**, 340 U.S. 416. To express an opinion upon the merits of the appellants' contentions would be to ignore this basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed."

Oil Workers Unions v. Missouri, 361 U.S. 363, 367-368 (1960). See, also, **Harris v. Battle**, 348 U.S. 803 (1954), as explained in the **Oil Workers Unions** case (361 U.S., at 368) and in **Bus Employes v. Missouri**, 374 U.S. 74, 77-78 (1963).

Among the many awards of this Board recognizing and applying the foregoing rule, see **Awards 619** (Swacker), **658** (without referee), **4470** (Robertson), **10011** (Weston), **10177** (Daly), **11086** (Boyd), **10543** (without referee), **11809** (Christian), **12336** (Engelstein), **14323** (Dorsey), **14806, 14807** (without referee), **15503** (House), **17382** (Rambo), **18083** (Dugan).

G. L. Naylor

R. E. Black

W. B. Jones

P. C. Carter

Dated at Chicago, Illinois, this 22nd day of October 1971.

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