

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Union Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it failed to recall Extra Gang Laborer A. L. James June 18, 1984 to July 16, 1984 (System File M-48/013-210-23).

(2) Extra Gang Laborer A. L. James shall be allowed twenty (20) days' pay at his straight time rate because of the violation referred to in Part (1) hereof."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On August 15, 1984, the Organization filed a Claim that Carrier had violated the Agreement when it failed to recall the Claimant from furlough in seniority order. The Organization listed the dates, the employees who worked the Extra Gang Laborer positions on Gang 3903 in place of Claimant and their respective dates of hire.

There is no dispute in the instant case that the Carrier violated the Agreement. Carrier acknowledged same in its first response on the property stating that Claimant "was inadvertently over looked." The Claimant had not been called from furlough in seniority order.

The instant case does not center upon Carrier's culpability. In the case at bar the central focus is upon compensation for Carrier violation of the Agreement. The Organization holds that Carrier's violation has created the loss of work opportunity for Claimant. It requests compensation for that

loss in the form of twenty (20) days pay less unemployment compensation. The Carrier offered to comply with the principle of "make whole" in paying Claimant his twenty days straight time rate, less unemployment compensation and outside earnings during the Claim period. The evidence of record indicates that Claimant was fully employed during the Claim period and earned more than he had earned had he been correctly recalled from furlough in seniority order.

The Organization points to Awards which have held that Carrier must pay a penalty payment even when the Claimant is fully employed (Third Division Awards 20412, 20892, 26593). The Carrier argues on property that there are no penalty provisions in the Agreement Rules that were violated. It argues that the offer to make the Claimant whole has been the basis for disposing of "hundreds of similar claims in the past." The Carrier points to Awards that have held that the Carrier is not liable for penalty payments wherein the Agreement between the parties provides no such remedy (Third Division Awards 22194, 21684, 17709).

This Board has taken different positions in its Awards. As stated in Third Division Award 26593:

"Many Awards support the proposition that even where there is a contract violation, a Claimant will not succeed unless there is a showing of actual loss of pay on the Claimants' parts. The opposing line of cases finds that to limit damages, in effect, gives a carrier license to ignore the contract provisions. A third viewpoint which has also been expressed is the conclusion that each case must be considered on its merits taking into consideration such factors as intent or motive on the part of the carrier."

The Board has previously held that punitive damages are proper in the absence of contract provisions even where there was no wage loss on the part of the Claimant (Second Division Award 11254). We have also held that a penalty payment must be considered in the context of the record at bar and must relate to the specific circumstances of each Claim (Third Division Awards 26137, 26381). We do not agree that in the event of a clear and obvious error on the part of the Carrier punitive damages must be imposed to enforce the Agreement or prevent future violations. Nor do we agree with the position that holds that where clear and obvious violations occur evidencing a disregard for the Agreement, its provisions, and the employees that punitive damages cannot be imposed without a showing of Rule support or losses sustained.

In the instant case, the Board finds no evidence that the Claimant was put in a worse position with respect to his employment or his future employment by the Carrier's violation. Nor does the Board find a loss of work opportunity as indicated in other Awards (Third Division Award 20412). We find no Agreement provision on punitive damages. It is unrefuted in the

record that the Carrier's action was the result of an "inadvertent clerical oversight." Carrier was negligent in not recalling Claimant from furlough. There is no evidence that Carrier's behavior showed a disregard for the terms of the Agreement or a resultant loss for the Claimant.

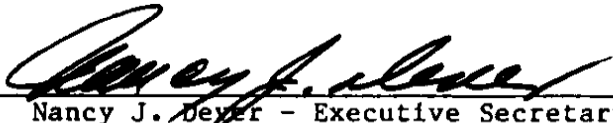
In effect, our review of this record finds no potential or real occupational harm to Claimant or a violation which harms the integrity of the Agreement. Each case must be decided on its own merits. As we stated in Third Division Award 26381, "finding no evidence of willful fraud, malice, monetary loss to Claimants, contractually supported penalty, potential employment loss or the like, we must deny...the claim."

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.