Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30756
Docket No. SG-31146
95-3-93-3-169

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of R.D. Cook, S.L. Myer, F. Carraway, and A.L. Tribioli for payment of 80 hours each at the Signalman's straight time rate of pay account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when it utilized an outside contractor to perform the covered work of removing trees from Carrier's pole line and deprived the Claimants of the opportunity to perform the work. Carrier's File No. SG-433. General Chairman's File No. RM2270-105-492. BRS File Case No. 8973-CR."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The fact situation in this dispute is reasonably clear and understandable. On this property, the SCOPE rule of the negotiated agreement provides, in pertinent part, that "Removal of brush or trees that impair the operation of the signal system" is work which accrues to Signal Department employees.

During November and December of 1991, Carrier utilized the services of an outside contractor to remove trees and brush from a section of its Enola Branch between Mile Posts 40.0 and 45.0. This is an unchallenged fact. On January 7, 1992, the Organization presented a claim on behalf of four (4) named individuals alleging that the use of the outside contractor constituted a violation of the SCOPE rule. They demanded that each claimant should be paid 80 hours pay at the Signalman's straight time rate of pay because of this alleged violation. The claim as presented alleged that "All claimants are currently furloughed from Seniority District #7." There was no information in this initial claim to indicate or identify the specific dates on which the alleged violation had occurred nor was there any explanation of the basis for the 80-hour claims which were presented. Carrier's initial rejection of the claims challenged the lack of specific claim dates and contended that "The trees that were removed did not impair the signal system."

At the first appeal level of the grievance procedure, the Organization identified - for the first time - eleven (11) dates on which they contended that the contractor's employees performed the tree and brush removal. The Organization argued at that time that "All the days worked were ten (10.0) hour days." Also at the first appeal level of the grievance procedure, the Organization contended that Carrier's Signal Supervisor "was in charge of this work" and further argued that two (2) Signal Maintainers "were required to open the signal power lines and ground them." In their response to the claim at this first appeal level, Carrier insisted that three of the four claimants were not furloughed but rather were on duty and under pay during the claim period and therefore did not suffer any wage loss. Nothing was said relative to the fourth claimant. Carrier repeated their denial of the claim on the basis that "The cutting and clearing of brush within a radius of 15 feet from the catenary system along this portion of the right-of-way does not violate the Schedule Agreement." Carrier said nothing relative to the involvement of the Signal Supervisor and/or Signal Maintainers.

When the grievance was advanced to the highest on-property level of handling, Carrier's rejection of the claim remained substantially the same, i.e., that the initial claim was deficient in that it did not contain any specific claim dates; that the brush and trees that were removed by the contractor did not impair the operation of the signal system; that "Claimants Cook and Myers were fully employed during the claim period and were not monetarily aggrieved; that the claim as presented was excessive because the "contractor's employees were not working ten (10) hour days as alleged"; and that "the contractor performed no work on Carrier's property on November 21 and 22, 1991, which were holidays." Carrier again made no mention of the alleged involvement of the Signal Supervisor or Signal Maintainers.

The Board has difficulty understanding Carrier's position in this case in light of the uncontroverted presentation by the Organization relative to Carrier's signal forces being, in fact, on site during the tree and brush removal. The Board has often held that material assertions made by one party in the presentation and progression of a dispute which are not refuted or rebutted by the other party during the on-property handling of the dispute must be considered as being correct. In this case, if indeed the tree and brush did not impair the operation of the signal system as Carrier contended, then why was it necessary to have other signal department employees present to protect the removal by supervising and grounding the signal lines. The Organization's position in this regard is more convincing than Carrier's.

While there may well be some basis for an out-of-hand rejection of this claim because of the absence of specific claim dates in the initial claim presentation, the Board is of the opinion that on the basis of the relative convincing force of evidence as found in this case, there was sufficient lack of proper handling on both sides of the case to permit the Board to consider this particular case on the basis of the merits rather than on the single technicality.

The Board has no problem with requiring the petitioning party to carry the burden of proving all essential aspects of a claim. In this case, the Board is faced with a clear and specific SCOPE rule which gives to signalmen the right to remove brush or trees that impair the operation of the signal system.

The Board is convinced in this case on the basis of the uncontroverted assertions of the Organization that the trees being removed did, in fact, impair the operation of the signal system. Why else would there be a need for a Signal Supervisor and Signal Maintainers to oversee the activity and/or ground the signal lines? Carrier's silence on this significant aspect of this dispute is convincing to the Board. It is the conclusion of the Board that the SCOPE rule was violated by the use of the outside contractor in this particular instance.

As to the issue of damages, the Board noted with interest the opinion expressed in Award No. 5 of Public Law Board No. 4603 involving these same parties. That Award concluded that "In the interest of justice and equity" an arbitrary penalty should be assessed in spite of the fact that "both Claimants were fully employed during the claim period." This Board's problem with that Award lies in the fact that penalties may not be awarded under a contract unless the contract clearly so provides. We may not, at our whim, dispense equity. While we may sympathize with the Claimants, our power to assess penalties must be found within the negotiated contract which we are bound by law to interpret and enforce.

In this case, the named claimants were either fully employed or were on furlough and therefore not available (Award No. 4, P.L.B. 2037) during the claim period. The Board is impressed with the logic and reasoning expressed in Third Division Award No. 28889 in this regard, to wit:

> "This Board is aware of the divergence of awards in this difficult area where a violation has been found but no loss has been established. We understand the 'emptiness' associated with a violation without a remedy. However, we believe the better reasoned and more jurisdictionally sound line of decisions does not provide for an award of damages where there is no proven cognizable loss causally traceable to the violation of the Agreement. No such loss or losses have been established here. Accordingly, no damages are awarded."

Therefore, the Board in this case finds that the SCOPE rule was violated by the use of the contractor's employees. However, because there has been no convincing showing that any of the Claimants suffered a proven monetary loss, no penalty damages will be awarded.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant (s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 1995.

LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
TO
AWARD 30756, DOCKET SG-31146
(Referee Mason)

The crux of this instant dispute centered on a violation of the Scope Rule, wherein, the Majority correctly held that:

> "The Board is convinced in this case on the basis of the uncontroverted assertions of the Organization that the trees being removed did, in fact, impair the operation to the signal system. Why else would there be a need for a Signal Supervisor and Signal Maintainer to oversee the activity and/or ground the signal lines? Carrier's silence on this significant aspect of this dispute is convincing to the Board. It is the conclusion of the Board that the SCOPE rule was violated by the use of the outside contractor in this particular instance."

During the hearing, the Board was provided a copy of Public Law Board No. 4603, Award No. 5., which supported the findings in this case. As can be noted, this dispute is not unfamiliar nor unique to this Carrier. As noted in that Award, Referee Rodney Dennis addressed this same dispute involving the same situation on this property, wherein he stated:

> "The Organization relied on words in the Scope Rule of the Controlling Agreement that clearly reserve to Signalmen the work of cutting trees and brush when those trees and brush can interfere with the operation of the signal system."
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> * * * *
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> "This Board has reviewed the positions of the parties and we conclude that Carrier should have made arrangements to have the brush cut by its own forces rather than contract the work out."

As noted in PLB 4603, Award No. 5, it additionally addressed the remedy

requested in that dispute, wherein, it stated:

> "The fact, however, that both Claimants were fully employed during the claim period mitigates against them receiving pay for work not performed, absent a clause to support their claim for pay. In the interest of justice and equity, however, the Board has concluded that Carrier should not be allowed in this case to escape liability. The Board therefore awards the sum of $1,000.00 to each Claimant."

The Referee in this instant dispute held, however, that, "In this case, the named claimants were either fully employed or were on furlough and therefore not available..." He then concluded that, "...because there has been no convincing showing that any of the claimants suffered a proven monetary loss, no penalty damages will be awarded." The Referee's rationale escapes simple logic. If neither employees who are working at the time of the violation nor employees who are furloughed are not considered the proper claimants, then who else is left?

Notwithstanding, it is the Organization's position that the Referee seriously confused "damages" and "penalties." The rationale of sustaining monetary claims when the Carrier has violated the Agreement has been addressed by literally dozens of Referees in hundreds of cases before the NRAB. While no purpose would be served by citing and quoting all of those awards, we are compelled to cite the decision of the United States Court of Appeals in Brotherhood of Railroad Signalmen v. Southern Railway, 380 F.2d 59 (1976):

> "Courts have uniformly held that GUNTHER precludes judicial re-examination of the merits of a Board award. Thus, beyond question, it is not within our province, or that of the District Court, to reappraise the record and determine independently whether Southern violated its obligations under the collective bargaining agreement when it denied Brotherhood members the opportunity to perform the work in question. Southern insists, however, that with respect to the monetary portions of the awards, the District Court acted not in conflict with GUNTHER in limiting Brotherhood to nominal damages on its findings that the records in both cases contain 'no evidence of any loss of time, work or pay' by any of the employees who were designated to receive compensation for the lost work. In accepting this contention of Southern, the District Court relied on the common law rule that damages recoverable for breach on an employment contract are limited to compensation for lost earnings. The court reasoned that since GUNTHER permits judicial computation of the size of the monetary awards, it could exercise a discretion to allow Brotherhood nominal damages only where its members lost no time.
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> This approach, however, completely ignores the loss of opportunities for earnings resulting from the contracting out of work allocated by agreement to Brotherhood members -- a deprivation amounting to a tangible loss of work and pay for which the Board is not precluded from granting compensation. Nothing in the record establishes the unavailability of signalmen to perform the work contracted out by the railroad. The vast number of factual possibilities which arise in the field of labor relations, and which must be considered by the Board in cases of this kind, clearly reflects the wisdom of the GUNTHER rule." (Underscoring added)

In this instant case, there can be little question that if the Carrier had not assigned the work to contractors, the Claimants would have had the opportunity to perform the work. The basic concept of contract law and agreement compliance is well founded in numerous decisions by the Board and in the District Courts. The common law rule on damages does not preclude sustaining monetary claims where it is shown that a breach

of the contract has occurred. The collective bargaining agreement specifically contemplates that the employees covered by that agreement have the right to perform the covered work either on straight time or on overtime. The agreement additionally provides a mechanism for recalling furloughed employees rather than utilizing a contractor.

Instead of the Referee addressing the loss of work opportunity, he relied on the reasoning expressed in Third Division Award 28889, which held that, the record failed to provide a cognizable loss causally traceable to the violation of the Agreement. It must be noted that the Organization involved in that dispute filed a dissent along with that decision, and, as evidenced, that dissent was ignored.

Notwithstanding, a review of Third Division Award 28889 denotes that all of the employees had been recalled from furlough, the Carrier had hired an additional 13 new employees, and temporarily transferred employees from another seniority district. The Referee in that case concluded that the Carrier had exhausted its available supply of employees. While not particularly agreeing with the Referee's decision in that case, at least he had some reasoning behind his findings.

In this instant case, the Referee simply stated that he sympathized with the Claimants. At this point, we also sympathize with the Claimants. As evidenced, the Referee has given the Carrier license to violate the agreement with impunity.

This particular dispute is the third in a series wherein the Carrier has hired the

same contractor to perform this same type of work. In all three cases, the Board has sustained the Organization's position that the Agreement had been violated. It was not until this instant Award that the Referee determined that monetary damages were not appropriate. We can only hope that the next Referee who adjudicates the next claim that arises, will have a basic understanding regarding the purpose of negotiating scope rules and the Carrier's responsibility for agreement compliance.

This Award is of little precedential value, except for documenting that the Carrier continually refuses to abide by the Agreement.

Respectfully Submitted,

C.A. McGraw

C.A. McGraw, Labor Member