Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32019
Docket No. MW-31492
97-3-93-3-473

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work of dismantling, sorting, stockpiling and salvaging track components at Lewiston Yard in Lewiston, Maine on various dates beginning May 4 through July 3, 1992, without providing advance written notice to the General Chairman (Carrier's Files MW-92-7, MW-92-8, MW-92-9, MW-92-10 and MW-92-11 MEC).

(2) As a consequence of the violation referred to in Part (1) above, Track Foreman S. Keniston and Machine Operator F. Gallant shall each be paid at their respective rates of pay from May 4 through June 3, 1992 and Track Foreman A. R. Jarvi and Machine Operators L. Brown and W. Jordan shall each be paid at their respective rates of pay from June 4 through July 3, 1992."

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 were given due notice of hearing thereon.

It is undisputed that Carrier hired a scrap dealer to retire its Lewiston Yard. Carrier did not provide the Organization advance written notice of its plans to use the outside forces to remove substantial quantities of the yard materials even though some of the material retired was retained by the Carrier. According to the record, the Organization agreed it was proper for the contractor do handle its owned material. But the Organization disputed the contractor's handling and stockpiling of the material retained by the Carrier. The Organization cited Third Division Award 26673 in support of its position.

Carrier did not raise any "piecemealing" of work defense on the property. Although it did so in its Submission, the Board will not consider evidence and argument that was not part of the claim handling on the property. Carrier also properly asserted, without challenge by the Organization, that each of the Claimants was fully employed and compensated on the claim dates.

Under the unique circumstances of this record, we find that Carrier did violate the requirements of Article IV of the May 17, 1968 National Agreement concerning the contracting of work.

As to the remedy, however, it has been a well established principle of this Board to deny compensation for Article IV violations when no loss of earnings is demonstrated. This principle was clearly stated in Third Division Award 26673 cited by the Organization. Since there was no loss of earnings proven by this record, we must deny Part (2) of the claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 6th day of May 1997.

LABOR MEMBER'S DISSENT
TO
AWARD 32019, DOCKET MW-31492
(Referee Wallin)

The Majority correctly found that the Agreement was violated when the Carrier assigned employes who hold no seniority under the Agreement to perform work without notifying the General Chairman before it did so. However, the Majority's finding that no monetary remedy is warranted for such a violation is both poorly reasoned and clearly ignores the caveat found within the very award it cites in support of its position to deny said remedy.

The Majority's first error was its finding that there is a "well established principle of this Board to deny compensation for Article IV violations when no loss of earnings is demonstrated". That finding is plainly and simply wrong. What is perplexing is how the Majority arrived at this plainly wrong conclusion. There is no precedent cited in the award. However, a review of the record establishes that the following list of awards was cited to the neutral member by the Organization as precedent concerning this type of work, Third Division Awards 24280, 28611 and Award 21 of Public Law Board 4370. Typical thereof is Award 24280, which held:

> "The claim has merit to some degree, however, in that the dismantling and removing performed by the purchaser included work on behalf of the Carrier which appears to the Board to be considerably more than incidental to the removal of the purchaser's property.
>
> The Organization in its claim states that the purchaser was 'taking selected rails and ties and piling

"them for the Milwaukee Road. ... This material is and continues to be Milwaukee Road property.' Such contention was not denied by the Carrier. In its correspondence, the Carrier states 'The contractor may have also found it necessary to handle Milwaukee Road property to avoid damage ... while he is attempting to remove his own personal property'.

Given this state of the facts, the Board finds that the Carrier caused outside forces to perform work customarily and normally performed by Maintenance of Way employes to the extent of dismantling and storing materials for continuing use of the Carrier.

* * *

Further, the Board does not agree -- again in these particular circumstances -- that there should be no compensation to the Claimants since they were not available to perform the work because they were 'fully employed in the dates of claim' as stated by the Carrier. If the Carrier had determined that the portion of the work on its own behalf was to be performed by Maintenance of Way employes, they would have been made available for this purpose. Award Nos. 13832, 15497 and 21678 (and others cited therein) hold in similar fashion.

In so holding, the Board is aware of Article IV cases, such as Award No. 21646, which hold that no compensation is due to claimant employes who are fully employed and can demonstrate no loss of earnings. However, in Award No. 21646 and others following the same reasoning, the primary issue appeared to be the failure of the Carrier to give appropriate notice under Article IV -- even though, given such notice, the subcontracting would have been appropriate, owing to the nature of the work involved. The dispute before the Board here may be readily distinguished from such cases. Dismantling of track and ties and stockpiling of a portion of them involves no unusual characteristics." (Underscoring in original)

Had the Majority taken the time to review the authority found within the above-cited award, as well as the other awards cited in

connection therewith, and applied said authority to the circumstances in the instant case, it would have been hard pressed to render the finding that it did.

Second, the Majority cited Award 26673 as part of the authority to deny the monetary portion of the claim. It is true in that case that the Board did not award a monetary remedy but it did go on to state:

> "With respect to the remedy, both Claimants were fully employed on the date of the claimed work. While the Carrier's violation in this case is clear, it has been a well established principle of this Board to deny compensation for Article IV violations when no loss of earnings is demonstrated (see for example Third Division Award 23560). We will follow that doctrine in this dispute, with the caveat that repeated violations could well result in a different holding."

Inasmuch as that award was adopted on November 23, 1987, more than five (5) years before this dispute arose, the caveat would have been satisfied and the damages portion of the claim in this case should have been enforced. Under such circumstances, a monetary award is not the equivalent of punitive damages. Instead, it is compensating the Claimants for work they otherwise would have performed and wages they would have earned. That is precisely the theory upon which the vast majority of awards have relied to sustain monetary claims for fully employed claimants.

After all, if it were an established principle to deny a monetary award based on the claimants fully employed status, what sense would it make to there being such a dispute to the National Railroad Adjustment Board. All the Carrier would have to do is contract out the employes work with impunity while the forces were fully employed, ignore the notification provisions and receive a mere slap on the wrist from the Board for doing so. If that were the case, the Carrier would begin to cut back its forces even further than it has, and hire contractors to do all seasonal work while the skeleton work force preformed the basic maintenance. After that the death of the Agreement would not be far off. Such a scenario is clearly not what the framers of the Railway Labor Act intended when it wrote Section 3 of the Act.

Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member