Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37576
Docket No. MW-36540
05-3-01-3-21

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation 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 and Structures Department work (cut weeds and brush around crossings) between Mile Posts 93 and 136 on the Geneva Subdivision on September 29, 30, October 1, 2, 3 and 4, 1999 (System File 3KB-6596T/1214868 CNW).

(2) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (cut weeds and brush around crossings) between Mile Posts 15 and 80 and Mile Posts 0 and 15.5 on the Peoria Subdivision and between Mile Posts 15.5 and 50.7 on the Madison Subdivision on September 22, 23, 24, 26, 27, 28, 29, 30, October 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, 18, 19 and 20, 1999 (System File 3KB-6593T/1214865).

(3) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (cut weeds and brush around crossings) between Mile Posts 38.1 and 95 on the Geneva Subdivision beginning on October 4 through November 12, 1999 (System File 3KB-6603T/1216000).

(4) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the above-referenced work as required by Rule 1(b).

(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Messrs. R. J. Timmons, R. L. Pillars, G. F. Norway, K. R. Spooner, H. R. Johnson and M. J. Clevenger shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the one hundred ninety-two (192) man-hours expended by the outside forces in the performance of the work in question.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Messrs. L. Wiseman, W. Hodgkins, J. Campbell, R. Boncouri and R. Reagan shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the five hundred (500) man-hours expended by the outside forces in the performance of the work in question.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Messrs. R. D. Clayton, G. R. Nieto, T. E. Wybourn, J. H. Gonzales, D. A. Hamel, J. E. Johnson and S. S. Gamino shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the nine hundred twenty six and one-half (926.5) man-hours expended by the outside forces in the performance of the work in question."

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.

The underlying facts of the current claim are essentially identical to the claim recently denied by the Board in Third Division Award 37363. The Board's discussion of the pertinent background facts in that case are incorporated herein by reference and, hence, will not be reiterated here. The distinguishing factor between the two cases involves the submission of employee statements. Unlike the situation in Award 37363, in the instant case the Organization did come forth with six employee eyewitness statements before the closing of the record. The questions before the Board concern the admissibility of the statements and, should the Board deem them procedurally acceptable, whether their content is of probative value.

Consistent with our findings in Award 37363, the Board initially points out that with respect to the threshold question of whether the Carrier met its notice and conference requirements in this subcontracting case, given the record before us, we again must respond affirmatively. Thus, Part (4) of this claim must be denied, we rule.

According to the record, on January 3, 2001, the Organization faxed a letter and six eyewitness statements from several of the Claimants to the Carrier. That letter, which addressed the Carrier's arguments in support of its decision to subcontract, stated in part:

> "The Organization submits six (6) statements prepared by employees who were first hand witnesses of the activities of the contractor. Collectively, these statements reinforce the Organization's position that the contractor did not utilize any specialized equipment, require any special skills or perform any tree or brush removal under or near power lines. Additionally, the sophisticated chemical application was no more than the use of a low tech common hand held garden sprayer used by most home owners.

> The cutting and chemical application was not a simultaneous operation."

The Organization additionally emphasized its earlier position that the Claimants were available, qualified and willing to perform the "non-emergency" work either during their workweek or on an overtime basis. Thus, the Organization reiterated its contention that the Claimants "did in fact suffer a lost work opportunity." The Organization then informed the Carrier:

> "The Organization is agreeable to extending the time limits for docketing this case with the National Mediation Board in order to permit the Carrier to review and respond to this correspondence. Furthermore, the Organization is willing to hold a second conference in an effort to resolve this dispute."

The record reflects that on the same date, January 3, 2001, the Carrier reviewed the Organization's letter and the accompanying statements and essentially rejected the correspondence in its entirety. According to the Carrier, the statements were untimely given the June 8, 2000 date of claims conference, and thus represented a wholly improper attempt to augment the record with inadequate time for the Carrier to prepare a response. The Carrier additionally contended that, in the event the claims should be progressed to arbitration, they would warrant dismissal by the Board for the Organization's "failure to handle the claim in the 'usual manner' as required by the Railway Labor Act." Moreover, the Carrier argued that the statements were general, did not "add merit to the claims," and "gave opinion as to what is a safe practice which is not a violation of the agreement."

The Board carefully considered the parties' arguments as regards the timeliness of the statements. We find for several reasons, set forth below, that the Organization's position must prevail, given the Board's holdings in Third Division Awards 35335, 31499, 30789 (involving brush cutting), 37315, 31996 and 20892. Thus, with respect to the first question before the Board, we rule that the statements are admissible and warrant review by the Board from the standpoint of their content.

First, in Award 35335, the Board acknowledged that employee statements may indeed be of probative value, especially when such statements are not refuted

by the Carrier. According to the Board, "The Organization bolstered its assertions of customary and traditional past performance of the disputed work with evidence in the form of signed employee statements. The Carrier provided no similar evidence to support its assertion to the contrary."

In the instant case it is clear that the Carrier's reply to the Organization's January 3, 2001 cover letter and accompanying statements did not address the substance of that correspondence in any manner whatsoever. Moreover, as the above excerpt from the Organization's letter shows, the Organization informed the Carrier of its willingness to extend the time for progressing the claim to the Board, so that the Carrier could review the statements and prepare responses.

Second, we note that Award 30789 addressed, in a general sense, the timeliness of post-conference submissions. The Board stated:

> "As to the timeliness of the President's letter, the Board would remind both parties that any document, letter, etc. which is presented on the property prior to the date of the notice of intent to file a submission to a section 3, RLA Board of Adjustment is proper material for consideration by the Board. Of course, the Board has held that:
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> > 'The timing of the submission of certain documents may have significant bearing on the credibility, or weight to be attached, specially if the timing suggests that the other party did not have reasonable opportunity to respond prior to the submission to this Board. (Third Division Award 20773)'"

From our review of Award 30789, it appears that the carrier in that case did "respond to the communication" in a material way. In the instant case, as noted above, the Carrier's response, issued immediately upon its receipt of the Organization's letter, did not address the substance of the statements, nor did it indicate that it would avail itself of the additional time offered for purposes of review and response. Rather, as noted above, the Carrier's response was essentially a strong procedural objection to the Organization's submission of documents "late in the claim handling process."

Furthermore we find no evidence in the Organization's January 3, 2001 transmittal letter that the Organization's intent was to "sandbag" the Carrier with belated statements. Nor is it apparent from the correspondence that the Organization's intent was to "corner" the Carrier into producing an immediate response. Again, the Organization clearly indicated a willingness to delay the preparation of a Notice of Intent to the Board so that the Carrier could review and respond to the statements. Under such circumstances, we hold that the Carrier's failure to respond in rebuttal fashion to the Organization's statements occurred at its own peril.

Third, in a similar brush cutting case addressed in Award 31499 the Board considered six rebuttal statements from employees who had supposedly observed the work as "eyewitnesses." In that case, like the current case, the statements had been submitted several months after the claims conference, but one month before the Notice of Intent was filed with the Board. We note that in the instant case, the Organization proceeded to file its Notice on January 11, 2001, eight days after its submission of the statements. In Award 31499 the Board declined to exclude the statements from the record as "untimely." The Board stated:

> "The fact that this evidence was submitted on the property, even if long after the conference, differentiates this case from Third Division Award 30782, which found such failure to timely submit evidence fatal to the Organization's claim, but noted that a different result may well have occurred if such evidence had been timely submitted."

Therefore, under the present circumstances, the Organization's decision to proceed with its filing of the Notice of Intent eight days after the parties' January 3, 2001 correspondence exchange cannot be characterized as untimely or prejudicial to the Carrier. Indeed, in Award 31996 the Board found that statements furnished seven days prior to its submission of the Notice of Intent were not untimely. In that case, like the present one, the Organization offered to delay its submission so that the Carrier could have adequate time to respond. According to the Board:

> "As the moving party, with the burden of proof with respect to Scope Rule coverage of the disputed work, the Organization appropriately submitted in handling on the property, seven written statements bearing on the work at issue. Carrier's assertion that the

> statements were 'too late' to be considered is contrary to a host of Awards holding that any evidence submitted on the property prior to the date of the Notice of Intent to file a Submission may be considered by the Board. See Third Division Awards 20773 and 22762 for example. We see no reason to disbelieve the Organization's representation that it provided the evidence to Carrier as soon as possible on the property prior to filing its Notice of Intent and no showing of prejudice to Carrier. Nor did Carrier submit any probative evidence with respect to its assertions of 'sharpshooting' or manipulation of the record."

Fourth, Third Division Award 37315 involved this Carrier's submission of an "as is, where is" sales agreement on the same date that this Organization filed its Notice of Intent to the Board. The Board in that case found the Carrier's submission "technically admissible" but of "limited probative value" given the fact that the submission coincided with the date the case was listed with the Board. Again, in the present case, the Organization's submission of the statements occurred eight days before its filing of the Notice and, again, offered the Carrier additional time to respond. The Carrier cannot have it both ways. It cannot, on one hand, argue that its own late submission of documentation should be deemed acceptable while, on the other hand, the Organization's documentation should be excluded, we emphasize.

Last, the Board essentially stated in Award 20892 that, as the "keeper of the records," the Carrier is not necessarily disadvantaged when confronted with employee statements even "late" in the claims handling process. With respect to the current case, the work performed by the contractor apparently was significant in scope given the hours and locations, as claimed above. Under the circumstances, the Board finds that, without undue burden, the Carrier could have submitted the statements to the Manager Engineering Resources, or his designee, for review and preparation of any necessary rebuttal comments.

Therefore, for all of the foregoing reasons, the Board reiterates that it is compelled to dismiss the Carrier's jurisdictional argument as set forth in its January 3, 2001 letter, and rule that the six statements were not untimely submitted and should be given appropriate weight. We summarize with an excerpt from the Board's holdings in Award 20892, in which the Board explained:

> "The employees presented Carrier with a detailed statement of the number of hours worked by the Carmen. Carrier took issue with the statement furnished by the employees, but it did not present any factual information to support its contradiction of the employees' assertion. Carrier, of course, is the party with the most direct access to the actual records of the work and if it wished to contradict the claim it was under an obligation to place in the record the facts upon which it based its denial. It chose not to do so and the Board is left with a specific claim on the part of the employees and a blanket denial on the part of the Carrier. Under these circumstances the Board will accept the claim made by the employees as factually correct."

Turning to the probative value of the statements, the Board disagrees with the Carrier's position that the statements should be dismissed for lack of proof given the fact that, in the Carrier's view, they are "general in nature," and "do not add merit to the claims." Having compared the statements with the allegations set forth in Parts (1), (2) and (3) of the claim, we find that the eyewitness statements stand as a material challenge to the Carrier's position that special skills and equipment necessitated the use of contractors over its BMWE-represented employees. We specifically note:

> * The Hodgkins statement asserted that with respect to the Peoria claim, the contractor used "tractor mowers and chain saws and a sprayer commonly found at local hardware stores. The statements submitted by employees Reagan and Wiseman assert that, on the Peoria and Madison Subdivisions, the contractors were cutting brush and trees as Carrier employees have done "since 1970."
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> * Claimant Boncouri's statement essentially contended that, on the Peoria and Madison Subdivisions, contractors were seen using "mower-type tractors" similar to those owned by the Carrier, and that a female employee of the contractor used a "hand held sprayer to spray weeds after her husband the tractor operator cut them." Boncouri furthermore contended that no brush or trees were removed from high voltage lines, and that, at the time of his statement, the Carrier's own brush cutter was working in the same vicinity on the Madison Subdivision.

* The statement from Claimants Clayton, Wybourn and Hamel asserted that, with respect to the locations specified on the Geneva Subdivision, "the statement that there was weed or brush controller applied is false, and the statement that large trees around power lines were removed is false."

From the above, the Board concludes that the above statements indeed carry probative weight. The claims are sustained on that basis.

Turing to the remedy requested in Parts (5), (6) and (7) of the claim, the parties have thoroughly educated the Board in the general principles that apply at the Third Division with respect to the awarding of monetary damages in subcontracting cases where violations of the scope rule have been found. We recognize that the predominate finding is that absent a showing of lost work opportunities or lost earnings by the Claimants, a monetary remedy is not routinely granted. Likewise, unless it has been shown that the contractor's employees performed the work on an overtime basis, no monetary relief is normally granted to BMWE-represented employees.

The Claimants in the current case were fully employed during the duration of the claim. There is no showing that the contractor employees performed the work on an overtime basis, no aggravating circumstances were shown to have been present, and the elements of proper notice and conference clearly were present. We furthermore importantly note that in the predecessor case, Third Division Award 37363, the Board denied the claim given the absence of statements which allowed the Carrier to prevail in its core defense that the contracting was predicated upon a need for special skills and equipment, two of the conditions under which contracting may be allowed under Rule 1(b). Because in that case the Board found no violation, and in light of all other factors explained immediately above, it is inappropriate to accord monetary damages in the instant case, we rule. Thus, no monetary remedy is due in this particular instance.

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 24th day of August 2005.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 37576, DOCKET MW-36540
(Referee Goldstein)

One school of thought adhered to by certain railroad industry advocates is that writing dissents is an exercise in futility because they are neither read nor considered by subsequent referees. This Organization does not belong to that school. For, to accept the theory that dissents are meaningless, is to necessarily accept the conclusion that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, the Organization Member of this Board is not ready to conclude that reason has become meaningless. Therefore, the Organization Member has no alternative but to file this emphatic dissent to the remedy portion of the claim.

The Organization Member whole-heartedly concurs with the Referee's finding that the Carrier violated the Agreement in this case. However, the Referee's decision to reject the Organization's request for compensation is just plainly and simply wrong.

In this case, there can be little question that if the Carrier had not assigned outside contractors to perform the basic brush cutting work at issue here, the Claimants would have performed the work. Hence, the inexorable conclusion is that Claimants were damaged when they lost the opportunity to perform the work and receive the concomitant reparations.

In this case the Majority is attempting to set a new standard to be required of the Organization to obtain a monetary remedy. This despite the fact that the Organization presented recent on-property awards wherein the Board made monetary reparation to fully employed employes employing standards at odds with the standards the Majority is attempting to foist on the Organization in this case. The Majority alleged that it had been throughly educated, in this case, to the application of damages when a Scope Rule violation was found. The Neutral Member of this Board has been performing work at the National Railroad Adjustment Board (NRAB) for nearly thirty (30) years. To assert that this is the first time he has encountered a Scope Rule violation and a prayer for damages in relation thereto is simply mind-boggling to say the least. The authority to award a monetary remedy could be found within the awards attached to our submission and to the awards presented to the Board during panel discussion. For instance, we cited recently adopted Awards **35735, 35736, 36854, 37022** and **37376** involving these same parties wherein a monetary remedy was allowed for a notice violation and **a lost work opportunity.** In these forums, literally dozens of referees have sustained monetary awards to enforce the integrity of the Agreement, irrespective of a showing of monetary loss. A sample of these awards, beginning with the early days of the NRAB and continuing to the present are as follows:

AWARD 685: (Third)

"The objection of the carrier to the payment of overtime under Rule 37 must also be overruled. It is true, as the carrier points out, that the claimant 'was not required to work regularly in excess of eight hours.' The Division, however, has found that the carrier made an improper assignment in this case. Accordingly, the claim, although it may be described as a penalty, is meritorious and should be sustained. The Division quotes with approval this statement from the Report of the Emergency Board created by the President of the United States on February 8, 1937:

> 'The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation.'"

AWARD 2277: (Third)

"*** The only question arises whether Gardner, who did not, in fact, do the work, is nevertheless entitled to be paid therefor, and on an overtime basis of pay, by reason of the claim that, while not exclusively entitled to the work, he would have, under ordinary circumstances, been called on therefor. If we are to allow the claim it must be done on the basis that the Carrier should be penalized for its violation of the Agreement, regardless of the fact that the result thereof would operate to compensate Gardner for work he did not perform, and on an overtime basis of pay. To impose this penalty may, in the circumstances, seem harsh; but Agreements are made to be kept and the imposition of penalties to attain that end, and to discourage violations, are justified. As we view the matter, less harm will result to the principles of collective bargaining by imposing the penalty than from ignoring the violation and refusing to impose the penalty. ***" (Underscoring added)

AWARD 12374: (Third)

"Carrier urges that the claim is for a penalty because Claimant actually worked on each of the days for which the claim is filed; that he received eight (8)

"hours of pay at his rate for each of the days; that he could not have been available for the work done on those days by the Machine Operators; that the Agreement does not provide for payment of services not performed; that this Division has no right to assess a penalty.

A collective bargaining agreement is a joint undertaking of the parties with duties and responsibilities mutually assumed. Where one of the parties violates that Agreement a remedy necessarily must follow. To find that Carrier violated the Agreement and assess no penalty for that violation is an invitation to the Carrier to continue to refuse to observe its obligations. If Carrier's position is sustained it could continue to violate the Scope Rule and Article I of the Agreement with impunity as long as no signal employes were on furlough and all of them were actually at work. For economic or other reasons, Carrier could keep the Signalmen work force at a minimum and use employes not covered by the Signalmens' Agreement to perform signal work. No actual damages could ever be proved. This is not the intent of the parties nor the purpose of the Agreement.

While Carrier alone has the right to determine the size of the work force in any craft, it has a duty and obligation to keep available an adequate number of employes so that the terms of the Agreement are not breached. Carrier is obligated to have a sufficient number of available signalmen on its roster for its needs. If it fails to do so, it may not complain when a penalty is assessed for a contract violation."

AWARD 17523: (Third)

"The Carrier, furthermore, argues that the instant claim is in the nature of an exaction--a penalty--as the claimants were employed on the days in question. We can only respond that this Carrier is fully familiar with the hundreds of awards which have held that a Carrier is liable in the event of a contract violation; that such assessment of damages is not an unfair labor practice, as it alleges."

AWARD 21751: (Third)

"The Carrier also asserts 'the monetary payment being sought by the Organization is improper. Claimant was fully employed on the dates in question and suffered no loss of earnings.' Thus under the principle that a Claimant is

"limited to the actual pecuniary loss necessarily sustained no monetary payment is due.

The question to be decided here, however, is not whether the Claimant suffered actual pecuniary loss, but rather there having been an improper assignment of work within the terms of the Parties Agreement of work to which the Claimant was entitled, is he without remedy?

The Organization asserts Claimant under Rule 3 was entitled to perform the work in his seniority district. There is no evidence to the contrary as Carrier did not have the authority to transfer the work, as it contends. The Organization submits the proper remedy is to pay the Claimant the rate for the work performed citing many awards, essentially, assessing such a penalty for violation, citing, among other Third Division Award 685:

> 'The Division xxx found that the Carrier made an improper assignment xxx. Accordingly, the claim, although it may be described as a penalty is meritorious and should be sustained. The Division quotes with approval this statement from the Report of the Emergency Board created by the President of the United States on February 8, 1937:
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> > "The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet experience has shown that if rules are to be effective, there must be adequate penalties for violation.'"'

AWARD 27614: (Third)

"As to the question of damages, Carrier asserts that Claimants were employed full time when the violation occurred. While we recognize that there is a divergence "of views on this subject, it is our view, and we have so held in prior cases, that full employment of the Claimants is not a valid defense in a dispute such as involved here. As we noted in Third Division Award 26593, '. . . in order to provide for the enforcement of this agreement, the only way it can be effectively

"enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses.'"

AWARD 28185: (Third)

"With respect to remedy, the Board recognizes that the Claimants were fully employed during the period that the work was performed. However, Carrier has not introduced any evidence that the work could not have been assigned to the Claimants on either an overtime or rescheduling of work basis. Clearly a monetary remedy is appropriate on two grounds: loss of work opportunity and, further, in order to maintain the integrity of the Agreement. ***"

AWARD 28241: (Third)

"*** the Board is not receptive to Carrier's argument that the violation was merely de minimis or that Claimants should be denied any recovery because they were otherwise occupied. This Board has held in numerous cases that a remedy ordinarily is appropriate where a violation of an agreement is proven. ***"

AWARD 28513: (Third)

"*** By the failure to give the required notice, the Carrier did not give the negotiated procedure set forth in Article IV an opportunity to unfold. Claimants therefore clearly lost a potential work opportunity as a result of the Carrier's failure to follow its contractual mandate to give the Organization timely notice. Given this Board's previous admonitions to the Carrier to comply with the terms of the 1968 National Agreement and the Carrier's failure to do so and further considering that the awarding of monetary relief to employees for violations of contracting out obligations even when the affected employees were employed is not unprecedented (see Third Division Award 24621 and Awards cited therein), on balance, we believe that given the circumstances of this case, such affirmative relief is required in order to remedy the violation of the Agreement. To do otherwise would ultimately render Article IV of the 1968 National Agreement meaningless."

AWARD 34 - SBA NO. 1016:

"We regard any improper siphoning off of work from a collective bargaining agreement as an extremely serious contract violation, one that can

"deprive the agreement of much of its meaning and undermine its provisions. In order to preserve the integrity of the agreement and enforce its provisions, the present claim will be sustained in its entirety. Contrary to Carrier's contentions, we do not find that the absence of a penalty provision or the fact that claimants were employed full time on the five dates in question deprives the Board of jurisdiction to award damages in this situation."

AWARD 41 - SBA NO. 1016:

"Beyond this the Board has considered and finds unpersuasive the Carrier's argument that notwithstanding the Board finding of an Agreement violation by the Carrier, the Claimants should not be awarded compensation for the work performed by Gang TK-134, because the Claimants were on duty and under pay during the period that the Gang was used at work locations on the Philadelphia Seniority District.

Prior authorities on this facet of the case have reached conflicting results. A number of authorities cited by the Carrier hold that notwithstanding a contract violation, compensation is allowable only where Claimants show a monetary loss from their regular work assignments in connection with the violation. Second Division Award 5890 and Third Division Award 18305. Contra authorities have ruled that full employment does not negate a compensatory award in situations where there is valid need to preserve the integrity of the Agreement.

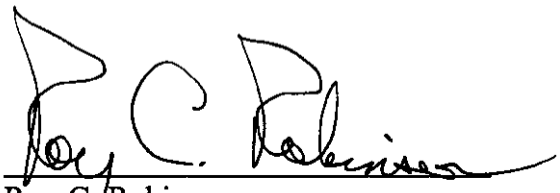
Important seniority rights are in question in this case, because an Employee whose name is on a seniority roster in an Agreement designated seniority district, owns a vested right to perform work in that seniority district that accrues to his standing and status on the district seniority roster. The Seniority District boundaries established by the parties' Agreement to protect and enforce that right, have been improperly crossed by the Carrier action, resulting in the Claimants loss of work opportunities, and hence the principle that compensation is warranted in order to preserve and protect the integrity of the Agreement, is applicable to this dispute. For similar rulings between these same parties see Award No. 34 of Special Board of Adjustment No. 1016 (07-28-89) and Award No. 7 of Public Law Board No. 3781 (02-12-86)." (Underscoring in original)

Although he does not say so in so many words, it appears that the Referee has accepted and grounded his opinion upon the Carrier's assertion that the Claimants were "fully employed". The fact that the Claimants may have been working on the claim dates is irrelevant under both the "damages" and "penalty" principles espoused by this Board. It is axiomatic that the employment status of the Claimants is meaningless under the penalty awards because they allow compensation to protect the sanctity of the Agreement irrespective of monetary losses by individual Claimants. The fact that the Claimants may have been working on the claim dates is also irrelevant under the damages awards because they are founded on a loss of work opportunity. The forty (40) hour work week provided for in the National Agreements establishes a minimum of forty (40) hours per week as long as positions exist. The fact that Claimants may have received that minimum payment during a claim period does not negate the fact that they lost the opportunity to perform the work in dispute during daily or weekend overtime or by having an extended work season for seasonal employes. The fact is, that the collective bargaining agreement specifically contemplates such work as is evidenced by the overtime rules, call rules and provisions governing work on holidays or during vacation periods. In recognition of these opportunities for extended hours or additional days of work, numerous awards have held that the so-called "full employment" of claimants is no bar to the awarding of monetary damages.

These awards clearly establish that so-called "full employment" is not a bar to finding and awarding monetary damages. Moreover, these same awards also establish that when work is improperly assigned to an outside contractor or even other employes who have no contract right to the work, this establishes a prima facie case for the Organization and the burden shifts to the Carrier to prove that the Claimants would have been unable to perform the work through the use of overtime, rescheduling, etc. In the instant case, no such showing was made or even attempted by the Carrier because no such showing was possible. The inescapable fact is that the Claimants had cleaned the right of way of brush, weeds, trees and other growth on the property for decades and there is no reason they could not have performed the work at issue here on the claim dates. Hence, the Claimants suffered a loss of work opportunity.

It is transparently clear that arbitral precedent does not prohibit the sustaining of the monetary award in this claim. In fact, precisely the opposite is true. There is ample precedent to mandate a sustaining award on this property. The Referee's finding that he somehow lacked authority or jurisdiction to sustain the monetary claim is without credible support. Instead, the Referee was dispensing his own brand of industrial justice based on his subjective notion of equity.

For all of these reasons, I emphatically dissent with respect to the damages finding in this award.



Roy C. Robinson
Employe Member