**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 5905**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES** )
) Case No. 14
and )
) Award No. 14
**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY** )

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. M. Gevaudan, Carrier Member

Hearing Date: March 23, 2001

**STATEMENT OF CLAIM:**

1. The Agreement was violated when the Carrier assigned C&E Department employes (electricians) to perform B&B water service work, i.e. install forced cold air switch point cleaners on switches located in Griffith Indiana on September 13, 20, 28, October 22, 28, 29, November 5 and 18, 1999, instead of assigning B&B water service employes to perform said work (System File SAC-26-99/UM-28-99).

2. The Agreement was further violated when the Carrier assigned C&E Department employes (electricians) to perform B&B water service work, i.e. install forced cold air switch point cleaners on switches located on the Normantown Siding on December 7, 1999, instead of assigning B&B water service employes to perform said work (System File GC-2-00/UM-3-00).

3. As a consequence of the violation referred to in Part (1) above, Water Service Mechanic Foreman T. Lee and Water Service Mechanic H. Pluta shall each be allowed seventy-eight (78) hours' pay at their respective straight time rate and twenty-eight and one-half (28.5) hours' pay at their respective time and one-half rate.

4. As a consequence of the violation referred to in Part (2) above, Water Service Mechanic Foreman F. Mau and Water Service Mechanic S. Bednarz shall each be allowed six (6) hours' pay at their respective time and one-half rate.

**FINDINGS:**

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds

that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On the dates in question, Carrier used electricians, members of the C & E Department, to install forced air switch cleaners. The Organization contends that, in so doing, Carrier violated Rule 2(e) because, in the Organization's view, Rule 2(e) reserves this work to Water Service Mechanics. Rule 2(e) provides:

> An employee who is capable in the performance of and assigned to the installation and maintenance of steam, water, oil and air pipe lines, lavatories, drinking fountains, wiping and calking lead joints, connections to water mains and curb stops, installing and maintaining water cranes, repairs to steam engines and steam and electric driven pumps, installing and maintaining sheet metal work on buildings and other water supply, plumbing and sheet metal work coming under the supervision of the Division Engineer shall constitute a water supply mechanic.

The Organization contends that the job entailed the installation of electric driven pumps and sheet metal work. Carrier contends that the switch cleaners consisted of mechanical fans driven by electric motors that compress air and blow snow off the switches. In Carrier's view, these were not pumps. Furthermore, Carrier contends, even if these were pumps, Rule 2(e) only reserves repairs to electric driven pumps and these jobs involved installation, rather than repair. Finally, Carrier contends, that the duct work was pre-fabricated and therefore did not involve sheet metal work because there was no bending or forming – only bolting together pieces of galvanized steel.

Our review of the record leads us to find that the jobs had two components: installation of the fans and installation of the duct work. With respect to the fans, we agree with Carrier. They clearly were not pumps, as that term is commonly understood. There is no evidence which suggests that the parties intended the term electric driven pumps to encompass the fans at issue in the instant case.

With respect to the duct work, we cannot agree with Carrier that the fact that the duct work was pre-fabricated defeats its being sheet metal work. Rule 2(e) speaks expressly to the installation of sheet metal work and makes no exception for the use of pre-fabricated components. Carrier has suggested no logical reason for implying such an exception and we can think of none. Accordingly, we hold that Carrier did not violate the Agreement by having employees other than Water Service employees install the fans but did violate the Agreement when it had employees other than Water Service employees install the duct work.

The next issue we must consider is the appropriate remedy. Carrier maintains that a monetary remedy is precluded by Rule 58. Rule 58 provides, "Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation." Carrier argues that the Organization has failed to establish any pecuniary loss. The Organization maintains that the lost

work opportunity constitutes a pecuniary loss. Both parties cite on property awards of the National Railroad Adjustment Board, Third Division, in support of their positions.

We have considered the numerous awards cited by the parties. At first glance, they may appear to be conflicting. Further scrutiny, however, reveals that, for the most part, they can be reconciled.

In Third Division Award No.7585, the Board wrote:

> In addition to the claim of violation of the agreement, claim is filed that the two senior track laborers at Waukegan, Gary, and South Chicago be paid at their respective straight time rate of pay for a like number of hours that transportation department employes were used to line switches and flagging work in connection with weed burning machines subsequent to June 29, 1949. Rule 62 of the agreement provides that "time claims shall be confined to the actual pecuniary loss resulting from the alleged violation." This provision could hardly be stated in a clearer fashion, and we therefore hold that payments to the two senior track laborers named in the claim are limited under this award to any actual pecuniary loss which they suffered as a result of the violation found herein.

On its face, Third Division Award No.7585 did not define actual pecuniary loss. It noted that monetary relief was limited to actual pecuniary loss but did not indicate what that loss would be. It merely rejected the contention that actual pecuniary loss was per se equal to the number of hours spent by other employees performing the work in question.

In Third Division Award No.10247, the Board held that Carrier violated the agreement by assigning certain work to carpenters instead of painters. It acknowledged "numerous awards of this Division which hold that a claim of this type is primarily to enforce the scope of the Agreement and where a violation occurs the Carrier must pay a penalty to the extent of the work lost." It then held that those awards calling for a penalty payment conflicted with the agreement's limitation of the remedy to actual pecuniary loss and with Award No.7585. Again, the Board did not define actual pecuniary loss, beyond indicating the obvious – that it does not include penalties. Similarly, Third Division Award No.10574 refused to impose a monetary penalty on Carrier in light of the limitation of monetary remedy to actual pecuniary loss.

Third Division Award No.10748 reiterated the holding that the limitation to actual pecuniary loss barred claims to impose monetary penalties. The Board went on to reject the Organization's argument that the limitation was superceded by Article V of the August 21, 1954 National Agreement. Third Division Awards Nos.10828 and 12328 also focused on whether the 1954 National Agreement superceded the damage limitation and again concluded that it did not.

Third Division Award No.15342 is the first award, chronologically, cited by Carrier, which considered what actual pecuniary loss is. In that case, the Board awarded monetary relief to the claimant who, it found, was entitled to be called for the work in question and who was not called. The Board observed that there was no evidence that the claimant was unavailable and

concluded that the claimant suffered an actual pecuniary loss.

Third Division Awards Nos.18521 and 29741 discuss the limitation of damages to actual pecuniary loss. However, in both cases, it appears that the Board found no violation of the Agreement. Thus, the discussion in these awards of actual pecuniary loss appears to be dicta.

On the other hand, in Third Division Award No. 30035, the Board found a violation when Carrier contracted out certain work without first holding the required conference to discuss the proposed subcontracting with the Organization. The Board held that pecuniary loss was established because, "Assuming that a timely conference had occurred prior to the letting of the contract, additional work may have been available to the Claimants (or others similarly situated)." (Underlining in the original).

The Third Division again defined actual pecuniary loss in Award No. 30867. The Board held that Carrier violated the agreement when it contracted out certain work reserved to Water Service employees. It rejected Carrier's argument that there was no pecuniary loss because the claimants were fully employed at the time of the violation. The Board reasoned:

> Despite the fact that they were fully employed, there has been no showing that the laying of this specific pipe could not have been accomplished on overtime, during rest days or at another time. We conclude that this case represents a lost work opportunity for Claimants requiring monetary compensation at the straight time rate.

The Board clearly was aware of the earlier awards which had held that the limitation of relief to actual pecuniary loss precluded awards of penalty payments. Such awards were cited extensively in the dissent to Award No. 30867, but, as Labor Member's response to Carrier Members' Dissent observed, those awards were deemed inapposite because in the case before them, actual pecuniary loss was established by "Carrier's failure to assign the work to them during daily overtime, on rest day overtime or by rescheduling the work to which they were assigned while the outside contractor was installing pipe." Similarly, Award No. 31502 awarded monetary relief to B & B employees for Carrier's assignment of bridge repair work to Car department employees. The Board found pecuniary loss resulting from the lost work opportunity, observing, "The Carmen involved suspended their regular work as Car department employees to do the work on the bridge. The Carrier has not shown why the Claimants could not have suspended the work they were doing to perform the work."

Thus, lost work opportunities can constitute actual pecuniary losses within the meaning of Rule 58. However, if Carrier shows that the Claimants did not suffer a lost work opportunity, because they could not have performed the work on overtime or on rest days or by rescheduling their other work, then no pecuniary loss would have resulted. Under such circumstances, a monetary award would constitute a penalty and Rule 58, as interpreted numerous times, precludes awarding a penalty. To similar effect is Third Division Award No. 32387, which was authored by the same referee as Award No. 30035. In Award No. 32387, the Board found that Carrier violated the agreement by assigning three employees as assistant foreman when, in

reality, they were performing as trackmen. The claimants were trackmen who had greater seniority than the assistant foremen. However, the evidence also indicated that the claimants were recalled from furlough and actually worked more hours than the junior assistant foremen during the period in question. Accordingly, the Board concluded that the claimants suffered no actual pecuniary loss and denied any monetary relief.

With this background, we turn to the instant case. It is apparent that Carrier's violations of the Agreement deprived the Claimants of the opportunity to perform the work of installing the duct work. There is no evidence in the record that the Claimant could not have performed this work on regular overtime, on rest days, or by rescheduling other work that they performed. Therefore, we conclude that Claimants must be compensated for the lost work opportunities. However, the amounts claimed involved installation of the fans as well as the duct work and we have held that Carrier did not violate the Agreement by having C & E Department employees install the fans. The record does not indicate the division of the hours expended between installation of the fans and installation of the duct work. Therefore, we shall direct the parties to jointly determine the number of hours expended on installation of the duct work. In accordance with Third Division Awards Nos. 30867 and 31502, compensation shall be at the straight time rate.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

Martin H. Malin, Chairman

D. M. Gevaudan
Carrier Member

D. D. Bartholomay
Employee Member

Dated at Chicago, Illinois, May12. 2001.