NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7163

Brotherhood of Maintenance of Way	)	
	)	
Employees Division, IBT Rail Conference	)	Case No. 309
	)	Award No. 309
and	)	
	)	
CSX Transportation, Inc.	)	

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when, beginning on June 2, 2014 and continuing through June 20, 2014, the Carrier failed to promptly issue a voucher to cover a shortage in pay that was equivalent to one (1) day's pay or more to Messrs. D Webb and B. Vermilyer (System File H42408314/2014-171337 CSX).

2. As a consequence of the violation referred to in Part 1 above,

   Claimants D. Webb and B. Vermilyer '...shall now be compensated for $100 for every day that they did not receive their pay checks. ***' (Employees Exhibit 'A-1')."

FINDINGS:

The Organization argues that the Carrier allegedly violated the Agreement by failing to pay the Claimants promptly upon a pay shortage. That this violation by the Carrier is obviously a violation of Rule 30(b). That the Carrier should issue the vouchers promptly is the requirement, nineteen (19) days in this situation is certainly by no means promptly. That this delay by the Carrier unquestionably caused Claimant's to suffer a serious hardship. The claim should be sustained in its entirety.

The Carrier responds that the Organization failed to show that the Carrier violated any rules or agreements. That the Roadmaster and Labor Relations made attempts to resolve the issue promptly, more importantly the Carrier made valid attempts to rectify a situation instigated by the Claimant's mistakes. The record reflects that the Organization has not met their burden of proof and the Board does not have the authority to rewrite Rule 30 and provide any monetary relief to the Claimant's. The claim should be denied.

The Board has, in detail, reviewed the entire record before the Board. We have paid special attention to the precedents furnished the Board by the parties. The

Board is reluctant to grant the monetary relief the Organization has requested, but a penalty of some type must be levied to address this most serious violation. The results could have been disastrous, destroying credit, loosing home or cars, and causing internal family turmoil. Fortunately, the record does not indicate such happened. The Board will order that the Claimant's each be awarded a one thousand-dollar ($1,000.00) performance bonus.

AWARD:

Case sustained in accordance with the findings.

Don A. Hampton

Neutral Chairman and Referee

***Written Dissent Attached

Katrina Donovan

Carrier Member

Andrew M. Mulford

Employee Member

DATED: July 13, 2018

PUBLIC LAW BOARD NO. 7163

PARTIES	) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION,
TO THE	) IBT RAIL CONFERENCE
	)
And	)
	)
DISPUTE	) CSX TRANSPORTATION, INC.

CARRIER'S DISSENT FROM
PLB 7163, AWARD 309

The Carrier respectfully and strongly dissents to this decision. The Majority's decision is not supported by either Agreement language or precedent. The Carrier fulfilled its obligations under Rule 30 when Claimants were made whole after their own payment errors caused a delay of wages. Regardless, Rule 30 clearly and unambiguously does not provide for award of a "performance bonus." Nor does Rule 30 provide for award of a penalty payment. Further, Board precedent does not support the imposition of a penalty payment where, as here, there is no Agreement support and no showing of Carrier misconduct. Therefore, the Majority's determination is palpably erroneous and holds no precedential value.

Foremost, the error of this decision is best demonstrated by the clear language of Rule 30 which states:

> *"(a) Employees will be paid off during regular working hours. Should the regular payday fall on a holiday, they will be paid on the preceding workday.*
>
> *(b) Where there is a shortage equivalent to one day's pay or more in the pay of an employee, a voucher will be issued promptly upon request to cover the shortage.*
>
> *(c) Employees leaving the service of the Company will be furnished with a time voucher covering all time due at the next scheduled payday for the pay period involved.*

> *(d) Upon receipt of proper form, the carrier will reimburse employees entitled to expenses within thirty (30) days.*
>
> *(e) In the event of an overpayment, the carrier will give advance written notice to the employee who will be sent to his last recorded address, certified mail return receipt requested. The employee shall be advised of the amount, and pay period in which the overpayment was made. If the employee does not dispute the overpayment, the carrier may recover such overpayment at a maximum of 20% in each pay period following the proper notice. However, if the employee disagrees that there was an overpayment, or disagrees with the amount of the contended overpayment, upon receipt of notice, the employee will appeal to the carrier's Highest Designated Labor Relations Officer under Section 3(a) of Rule 25 within fifteen (15) days. When such appeal is made, it will act as a stay in recovering the monies until after the employee has been given a hearing and the carrier responds under paragraph (c) of Rule 25. If the employee is not satisfied with the carrier's decision, further appeal will be subject to the procedural provisions of paragraph (c) of Rule 24."*

The sole obligation within the parties' negotiated language states the Carrier will "promptly" issue a voucher, upon request. That the Carrier paid Claimants these delayed funds in full was supported by the on-property record and, further, never disputed by the Organization.

Notwithstanding, even if a there was a violation, which there was not, Rule 30 does not require or even reference a penalty payment for delayed wages, as was improperly awarded in this dispute. Despite the Majority's characterization, the awarded "performance bonus" is merely a penalty payment by a different name. Any monetary remedy beyond this payment or beyond the remedy set forth in the Rule is punitive in nature. The award of punitive damages in the matter at issue improperly rewrites Rule 30 to include a penalty where one does currently exist. The Organization must show Agreement support for such a penalty, which it did not and cannot do in this case. The following awards are illustrative of this principle:

> *"The claim arose after the Carrier failed to post the 1983 Seniority Roster for Radio Maintainers and belatedly posted the 1984 Roster.*
>
> *The Board finds that the Carrier failed in its responsibility to issue the Seniority Rosters in a timely manner. While no harm has been shown, certainly, a matter such as this could affect significant rights of the craft and may not be taken lightly.*

> *However,* ***there is no Agreement support for the requested compensation, and it therefore is denied****."* NRAB Second Division, Award 11460 (Muessig).

See, also, a similar instance where the Organization demanded a penalty payment for the Carrier's alleged failure to post seniority rosters:

> *"At no time during the handling of the claim did the Organization buttress its allegations of Rule 35 violation(s) with probative evidence* ***or show any contractual support for the $5.00 per capita penalty claimed.*** *Careful examination of the record dictates that the claim must be dismissed because the Organization failed to meet its burden of proof. In summary, the Organization did not furnish any evidence to prove that the Carrier did not distribute or post the Division and/or System Signalmen rosters in or any Agreement language to support its request for the $5.00 penalty."* NRAB Third Division, Award 35632 (Eischen).

The Board is limited to interpretation of the Agreement under the Railway Labor Act. If a different result was desired by the Organization, the proper venue is at the negotiation table rather than through arbitration. As such, penalties go beyond the authority of the Board.

> *"The jurisdiction of the National Railroad Adjustment Board, insofar as here material,* ***is limited to the interpretation or application of Agreements entered into by the parties through the process of collective bargaining. The Board may not add to or subtract from the terms of such an Agreement.*** *The words 'interpretation or application of agreements' are persuasively convincing that the law of contracts governs the Board's adjudication of a dispute. The law of contracts limits a monetary Award to proven damages actually incurred due to violation of the contract by one of the parties thereto.* ***This is not to say that the contract by its terms may not provide for the payment of penalties upon the occurrence of specified contingencies; but, the contract now before us contains no such provision.****"* NRAB Third Division, Award 10963 (Dorsey). (***Emphasis*** added).

Furthermore, it is a basic principle of the common law of damages that absent any specific penalty provision, a remedy is limited to actual proven damages.

> *"We approve the reasoning set forth in Third Division Award No. 10963, and the Court decisions quoted in Carrier's Submission, p.p. 11-13. In substance, the Award and the Courts state that damages and compensation, if any, must be the proven loss arising from violation of contract provisions or agreements.*

> *This Board has not the power to fashion remedies or to create sanctions other than as set forth in or flowing from the agreements of the parties."* NRAB Second Division, Award 6355 (Bergman).

See, also:

> *"…we also must rely on common law principles relating to damages when determining appropriate remedies for such violations.*
>
> *The basic common law on damages requires that an employee prove he has suffered monetary damages. For this board to require the payment of punitive damages where none have been proven, would be, in this Board's opinion, tantamount to writing a new rule for the parties."* Special Board of Adjustment 1048, Case 21 (Mason).

The Organization failed to present a single piece of evidence demonstrating tangible damages. While the Majority opined a number of calamities that could have befallen Claimants, the fact remains, and the Majority conceded, these were but mere possibilities that in reality did not take place. Moreover, the remedy awarded was completely arbitrary in nature with no causal relationship traceable to the claimed wrong.

> *"The purpose of a remedy in a contract violation case is to make the affected employees whole."* NRAB Third Division, Award 30945 (Benn). (BMWE v. CSXT).

As Claimants had been made whole, no further remedy is required. There was no necessity to make up a remedy out of whole cloth and label it a "performance bonus" to hide its punitive nature.

Perhaps, a remedy, *in arguendo,* could be demanded for damages directly arising from delayed wages, but this was not even alleged in this matter. In fact, the Majority conceded no such harm occurred in the instant dispute. Regardless, the Carrier fulfilled is Rule 30 obligations when it paid Claimants the delayed wages. The Board has no authority to grant further compensation based on equity or justice.

> *"It is well settled by controlling authority that this Board has no power to impose principles of 'equity' or 'justice'. Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties, as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute."* NRAB Third Division, Award 20844 (Norris).

A penalty payment is, by clear language of the Agreement, is not warranted in this matter. Nor does a penalty payment have any basis in precedent. The precedent relied upon by the Organization was limited to cases involving subcontracting and alleged loss of work opportunity, circumstances clearly distinguishable from the matter at issue. The Organization presented a single arbitration award arguably relevant as precedent, and the Organization relied upon it heavily. However, this award clearly bolstered the Carrier's position that no penalty was permitted in this case. In NRAB Third Division, Award 36942, Neutral Newman, assessed a $100.00 per week penalty payment for the alleged failure to post seniority rosters. However, Newman made a point to reason why imposition of such a penalty is the exception to established principle:

> *"While the Board has normally adopted the Carrier's assertion that a penalty payment to a Claimant who has suffered no ascertainable harm is inappropriate, we have also made exceptions for a clear showing that the contract has been **breached with impunity**, in order to deter future violations and permit the Organization to uphold the integrity of the Agreement."* (***Emphasis*** added).

Newman specifically notes the Carrier's bad faith and lack of respect for its obligations under the Agreement. The record in this matter did not establish such conduct on the part of the Carrier. There was no evidence of Carrier action that was repeated, willful, wanton or otherwise demonstrated misconduct requiring punitive pay. Quite the contrary, the record clearly shows the Carrier immediately and diligently took steps to correct the errors made by Claimants when entering their pay. Properly applying Newman's analysis in the present case, it is obvious that there would have been a very different result. Other precedent supporting this principle includes:

> *"The Board does not find that the granting of a penalty payment would be appropriate. The **facts do not establish that the Carrier was guilty of willful or wanton misconduct**, **and the Agreement does not provide for penalty payments.**"* Public Law Board 3775, Award 21 (Buchheit). (***Emphasis*** added).

See, also:

> *"As for the requested remedy, the Organization not only carries the burden of proof, but of perfecting all elements of its Claim. There is no evidence in the record that Carrier's actions affected the senior extra Train Dispatcher in any material way. Nor is there evidence of record on the property that one (1) day's pay was lost, that the remedy is contractually provided, or that it is anything other than de minimus which it clearly appears to be.* ***As such, although the evidence shows the work belongs to Train Dispatchers (and we do not lightly ignore Carrier violations), finding no evidence of willful fraud, malice, monetary loss to Claimants, contractually supported penalty, potential employment loss or the like, we must deny parts (b), (c), (d) and (e) of the Claim.****"* NRAB Third Division, Award 26381 (Zusman). (***Emphasis*** added).

And:

> *"The Board has long agreed with Awards holding that when needed to uphold the integrity of the Agreement or when precedent exists on the property, penalty payments are absolutely necessary.* ***But when, as here, there is no showing of any attempt to circumvent the Agreement; flout, run around, or sharp shoot the Agreement; no showing of any monetary loss to the Claimant or lost opportunity for earnings; and no demonstration whatsoever that the Carrier has a payment precedent on property or a history of clerical errors for which a penalty might be imposed to assure careful compliance; a penalty payment is not mandated****."* Public Law Board 7367, Award 3 (Zusman). (UTU-YM v. CSXT). (***Emphasis*** added).

This established principle is further upheld by precedent in the federal courts. See, for example, Norfolk and Western Ry Co v. Brotherhood of Ry Airline and SS Clerks Freight Handlers, 657 F.2d 596 (11th Cir. 1981) involving the unilateral transfer of work content from an abolished position to another position where the bargaining agreement was silent on the matter. While the Court held the Board acted within its authority finding a contract violation, the Court nonetheless found the Board acted outside its jurisdiction in awarding penalty pay. In so holding, the Court cited a number of previous cases where penalty payments were prohibited due to lack of Agreement support or due to the "absence of willful or wanton conduct." See, for example, Westinghouse Elec Corp Aerospace Div v. International Broth of Elec Workers AFL-C, 561 F.2d 521 (4th Cir. 1977), which held additional vacation days were an inappropriate penalty where the Company violated vacation shutdown notice provisions:

> *"With respect to vacation shutdowns,* ***compensatory damages may be awarded only when a breach of the bargaining agreement causes a monetary loss. In the absence of willful or wanton conduct, punitive damages should not be awarded.*** *See also F. Elkouri and E. Elkouri, How Arbitration Works 356-57 (3d ed. 1973); O. Fairweather, Practice and Procedure in Labor Arbitration 303-09 (1973)."* Westinghouse, supra. (***Emphasis*** added).

Clearly, arbitration and court precedent show remedies constituting punitive or penalty pay are improper unless supported by the agreement or where the Carrier's misconduct requires it.

Finally, but certainly not insignificantly, the Board exceeded its authority under the Railway Labor Act. This Public Law Board's powers are limited to disputes:

> *". . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. . ."* 45 USC §153 First, (i).

Paragraph 2 of the implementing agreement for this Public Law Board, 7163, similarly defines the Board's jurisdiction:

> *"The Board shall have jurisdiction only over the claims and grievances shown on the attached list (Attachment '·A"), and those that may be added by mutual agreement of the parties, a****rising out of grievances or out of the interpretation or application of agreements governing rates of pay, rules or working conditions*** *that may otherwise be referred to the National Railroad Adjustment Board (NRAB)."* (***Emphasis*** added)

The Board thus patently exceeded its jurisdiction in fashioning a remedy that was not demanded in the initial claim and that held no basis in Agreement language.

Consequently, the Majority's decision is palpably erroneous, holds no precedential value, and requires the Carrier Member's strong dissent.

Respectfully submitted,

Katrina Donovan
Senior Manager Labor Relations
Carrier Member