SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 21 (REVISED)

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces to perform work cleaning railroad hopper cars at Princeton, West Virginia on March 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30 and 31, 1987 (Carrier's File MW-BL-87-29).

2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work, in accordance with Appendix "F" and the December 11, 1981 Letter of Agreement.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Steele, H. Bond and B. Marsh shall each be allowed one hundred thirty-six (136) hours pay at the trackman's rate of pay.

FINDINGS:

Upon the whole record and all evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This is one more in a long line of cases involving the use by Carrier of an outside contractor to perform certain work

which the Organization alleges accrued to employees covered by the Maintenance of Way Rules Agreement. Three (3) of the key elements in this case are (1) the Scope Rule of the Rules Agreement, (2) Appendix "F" - Contracting Out as found in the Rules Agreement, and (3) the National Letter of Agreement dated December 11, 1981, by and between the Chairman of the National Railway Labor Conference and the President of the Brotherhood of Maintenance of Way Employees.

Rule 1 - Scope reads as follows:

> "These rules govern the rates of pay, hours of service and working conditions of all employees in the track sub-department and bridge and building sub-department of the Maintenance of Way and Structures Department listed in this rule, and other employees performing similar work recognized as belonging to and coming under the jurisdiction of the track and bridge and building sub-departments of the Maintenance of Way and Structures Department, but do not apply to supervisory forces above the rank of foreman.
>
> The scope of this Agreement will also apply to employees used in the operation of power driven machines hereafter introduced in the Maintenance of Way Department and in the Roadway Material Yard at Roanoke."

Appendix "F" - Contracting Out reads as follows:

> "In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said carrier and

organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement.

(From National Agreement of May 17, 1968)"

The December 11, 1981 Letter of Agreement referenced above reads as follows:

"December 11, 1981

Mr. O. M. Berge
President
Brotherhood of Maintenance
of Way Employes (sic)
12050 Woodward Avenue
Detroit, Michigan 48203

Dear Mr. Berge:

* * *

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to

and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

* * *

Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

/s/ Charles I. Hopkins, Jr.

Charles I. Hopkins, Jr.

I concur:

/s/ O. M. Berge"

From the history of this dispute, as set forth by both parties without significant contradiction or differences, it is apparent that as long ago as 1979, Carrier utilized Maintenance of Way employees to perform certain car cleaning work at Princeton, West Virginia. The Work continued on an as-needed basis until sometime in 1985 when the State Environmental Protection Agency informed Carrier that their car cleaning operation would have to be closed because of environmental considerations which apparently existed at that time. Subsequently, in March, 1987, Carrier resumed car cleaning at Princeton, West Virginia, but at a location within the Princeton area different from the area closed in 1985. At this time, Carrier did not reassign its Maintenance of Way employees to the work but rather employed the services of an outside contractor to

effect the cleaning of the cars and the salvaging of the material cleaned from the cars. No notice was given to the Organization by the Carrier relative to this use of the outside contractor.

By letter dated March 31, 1987, the Organization submitted a penalty time claim for 3 named claimants seeking compensation of 8 hours for each man on each of seventeen (17) dates during the month of March, 1987, on which the outside contractor performed car cleaning work at Princeton, West Virginia. Carrier's officer initially denied the claims alleging that the car cleaning operation required the use of a "contractor licensed by the EPA." These claims were advanced to the Engineer Maintenance - Operations who denied them with the reason "there was no violation of the schedule agreement or any other applicable agreement." Upon appeal of the claims to Carrier's highest level officer designated to handle claims and grievances, the Organization was told, by letter dated September 16, 1987, that the claims were denied because (1) they were excessive; (2) the State EPA prevented Carrier from using its own forces and "having no other alternative, a contractor registered and certified by the Environmental Protection Agency of West Virginia was engaged to clean the cars"; and (3) this operation involved an unusual or novel situation which exempted it from Appendix "F" notification. Carrier cited 3rd Division N.R.A.B. Award 20785 in support of their action and decision.

During subsequent on-property handling of this dispute, the Organization presented to Carrier a letter dated October 27,

1987, from the Chief of the State Department of Natural Resources in which it was indicated that the State agency did not require any type of license or permit to effect the type of resource recovery operation in which Carrier was involved at Princeton, West Virginia; that the contractor in question was not licensed by the State to handle hazardous materials; and that the types of material being handled by the contractor were merely rock, coal and coke.

The next correspondence of record in this case is from Carrier under date of May 22, 1989, some eighteen (18) months later, in which, for the first time of record, Carrier acknowledged that their previous information relative to EPA involvement and control was erroneous and those references should be disregarded by the Organization. Carrier then for the first time contended that the work of cleaning cars was "not work required by statute or regulation, nor does this work concern the operation of maintenance of the railroad." Carrier further contended that no work had been removed from the agreement and that "since the work contracted in this instance was not within the scope of your (Maintenance of Way) agreement, the notice provisions of Appendix "F" do not apply."

Considerable correspondence and discussion between the parties followed culminating in a conference on March 22, 1991. The conference was followed by a response dated March 26, 1991, wherein Carrier summarized their position to include the contentions that (1) the work in question was not covered by the

Scope rule; (2) that the practice on the property did not reserve this work exclusively to Maintenance of Way employees; (3) that the Claimants were fully employed during the claim period and therefore were not available to perform the work nor did they suffer any monetary loss because of the use of the contractor. Thus the issues were joined on the property for presentation to this Board for final and binding adjudication.

We will first address the issue of Carrier's somewhat cavalier attitude displayed by their initial insistence that they were somehow restricted in the use of the Maintenance of Way employees versus the use of an outside contractor by limitations allegedly imposed by the State Environmental Protection Agency when - in fact - they had no basis for such contentions. The Organization argued strenuously that this line of defense by Carrier indicated a demonstration of bad faith employed with a willful intent to dissuade, if possible, the Organization's progression of their legitimate grievance. The Organization cited with favor 3rd Division N.R.A.B. Awards 26770 and 28044 in support of their argument that Carrier's lack of good faith handling was a blatant violation of the spirit and intent of the December 11, 1981 Letter of Agreement and was sufficiently egregious to persuade this Board to sustain the claims as presented on that basis alone.

We have examined the Awards cited supra and do not seriously disagree with the language and philosophy contained in each of them. They do not, however, address the type of

situation which we have in this instance. Here the Carrier did indeed show a lack of investigative concern when initially addressing the grievance. They accepted at face value and without question the "story" fabricated by the officer who initially received and handled the claims. However, when the correct fact situation was set forth by the Organization - as is the primary responsibility of the moving party in a dispute - Carrier acknowledged, albeit belatedly, their erroneous position and this case continued to be discussed and re-discussed on the property over a period of more than three (3) years on the basis of the correct fact situation along with the respective arguments and positions. There was not, in this Board's opinion, an absence of good faith claim handling once the "true facts" were brought forth. We, therefore, reject this contention as advanced by the Organization.

At page 50 of their ex-parte submission to this Board the Organization states that:

> "EACH AND EVERY INSTANCE OF CONTRACTING OUT OF WORK MUST BE VIEWED ON ITS INDIVIDUAL MERITS. TO HOLD OTHERWISE IS CONTRARY TO THE INTENT AND PURPOSE OF ARTICLE IV AND THE DECEMBER 11, 1981 LETTER OF AGREEMENT."

This Board will do just that by examining the Scope rule here involved. As evidenced by the language of that rule - quoted earlier in this Award - the Scope rule on this property is a "general" scope rule which does not specifically delineate items of work which are reserved to employees working under its jurisdiction.

In this case it is unchallenged that Carrier has used many classes of employees - including outside contractors - to perform car cleaning work at various locations throughout its system. It is also unchallenged that at the location in question Maintenance of Way employees were used to perform car cleaning work for a period of about six (6) years prior to the incident here in dispute. Carrier contends that the Organization must prove that they have the "exclusive" right to clean cars. They point with favor to 3rd Division N.R.A.B. Awards 19969, 28786, 28788 and Award #10 of P.L.B. 3445, among others, in support of their contention relative to an application of the "exclusivity" theory to cases arising under the provisions of Appendix "F" - Contracting Out as it relates to the Scope rule.

Appendix "F" has been quoted earlier in this Award. Its language - and the language of the related December 11, 1981 Letter of Agreement - is the product of several knowledgeable, sophisticated labor relations minds from both the Carriers and the Organization. Its language makes reference to work "within the scope of the applicable schedule agreement." Nowhere in Appendix "F" is the word "exclusive" or "exclusively" to be found. The "exclusivity" theory has been argued from every possible angle. The parties to this dispute have presented to this Board a plethora of awards which, they say, support their divergent contentions on this issue. We have read and studied each and every award that was presented on this issue in this case. From our review and study, we are convinced that the

"exclusivity" theory has no application in deciding cases involving Appendix "F" - Contracting Out. We are further convinced that the issue of "exclusivity" has - or should have been - put to final rest, especially on this property, by the issuance of 3rd Division N.R.A.B. Award Nos. 19574, 19578 and 19860. Added to this strong line of precedential support are 3rd Division N.R.A.B. Awards 23560 and 28513. Carrier's repeated argument on this same issue is again - and hopefully for the last time - rejected. The work here in dispute was by an extended practice at Princeton, West Virginia, "within the scope of the applicable schedule agreement." Therefore, before Carrier had the right to use an outside contractor to do this work at Princeton, West Virginia, they had the obligation to give the notice required by Appendix "F" and the responsibility to engage in the "good faith discussions" required by the December 11, 1981 Letter of Agreement.

At this point in our determination, we must address an issue which was raised by the Carrier at an executive session of this Board following the initial issuance of the proposed award. At that time, Carrier argued strenuously that the December 11, 1981 Letter of Agreement had no standing on this property inasmuch as the complete rules agreement between the Carrier and this Union was re-written as of July 1, 1986, and the December 11, 1981 Letter of Agreement was not specifically mentioned or displayed therein. Carrier acknowledges that Appendix "F" of the re-written 1986 rules agreement is a reproduction of the original

Article IV of the May 17, 1968 National Agreement which deals with the subject of contracting work and the notice requirements attendant therewith. Carrier argues, however, that inasmuch as the December 11, 1981 Letter of Agreement was not specifically by inclusion or reference contained in the 1986 re-written rules agreement, it was abandoned by all of the parties signatory to the re-written rules agreement and is now a nullity on this property.

Not only is this contention new argument raised for the first time at the executive session of the Board, but also, it is a misplaced argument. The 1986 re-written rules agreement preserved in Appendix "F" thereof the language of Article IV of the May 17, 1968 National Agreement which deals with the specific subject here under review. The December 11, 1981 Letter of Agreement merely reaffirmed the intent of Article IV of the May 17, 1968 Agreement. The Letter of Agreement says just that in its body. It was not a new or separate rule. It dealt solely with the subject matter of Article IV of the May 17, 1968 National Agreement. Whether or not the December 11, 1981 Letter of Agreement was specifically referenced in the 1986 re-written rules agreement, the reaffirmation of intent of Article IV of the May 17, 1968 Agreement as set forth in the December 11, 1981 Letter of Agreement remains in full force and and effect on this property as long as the terms and conditions of the original Article IV of the May 17, 1968 Agreement remain in effect.

Having determined that Carrier did, in fact, violate the advance notice provisions of Appendix "F", we now turn to the issue of the measure of damages. Carrier has argued that the Claimants were fully employed during the period of the claim and therefore have suffered no loss. The Organization, on the other hand, points to Carrier's repeated violations of Appendix "F" and argue that there is precedential support for the granting of affirmative relief to the Claimants even though they may have been regularly employed during the period of the dispute.

The parties concede that there is a substantial divergence of arbitral opinion on the issue of damages where no actual loss has been established. Again the parties have each presented numerous awards which, they say, support their respective positions. And again, we have read and studied each of the awards which have been submitted for our consideration.

On this issue, we are compelled to note that this Board has no equity powers. This Board is a creature of an agreement made by and between the respective parties. We do not have authority or jurisdiction "to change existing agreements governing rates of pay, rules and working conditions, and shall not have the right to write new rules."* We rule on issues and arguments raised during on-property handling of a dispute. We are not a de novo tribunal. Rather, we are an appellate tribunal whose limits of authority are delineated by the agreement which created the Board. We interpret and apply agreements and rules

*Excerpted from Paragraph 2 of Agreement dated March 22, 1991 creating S.B.A. #1048.

as written by the parties. We do not, however, operate in a vacuum. Just as we have to rely on common law principles of contract interpretation when determining whether or not a contract has been violated, we also must rely on common law principles relating to damages when determining appropriate remedies for such violations. In the agreements here involved, the parties who gave life and meaning to the agreements did not see fit to include a penalty provision to be applied in the event of a violation of the agreement even though there is nothing inherently wrong in having a penalty provision in a contract or agreement. In fact, many agreements do contain their own measure of damages for violations thereof.

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. Therefore, we reject the Organization's request for compensation as outlined in Part 3 of the claim as presented. In support of this decision we offer 3rd Division N.R.A.B. Award 19574, Award No. 55, P.L.B. 2037 and Award No. 40, P.L.B. 3657 as precedent.

While we sympathize with the frustration felt by the Organization where, as here, the Carrier has repeatedly thumbed their nose at the agreement, we strongly suspect that this issue will be resolved elsewhere by the aggrieved party. We do not, however, believe that two (2) "wrongs" will make a "right." For

this Board to award punitive or affirmative damages where none are provided for in the agreement of the parties would be just as wrong as is Carrier's repeated violation of the agreement. We would repeat to the Carrier the advice which was proffered by 3rd Division N.R.A.B. Award 19574 to the effect that "calculated violation of the contract, such as in this case, cannot lead to a constructive relationship between the parties." We would add that continued failure to abide by the terms of Appendix "F" and repeated instances of ignoring the provisions and conditions of nationally negotiated Letters of Agreement such as the December 11, 1981 Letter of Agreement, will surely generate additional decisions such as found in 3rd Division N.R.A.B. Award No. 28513, 26770 and 27189.

AWARD:

Claim disposed of as outlined in the FINDINGS.

James E. Mason
Chairman and Neutral Member

Richard A. Lau - I dissent, written dissent is attached.
Richard A. Lau
Organization Member

L. F. Miller, Jr. - Dissenting to issue of notice; see attached written dissent.
L. F. Miller, Jr.
Carrier Member

Re-Issued At Palm Coast, Florida
September 4, 1992

SBA 1048
Case 21

LABOR MEMBER'S DISSENT
TO
AWARD NO. 21 OF SPECIAL BOARD OF ADJUSTMENT NO. 1048
Referee Mason

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.

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 order to support this erroneous finding, the Referee set forth three premises and then reasoned from these premises to reach his conclusion. If one or more of the premises is false, then the conclusion is obviously invalid. As shall be demonstrated below, not just one, but all three of the Referee's premises are wrong.

The Referee held that the common law principles relating to damages applied in this case and, therefore, because the Claimants were fully employed it would be a penalty payment if the monetary claims were sustained. The Referee had it wrong on all three counts. First, he incorrectly applied the common law rule of damages in this case. Second, without a shred of evidence or reasoning, he found that there was full employment. Finally, he seriously confused "damages" and "penalties".

The Referee's first and greatest error was his improper application of the common law rules on damages in this dispute. No less an authority than the Supreme Court of the United States has rejected this type of simplistic application of common law concepts to collective bargaining agreements. In Transportation Communication Employees Union v. Union Pacific Railroad Company 385 U.S. 157 (1966) the Court stated:

> "'... A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common law concepts which control such private contracts [cases cited]. It is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate.... The collective agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or a particular plant.'" (Underscoring added)

The following year, the United States Court of Appeals in Brotherhood of Railroad Signalmen v. Southern Railway, 380 F.2d 59 (1967) said:

"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 of 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.

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)[1]

The rationale of the Courts did not go unheeded by the NRAB. Subsequent to the Signalmen decision literally dozens of Referees in hundreds of cases have either explicitly or implicitly applied the reasoning in Signalmen and sustained monetary claims when work

[1] The Signalmen case is of particular relevance here inasmuch as it may be construed as precedent on this property. The Norfolk Southern Corporation now controls the former Southern Railway and Norfolk and Western Railway and operates them as a single transportation system.

was improperly removed from the bargaining unit and assigned to others, thereby causing a loss of the right to perform that work to the members of the bargaining unit. While no purpose would be served by citing and quoting all of the awards, we are compelled to cite a representative sample so that future readers may see just how wrong this award is:

AWARD 15689: (Third)

"*** However, in those cases the Awards are in conflict as to whether Claimants were entitled to compensation for breach of the Agreement during a period they were on duty and under pay. ***

In Award No. 10963 (1962), in which the present Referee participated we held that: (1) this Board was without jurisdiction to impose a penalty; (2) the common law of damages for breach of contract applied; (3) damages were limited to actual proven loss of earnings. In Award No. 13236 (1965) involving the same parties herein, we reached the same conclusions; and citing Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 338 F.2d 407 (C.A. 10, 1964), in which certiorari was later denied, 85 S. Ct. 1330, we awarded nominal damages.

Subsequent to the Gunther case, on June 20, 1966, Public Law 89-456, 80 Stat. 208, amending the Act, was enacted. It provided for severe restraints on the scope of judicial review of awards of the Railroad Adjustment Board, all of which is spelled out in Brotherhood of Railroad Trainmen, et. al. v. Denver and Rio Grande etc. 370 F. 2d 866 (C.A. 10, 1966), cert. den. 87 S. Ct. 1315. In this second Denver and Rio Grande case, involving the same parties and issue as in the 1964 case, supra, the court held 'the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of damages, like the application of affirmative defenses, offers no jurisdictional question.'

In the period between the Gunther case and the second Denver and Rio Grande case the Supreme Court on December 5, 1966, handed down its Opinion in Transportation-Communication Employees Union v. Union Pacific Railroad Co. 385 U. S. 157, wherein it stated:

> "'... A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common law concepts which control such private contracts. John Wiley & Sons v. Livingston, 376 U.S. 543, 550; cf. Steele v. Louisville & N. R. C., 323 U.S. 192. It is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate.... The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or of a particular plant.'

Shortly thereafter the Fourth Circuit, on May 1, 1967, decided Brotherhood of Railroad Signalmen of America v. Southern Railway Company. In that case the parties herein were parties therein. The same issues were raised relative to two of our Awards as in the instant case both as to the merits and damages -- the record contained no evidence of any loss of time, work or pay by any of the employes who were designated in the Awards to receive compensation for the lost work. The court reversed the holding of the District Court that since Gunther permitted judicial computation of the size of monetary awards it could exercise a discretion to allow Claimants only nominal damages where they had lost no time. The court held that the District Court's approach:

* * *

In the light of the amendments of the Act and the judicial development of the law, cited above, we hold that when the Railroad Adjustment Board finds a violation of an agreement it has jurisdiction to award compensation to Claimants during a period they were on duty and under pay."

AWARD 16009: (Third)

"The most recent judicial pronouncement on the issue of damages for contract violations where no actual losses were alleged or shown and the controlling agreement contains no penalty provisions is found in Brotherhood of Railroad Signalmen of America v. Southern Railway Company, a corporation ____ F. 2d ____ (C. A. 4, decided May 1, 1967). Therein, the court disavowed the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings and stated that this Board is not precluded from granting compensation for the loss of opportunities of

"earnings resulting from the contracting out of work under circumstances similar to those found in this dispute. We find the Fourth Circuit decision applicable in this case and will sustain the claim with certain modifications." (Underlining by Referee)

AWARD 16430: (Third)

"Carrier contends that Claimants were fully employed and therefore the compensation sought should not in any case be granted. But there was a loss of earnings opportunities and, pursuant to many Awards of this Division (6063, 6284, 16009), the hours worked by employees who held no seniority in Territory No. 40 are a proper measure of the Claimants' loss and should be paid. ***"

AWARD 19899: (Third)

"After a thorough consideration of the various Awards, the Board continually returns to, and finds authority in, the determination of the United States Court of Appeals, Fourth Circuit, in Brotherhood of Railroad Signalmen of America v. Southern Railway Company 380 F 2d 59 : 55 CCH Labor Cases 11,941 (May 1, 1967); rehearing denied (June 9, 1967) 55 CCH Labor Cases 12, 302; cert denied (November 13, 1967) 56 CCH Labor cases 12,272. (Emphasis in original)

In the case, the Court of Appeals considered a lower Court's refusal to enforce a National Railroad Adjustment Board award of damages; which refusal was grounded upon 'full employment' at all relevant times. In reversing and remanding, the Fourth Circuit stated:

> '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 (Gunther v. San Diego and Arizona Eastern Railroad, 382 US 257 (1965)

"'.
.
.

'Yet, if, whenever no direct lay-off of a union's members is involved, the employer can unilaterally contract out work that has been allocated by agreement to the union, under no greater threat than liability for merely nominal damages, the collective agreement would soon become a worthless scrap of paper. It requires but slight insight into the realities of human behavior to realize that neither party would feel bound to abide by an agreement that will not be effectively enforced in the courts.'

We are not congnizant (sic) of any basic reason why the rationale of the Fourth Circuit should be adopted and adhered to by Referees in one line of cases, but ignored in cases dealing with demonstrated violations of Article IV of the National Agreement, nor have the Article IV cases suggested any cogent reason for such a distinction.

Article IV of the National Agreement results from the free collective bargaining process. While it does not compel either party to agree, it does require a Carrier to notify the Organization of plans to contract out work within the scope of the applicable agreement. Thereafter, if requested, a meeting shall be held and a good faith attempt made to reach an understanding concerning the contracting out.

We have difficulty in hypothicating (sic) many instances more imperative to loss of opportunities than a proposed contracting out of bargaining unit work - which may well result in a severe deprivation amounting to a substantial tangible loss of work and pay. Article IV is mandatory in concept. We wonder then if, as noted by the Fourth Circuit it may become a 'worthless scrap of paper' if it may be unilaterally ignored. Accordingly, we favor the rationale of the Fourth Circuit as properly applied to violations of Article IV. For these stated reasons, the Board holds that a claim for damages may be sustained for a violation of Article IV of the 1968 National Agreement even though employees in question were fully employed at all relevant times. This result does not compel Carrier to agree to anything or to do anything other than what it previously agreed to i.e. give notice and bargain in good faith. While it is urged by Carrier that damages may be speculative, it is Carrier itself, by

"its failure to comply with its agreement, who places the matter in that posture - not the employees.

The Board has considered, but rejected, the approach to damages in Public Law Board #249 - Docket #16 and Award 19635 (one of which speak of damages in terms of one-half (½) of the claim and the other, one-half (½) of the amount paid to the outside contractor) for two reasons. Initially, neither Award states a basis for its one-half (½) concept and secondly, it seems that a damage award should deal more specifically with the detailed loss of opportunity in question. Similarly, we reject the results of Award 18792 which dealt with payments 'in futuro'. While that concept may have had a particular reference to the facts there under consideration, as a general proposition, it could easily lead to numerous unforseen (sic) speculations as applied to individual cases.

Rather, we feel, the Board should award damages, in each individual case, in direct relationship to the loss of job opportunity - and a tangible loss of pay - notwithstanding a 'full employment' situation." (Underscoring in original)

AWARD 21678: (Third)

"The only question remaining is relative to appropriate remedy. Claimants seek compensation for 64 hours of straight time, the amount of time which the Fargo District gang consumed in performing the disputed work. Carrier resisted payment of damages even if arguendo the Agreement was violated on the grounds that Claimants suffered no loss of earnings and the Board has no authority to award damages. We have dealt authoritatively with similar contentions in prior Awards involving these same parties and concluded that where, as here, Claimants by Carrier's violation lost their rightful opportunity to perform the work then they are entitled to a monetary claim. Nothing on this record persuades us to deviate from those precedents in this case. See Awards 19899, 19924, 20042, 20338, 20412, 20754, 20892." (Underscoring in original)

AWARD 24621: (Third)

"We turn now to Carrier's argument about compensation. Carrier argues that Claimants may not receive compensation because they were fully employed during the claim period. The Organization argues that the assignment of this work to outside forces resulted in loss of work opportunity and related monetary benefits to

"Claimants. We agree. See Awards 12785, 15689, 15888 and others. 'This Board is not precluded from granting compensation for the loss of opportunities of earnings resulting from the contracting out of work ...' (Award 16009).

The claim is sustained and compensation shall be paid to Claimants as requested in Claim (3)."

AWARD 25402: (Third)

"Furthermore, it cannot be denied that Carrier actually received benefit from the work performed. Eventually it would have utilized Claimant's services to weed-mow the two miles of right of way in question at an undisputed cost based on 8 hours of straight time pay. The actions of an unauthorized third party have therefore conferred financial benefit on Carrier while removing a commensurate work opportunity from Carrier's Employes.

Though Carrier has exhibited no bad faith here, the Board concludes that an affirmative duty rests on Carrier to enforce the Scope Rule. By reason of the breach of its Lease Agreement, Carrier would appear to have recourse, which Organization does not, against the Lessee for damages, if any, resulting from that breach.

Finally, though Claimant was in fact employed elsewhere at the time the mowing took place, he has nevertheless been deprived of a future opportunity to perform that additional work to which he was rightfully entitled. Accordingly, the claim must be sustained."

AWARD 29232: (Third)

"The Carrier maintains that the Claim seeks unsubstantiated, excessive hours of pay at improper rates and that Claimants are not proper. The Organization contends that the issue of whether Claimants were proper was not raised by the Carrier during the on-property handling of this Claim. Moreover, urges the Organization, Claimants are entitled to the compensation sought by the Claim even though they worked on the Claim dates and received compensation therefore because Claimants lost work opportunities when the Carrier wrongfully assigned the work to the signal forces. Moreover, the Organization urges, the Claim represents an attempt to police the collective bargaining Agreement and require the Carrier to follow its provisions.

Inasmuch as the issue of whether Claimants are proper was not raised during the on-property handling of

> "the Claim applicable Board rules prohibit the Board from considering that argument. We agree with the Organization that Claimants are due compensation despite the fact they worked and received compensation on the Claim dates. Claimants in fact did lose work opportunities due to the Carrier's violation of the Agreement, and this type of Claim long has been viewed as a proper device to police the Agreement."

The above-quoted awards establish that over a period of twenty-five (25) years, from 1967 through 1992, the NRAB has consistently and frequently applied the reasoning in Signalmen and awarded compensation when work was improperly removed from the bargaining unit and assigned to strangers, thereby causing a loss of work opportunity. The fact that the Claimants in each case were regularly assigned at the time of the violation mattered not. The compelling point was the lost work opportunity. The application of the common law rule on damages did not operate to preclude sustaining monetary claims in these awards and there is no reason that it should have been so applied here.

After improperly applying the common law rule on damages in this case, the Referee next compounded his error by referring to the monetary claim as a "penalty". Apparently, the Referee was confusing "penalties" with "damages". This issue has also been examined by the NRAB and thoughtful Referees have consistently distinguished between "damages" and "penalties" as follows:

AWARD 10033:

"The Carrier in this case has contended that there were no monetary damages and the argument has been made by the Carrier on the premises and here that this Board has no authority to award a penalty.

Since the presidential fact finding Board in 1937 rendered its opinion in which it stated:

> '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 violations.'

This division and others has continued to characterize awards in such cases as a penalty. The fact is that what we are dealing with is nothing more than a Contract violation and an award of damages for such breach. Granted that in some cases the award may be greater than the actual damage sustained but as long as this issue is not properly presented on the premises this Board has been forced to establish some criterion in the way of liquidated damages when the facts show that as a result of the breach some damage potentially flowed. It is perhaps unfortunate that the word 'penalty' ever crept into the language of the Board."

AWARD 11701: (Third)

"We are of the opinion that the fundamental factor in this dispute is the violation of the Agreement. For Carrier to concede the breach and then to assert that Claimant is not entitled to reparations is virtually to ignore its responsibility as a party to the Agreement. For an Agreement to be effective, both parties must uphold the terms. It is not enough to recognize the breach without expecting the violator to accept the consequences for its act. We, therefore, cannot sustain Carrier's position that Claimant must show that he 'was in some manner adversely affected by the action of the Carrier' for this factor is irrelevant and distracts attention from the real issue of the admitted violation of the Agreement. The argument that compensation to Claimant would be in the nature of a penalty is likewise extraneous, for it brushes aside the sanctity of the Agreement. Claimant's behavior or employment income are not the conditions that caused the breach. We regard the claim as one for damages rather than a claim for a

"penalty. Accordingly, we hold that Mr. Swafford is entitled to full indemnification for his claim."

AWARD 11937: (Third)

"Carrier avers that Claimants can show no damages because they were fully employed at the time the fence was erected. But, Carrier has adduced no evidence that Claimants could not have performed the work by working overtime or that the work could not have been delayed until a time at which it could be included in Claimants' work schedule. When a Carrier violates the scope rule of an Agreement the covered employes have been damaged **de jure**; but, the extent of the monetary damages, if any, is a matter of proof. Where, as here, the violation has been established, the Claimants have made a **prima facie** case of damages as claimed and the burden to rebut, by factual evidence, shifts to the Carrier. Carrier, in this case, has not met the burden of negating damages as claimed.

Carrier confuses 'damages' and 'penalties.' While monetary 'damages' awarded are sometimes loosely referred to as 'penalties' the terms are technically distinct. Technically, in contract law, monetary 'damages' make whole a person injured by violation of an agreement; 'penalties' are the assessment of a fine over and above damages suffered. Monetary 'penalties' are imposed as punishment for a violation of a contract with the objective of deterring like future conduct. Therefore, the making whole of Claimants herein for work they would have performed and wages they would have earned, absent Carrier's violation of the Agreement, is the award of compensatory 'damages;' not a 'penalty.' ***" (Underscoring added)

AWARD 16946: (Third)

"By its violation, Carrier deprived Claimant of the opportunity to perform and to be paid for the work, possibly at overtime rates. We do not see an award to Claimant of pay for the time spent on the involved work as a penalty, like a fine for passing a traffic light, but rather as part of redressing the damage done by Carrier's violation."

AWARD 19814: (Third)

"Insofar as Part 2 of the claim is concerned, having found that the Agreement was violated in this case, we now hold that this monetary portion of the claim is one for damages and not a penalty claim as argued by Carrier,

"for it is clear from the record that the motivation behind the claim was primarily to seek enforcement of the Agreement. Although there are conflicting prior Awards on the question of 'damages' vs. 'penalties' we feel that the Opinion of the Board as expressed in Award 11701, involving the same parties as in the instant case, is significant and is quoted, in part, as follows:

> 'Claimant contends that he is entitled to reparations resulting from the violation of the Agreement. Carrier, on the other hand, maintains that Claimant suffered no loss because he was employed. Carrier also points out that the compensation requested by Petitioner is in the nature of a penalty and that the Agreement makes no provision for a penalty payment in the event of a violation of the Agreement.
>
> We are of the opinion that the fundamental factor in this dispute is the violation of the Agreement. **** For an Agreement to be effective, both parties must uphold the terms. It is not enough to recognize the breach without expecting the violator to accept the consequences for its act. **** The argument that compensation to Claimant would be in the nature of a penalty is likewise extraneous, for it brushes aside the sanctity of the Agreement. Claimant's behavior or employment income are not the conditions that caused the breach.'

This principle has been reiterated in numerous other Awards of this Board, and we subscribe to the reasoning therein."

In this case, there can be little question that if the Carrier had not assigned outside contractors to clean the hopper cars at Princeton, the Claimants would have performed the work. In fact, the Referee clearly recognized that, "It is also unchallenged that at the location in question, Maintenance of Way employes were used to perform car cleaning work for a period of about six (6) years prior to the incident here in dispute." (Award at 9). Hence, the inexorable conclusion is that Claimants were damaged when they lost

the opportunity to perform the work and receive the concomitant reparations.

In addition to the general body of awards cited above, it should be noted that the Norfolk and Western raised precisely and exactly the same penalty pay argument in Case Nos. 59, 60, 62 and 63 of Public Law Board No. 1837. In each of those cases, the Referee rejected the N&W's argument and awarded the pay claimed because the Claimants had been denied the opportunity to perform the work. Representative of the Referee's ruling in each of these cases is his award in Case No. 59, which held:

> "The Record reveals that the Claimants were fully qualified and available to perform the work. Although the Carrier contests their availability, contending that they were working on assignments elsewhere, this Board finds that since those assignments had been made BY THE CARRIER the Claimants are still to be considered available. As the Third Division stated in Award 13832:
>
> > 'The fact is that Claimants were working where Carrier has assigned them, hence were not only available but Carrier was then availing itself of them. If they were not available at the time and place where the extra work was to be done, it was because Carrier chose not to assign them there.' (See, also Third Division Awards 19324 and 25964).
>
> With respect to the Carrier's argument that granting the claim would be considered a penalty or somehow excessive, this Board states that in numerous awards the Divisions and various Boards have held that awarding the pay for rule violations of this kind is appropriate since the Claimants were, in essence, denied the work." (Underscoring added)

The Referee in Case No. 59 and the like cases mentioned above sustained the monetary claim because the Claimants had been "denied the work". This rationale is consistent with a "damages" and not a "penalty" theory. In addition, See Third Division Award 19542, Award Nos. 4 and 5 of Public Law Board 249 and Case Nos. 48 and 52 of Public Law Board No. 1837 which held to a similar effect ON THIS PROPERTY.

The Norfolk and Western Public Law Board awards referenced above are particularly pertinent here, not only because they are on this property, but also because of the enabling language in the Agreements which created these Public Law Boards. In the instant case, the Referee relied upon the language in the Special Board of Adjustment Agreement to support his erroneous "penalty" theory. At Page 15 of the award, he wrote:

> "*** This Board is a creature of an agreement made by and between the respective parties. We do not have authority or jurisdiction 'to change existing agreements governing rates of pay, rules and working conditions, and shall not have the right to write new rules.'* We rule on issues and arguments raised during on-property handling of a dispute. We are not a de novo tribunal. ***
>
> *Excerpted from Paragraph 2 of Agreement dated March 22, 1991 creating S.B.A. #1048."

The problem with the Referee's argument is that the language from Special Board of Adjustment No. 1048 which he quotes is standard language in virtually all Public Law Board and Special Board of

Adjustment Agreements. Virtually identical language appears in the fourth paragraph of the Agreement that established Public Law Board No. 1837. As we pointed out above, the Referee in Case Nos. 59, 60, 62 and 63 in Public Law Board No. 1837 sustained the monetary claims in those cases, notwithstanding the same language which this Referee apparently found so restrictive to his "authority and jurisdiction". Case Nos. 59, 60, 62 and 63 resulted in very substantial monetary payments. If indeed the Carrier believed that the Special Board of Adjustment language in question restricted the jurisdiction of the Referee in the manner suggested by this Referee, one would have expected the Carrier to challenge the monetary award. Did the Carrier refuse to make the monetary payments? Absolutely not. Did the Carrier challenge the jurisdiction of the Referee in court? Absolutely not. Instead, the Carrier paid the awards as directed and then turned right around and drafted the Special Board of Adjustment No. 1048 agreement, and included the same type of language under which the Public Law Board No. 1837 Referee had made the monetary awards in Case Nos. 59, 60, 62 and 63.

While it is certainly not necessary to ascribe to the "penalty theory" in order to find sound basis for sustaining the monetary portion of this claim, we would be remiss if we failed to set the record straight on this issue as well. Although it is not completely clear, it appears that the Referee has ruled that he has no authority or jurisdiction to issue a penalty because there is no

"penalty provision" in the Agreement. Once again, the Referee's finding is at odds with literally hundreds of awards of the NRAB and Public Law Boards. 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:
>
> > "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 in the above-quoted awards. 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 hour work week provided for in the National Agreements establishes a minimum of forty 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:

AWARD 13349: (Third)

"However, the Carrier contends the Claimants have proven no damages. It is firmly established that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Brotherhood of Railway Trainmen vs. Denver & Rio Grande Railroad Company (10 circuit C.A. 7651 & 7632) related specifically to a dispute between a railroad and the members of a union. This case is binding upon this body. As stated the evidence shows that the Carrier has failed to employ the members of the Brotherhood as agreed. But the evidence also establishes that the Claimants were employed at another point on the Carrier's lines on the dates the disputed work was performed. However, the evidence indicates the employes and at least some of the equipment were available at other times and further that the work could have been done at other times.

The burden is upon the employe to show what his loss has been. But upon showing that he has sustained a loss of certain work and what that work was he has overcome this burden. If the Carrier wishes to show in mitigation that the employe received other income, the burden of proof is upon the Carrier. Further, in a case such as this where the employe could have done the work at more than one time the Carrier must show that the employee was employed at all times when he could reasonably have done the work."

AWARD 14004: (Third)

"We do not distinguish between a contracting out case and one in which work reserved to a class or craft is performed by other employes stranger to the agreement.

The fact that Claimant was elsewhere working at the time of the violation is not proof that he could not have performed the crane work. In the instant case, therefore, Carrier having failed to adduce any evidence that the work involved could not have been performed by Claimant, has failed in its burden to prove an affirmative defense to overcome Petitioner's prima facie case. In the posture of the record we are not confronted with

"the legal distinction between 'penalties' and 'damages.' See Award No. 11937.

We find it unnecessary to decide the number of hours the crane was operated on the project. The make whole theory will be satisfied by Carrier paying to Claimant his pro rata rate for the hours the crane was operated on the project as recorded in Carrier's records kept in the ordinary course of business. We will sustain paragraph 2 of the Claim to the extent of the foregoing prescription."

AWARD 14982: (Third)

"In resolving Claim No. 2 herein, we will follow Award No. 14004 (Dorsey). In this award, the Board held that there was no distinction between a contracting out case and one in which work reserved to a class or craft is performed by other employes stranger to the Agreement. Also, in Award 14004, we stated:

> 'The fact that Claimant was elsewhere working at the time of the violation is not proof that he could not have performed the crane work. In the instant case, therefore, Carrier having failed to adduce any evidence that the work involved could not have been performed by Claimant, has failed in its burden to prove an affirmative defense to overcome Petitioner's prima facie case. In the posture of the record we are not confronted with the legal distinction between "penalties" and "damages." See Award No. 11937.'"

AWARD 19268: (Third)

"This Board has held before, and it is basic in order to maintain the Scope of any collective agreement, that work which belongs to those under an agreement cannot be given away to others not covered by the agreement except under circumstances that are so unusual as to fall within recognized exceptions to the general rule.

Even if Carrier had made a reasonable effort to maintain a sufficient force of signalmen, it would be obligated to show that the work which had been contracted out could not have been performed by the Claimants on rest days, by way of overtime, or by rearrangement of their work schedule. The Board finds that Carrier has not met its burden of proving that it could not have

"worked existing signal employes on weekends or extra hours during the week to perform the work."

AWARD 19324: (Third)

"On June 13, 1969, Carrier assigned B & B forces to make temporary repairs to a steel slat rowing (sic) door at Shop 18, Oneonta, New York, that had been damaged by a switch engine earlier that day. On June 24, 1969, a Plumber Foreman and three Plumbers were assigned to make permanent repairs to the door. Claimants are all members of B & B Force. Claimants were available and qualified to have performed this work. Award 4845 (Carter) confirms Claimant's position in this case. On the basis of said Award, Claimants were entitled to perform the involved work. Carrier, not having proved that this work could not have been performed on overtime or by rescheduling work, is also liable for damages as claimed in Part 2 of this claim. However, Carrier is not liable for the interest claimed in Part 3 of this claim."

AWARD 19846: (Third)

"With respect to Carrier's contention that Claimants were 'fully employed' when the disputed work was performed and therefore suffered no monetary loss, the Board would make two observations. First, this seems to be a new defense, not raised on the property and not properly before the Board. Second, even if a proper defense, to support it Carrier would be required to show that Claimants could not have performed the contested work during overtime hours or on weekends and this it has failed to do."

AWARD 19924: (Third)

"Carrier argues that Claimant has suffered no monetary loss and no rule of the Agreement requires or provides for a penalty payment. We have examined with care the cases cited by both parties on the subject of punitive damages and recognize the divergent philosophies expressed in those Awards. In the case before us Carrier has offered no proof that the work in question could not have been performed on overtime (in fact the work was performed partially on one of Claimant's rest days) or that it could not have been performed during regularly scheduled hours of work. We agree with those cases which hold that Claimant lost his rightful opportunity to perform the work and is entitled to a monetary claim. See Awards 12671, 17059, 18365, 16430, 19441, and 19840."

AWARD 27485: (Third)

> "4. Innumerable Awards have held that -- absent emergency or total unavailability of qualified employees -- where there is a contractual violation, a monetary remedy is appropriate. If, in fact, the Claimants should have been assigned the work in question, the work they performed during the period in question could have otherwise been accomplished as directed by the Carrier."

AWARD 28851: (Third)

> "*** The Board also denies the Carrier's view that since the Claimant was fully employed and suffered no monetary loss, he is not entitled to 'enrichment.' There is no evidence that these four jobs could not have been assigned the Claimant at some point. They were not shown to be required on the dates in question. Given the undisputed record of the Claimant's hours worked in the previous seventeen (17) months, the Claim is sustained in these instant circumstances."

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 N&W because no such showing was possible. The inescapable fact is that the Claimants had cleaned the hopper cars at Princeton for at least six years and there is no reason they could not have cleaned them on the claim dates. Hence, the Claimants suffered a loss of work opportunity for which they were entitled to receive associated wage loss.

It is transparently clear that neither judicial or arbitral precedent prohibited the sustaining of the monetary award in this claim. In fact, precisely the opposite is true. There is ample precedent in both forums to mandate a sustaining award. The Referee's finding that he somehow lacked authority or jurisdiction to sustain the monetary claim is without credible support. The simple fact is that this was not a matter of jurisdiction or authority as the Referee attempts to assert. Instead, the Referee was dispensing his own brand of industrial justice based on his subjective notion of equity. The problem is that there is no justice or equity in rewarding a Carrier who, by the Referee's own finding, not only engaged in "repeated violation of the agreement" but also, "repeatedly thumbed their nose at the agreement" and thereby caused their employes to suffer clear and unmistakable monetary damage.

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

Richard A. Lau

R. Lau
Employe Member

SBA 1048
Case 21

CARRIER MEMBER'S DISSENT
TO
AWARD 21
SPECIAL BOARD OF ADJUSTMENT 1048

Without wishing to unnecessarily expand the already lengthy written record in this case, certain points in this Award are incorrect and need to be addressed. For that reason, this dissent is required.

First, on page 11, the Award stated that Carrier raised a "new argument" [that the December 11, 1981 "Berge/Hopkins letter" was not applicable on NW] for the first time at the executive session; this is factually incorrect. During the protracted handling of this case on the property, the Organization never relied on or referred to the "Berge/Hopkins letter." However, this issue was raised by the Organization for the first time in its submission (which was received by Carrier shortly before the Referee Hearing). During that Referee Hearing, Carrier not only argued that the "Berge/Hopkins letter" was not applicable on this property, but also objected that its introduction into the record was a new position not handled on the property and should not be considered. As a result, it was the Organization, and not the Carrier, that belatedly raised a position that was not handled on the property, and this position (that the "Berge/Hopkins letter" supported the claim) should not have been considered by the Referee in rendering this Award.

Furthermore, the Board's determination that the "Berge/Hopkins letter" is applicable on this property is in error. The rationale contained on pages 10 and 11 of the Award ignores the fact that Rule 59(p) of the July 1, 1986 schedule agreement on this property makes it clear that it is "sole agreement" between the parties. In light of that language, agreements that were not contained therein which predated that scheduled agreement (such as the "Berge/Hopkins letter") are not applicable on this property. This Award failed to properly apply Rule 59(p), and in fact did not even mention it. Therefore, the Board's finding that the "Berge/Hopkins letter" is applicable on this property is improper and incorrect and is not considered as a precedent on this point.

For the foregoing reasons, we dissent to the Board's findings on the points discussed above.

L. F. Miller, Jr.
Carrier Member