

Award No. 6465
Docket No. MW-6237

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
BANGOR AND AROOSTOOK RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, that:

- (1) The Carrier violated the agreement when it required or permitted a loading platform at Derby Shop to be constructed by employes holding no seniority under the effective agreement, on June 13, 1951;
- (2) Carpenter K. H. Beals be allowed twenty-four (24) hours' pay at his straight time rate account of the violation referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On June 7, 8, and 11, 1951, employes holding no seniority under the effective agreement, consumed twenty-four (24) hours in performing work which is contemplated within the scope of the effective agreement, namely: constructing a loading platform in front of the Carrier's Machine Shop at Derby, Maine.

Bridge and Building Carpenter K. H. Beals submitted a time slip claiming twenty-four hours' pay at his regular rate of pay account of the violation. Mr. Beal's claim was denied in accordance with the following memo:

"BANGOR AND AROOSTOOK RAILROAD COMPANY

Houlton, July 5, 1951
File 037.1

TO—K. H. Beals

FROM—C. E. Garcelon

Referring to your claim of 24 hours work on account of work being done by Mechanical Department employes at Derby.

I am declining this claim on the basis that you were employed on the days that this work was done by the Mechanical Department employes.

Cy: W. J. Strout"

The denial quoted above was appealed to Superintendent, Bridges and Buildings, Mr. C. E. Garcelon, who tacitly admitted the agreement violation

The Company is, however, opposed to the theory that an employe who loses nothing and who works full time, as Mr. Beals did, has a right in an incident of this kind to fine or penalize the Company in his own behalf in the form of a time claim.

The amount in this instance is small, but the Company believes the principle is important.

All of the matter contained in the Company's submission has previously been discussed with the Organization representing the employes.

OPINION OF BOARD: On July 7, 8 and 11, 1951, employes holding no seniority under the Agreement worked 24 hours in constructing a loading platform in front of the Carrier's machine shop at Derby, Maine. It is the position of the Employes that under Article I, Section 1, all work in the Maintenance of Way and Structures Department shall be performed by employes covered by the Agreement.

It is the position of the Carrier that Beals worked full time during the period in question, and lost no time and that an employe has no right to fine or to penalize the Carrier where the claimant has suffered no monetary loss.

The claim before us is in the nature of a penalty against the Carrier for having violated the Agreement. The Carrier relies upon a number of decisions of the First Division of the National Railroad Adjustment Board to the effect that where claimant was otherwise employed on the day, or days, in question, he was not available for the services in question and not entitled to an Award. The Employes likewise rely upon decisions of the Third Division of the National Railroad Adjustment Board to the effect that proof of wage loss is not controlling where the Carrier deliberately violated the Agreement. In the case at bar there was a violation of the Agreement by the Carrier for the reason that the shop foreman used employes to perform work that properly belonged to the B & B Gang.

The case is controlled by Awards 4869, 4921 and 3375.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the terms of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of January, 1954.

DISSENT TO AWARD 6465, DOCKET MW-6237

This Award is in error for the reason that it sustains a claim for a penalty when the Agreement between the parties hereto contains no penalty covering time during which claimants admittedly were fully employed at other work. Our office, conferred by statute, does not go beyond the interpretation of rules, rates of pay and working conditions. As to the rules, it cannot be shown by the majority that their violation calls for payment for time consumed by the shop forces to perform the work herein involved. If the majority could show that such a payment is provided for in the rules, it would amount to a penalty. A contract provision for a penalty disproportionate to the damage experienced is wrong per se (Williston on Contracts, par. 777, p.2184). Therefore in the so-called interpretation of the rules here, the Award not only injects a penalty that is wholly absent from the rules, but if that very penalty provision were present in the rules, it would be unenforceable. This Board, in the experience of its First Division, has adhered in a long line of Awards, all cited in this proceeding, to the proposition that the claimant must have lost work in order to make out a case for recovery.

Here the Carrier is ordered to pay a bonus amounting to a penalty grossly disproportionate to damage which the claimants did not experience because they were fully employed. In Republic Steel Corp. v. Labor Board, 311 U.S. 7, the Supreme Court said, speaking of a labor statute directed to the same general purpose as our Railway Labor Act, "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.'"

Limited as we are here to the adjudication of disputes growing out of the interpretation or application of Agreements, we have no discretion, at all, to "devise punitive measures, and thus to prescribe penalties of fines which the Board may think would effectuate the policies of the Act."

This Award and those few with which it apparently seeks to conform are beyond the realm of interpretation and show the need for a response to lawful jurisdiction.

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ J. E. Kemp