NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19899
THIRD DIVISION Docket Number MW-19790

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(St. Louis-San Francisco Railway Company

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

(1) The Carrier violated the Agreement when it used outside forces to plow fire guards from Mile Pole C-567 to Mile Pole C-576 on December 2, 3, 7, 8, 9, 10, 11, 14, 17, 19, 22, 28 and 30, 1970 (System File A-8322/D-6373).

(2) The Carrier also violated Article IV of the National Agreement of May 17, 1968 when it failed to give advance written notification to the General Chairman of its intention to contract this work of plowing fire guards.

(3) Special Machine Engineer E. J. Lowery be allowed thirty and seven-tenths (30.7) hours of pay at the special machine engineer's straight time rate because of the violation referred to in Part (1) hereof.

(4) The Carrier shall also pay the claimant six percent (6%) interest per annum on the monetary allowance accruing from the initial claim date until paid.

OPINION OF BOARD: The Carrier disputes Organization's claim (1) that it violated the Agreement when it used outside forces to plow fire guards on certain specified days. Among other things, Carrier denies that the Organization has demonstrated that the work in question has been exclusively performed by bargaining unit personnel to the exclusion of others. Because of the proof surrounding Claim Number (2) we find it unnecessary to reach a determination in that regard. Although Claim (1) is denied, this Award should not be considered as a resolution of the merits of that dispute.

In Claim (2) Organization alleges a violation of Article IV of the May 17, 1968 National Agreement, because of the Carrier's failure to give written notification to the General Chairman of intention to contract out the work in question.

The pertinent Article is 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."

The record clearly shows that the Carrier did not notify the General Chairman of its plans to contract out the work in question; and the record also establishes that the work was within the scope of the applicable agreement (whether or not it was performed exclusively by the bargaining unit employees).

In a long series of Awards, commencing with Number 18305 (Dugan), this Board has determined that the "contracting out" prohibitions of Article IV deal with work which is within the scope of the Agreement, but that the Organization is not required (in proving a violation of Article IV) to show that the work had been performed exclusively.

We have reviewed the series of Awards and are satisfied that they are well reasoned in that regard. Because of that, and because no persuasive argument has been advanced which would compel the Board to re-examine the prior Awards concerning the quantum of proof necessary to find a violation, we will sustain Organization's Claim (2).

The Organization requests 30.7 hours of pay at the straight time rate on behalf of an identified Machine Engineer.

The Carrier resists that request because the record demonstrates that the Claimant suffered no pecuniary Loss as a result of, or during, the time the work in question was contracted out. Thus, the Carrier urges that the Board reaffirm the doctrine that it will not award compensation in damages during a period when Claimants were on duty and "under pay". In addition, although not raised on the property in specific terms, Carrier Member stresses that Article IV does not, itself, confer any work rights, and consequently the employee8 can not suffer a loss of work opportunity when Article IV is violated. In essence, then, it is urged that the Board is without authority to award damages, unless the Organization can establish a specific Scope Rule violation.

In order to dispose of the above contention, it is helpful, initially, to consider the Board's treatment of the general question of awarding damages when "full employment" has been demonstrated on the record.

This question has been considered by this Board on numerous occasions, and one notes a general lack of a unified approach to the question. In 1967, Referee Dorsey, in Award 15689 considered various aspects of the question, and re-examined prior Awards of his own on the subject. In his treatment of the question, he noted certain statutory amendments and Federal Court determinations. He concluded that a loss of opportunities for earnings which result from the contracting out of work may be a deprivation amounting to a tangible loss of work end pay for which the Board is not precluded from granting compensation, and held:

> "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 when they were on duty and under pay."

The Award provoked a rather heated Dissent by the Carrier members, in which they traced the Referee's prior treatment of the question. If it accomplished nothing else, at least the Dissent and the Labor Members' Answer thereto further crystalized the fact that the issue had produced numerous conflicting Awards and a wide variance of decisions rendered by many Referees who had served the Board.

In any event, the rationale and ultimate conclusions of Award 15689 found favor with other Referees. For example, Referee Ives, in Award 16009 sustained a claim, citing the then recent judicial pronouncement of the United States Court of Appeals, Fourth Circuit (discussed hereinafter). See also Award 15886 (Heskett) and 16430 (Friedman). No purpose is served by a detailed listing of the numerous Awards, prior to end since Award 15689 which have reached the same conclusion, nor should this Award be further Lengthened by a listing of various citations to Awards which have reached contrary conclusions. Suffice it to say that in November of 1970 the matter remained generally unsettled and susceptible of contrary conclusions. To be sure, the above cited cases did not deal with Article IV violation

With the matter in that posture in November of 1970, Referee Dugan issued the initial Award dealing with Article IV of the May 17, 1968 National Agreement (X8305). Concerning the issue of compensation for the violation, the Referee stated:

> "In regard to damages, we adhere to the principle, that damages shall be limited to Claimants' actual monetary loss arising out of the Agreement violation.... Since Claimants suffered no pecuniary Loss in this instance, we will deny paragraph 2 of rhe Statement of Claim."

Yet Award 18305 did not attempt to distinguish a violation of Article IV from other violations, as it related to the question of damages, nor did it state or Infer that the Board is without authority to award damages for an Article IV violation, because that Article "does not confer any rights to work". The Referee merely seemed to adhere to the line of cases which had previously denied damages in any "full employment" situation, and in essence, he preferred the line of decisions which ran contrary to Award 15689, cited above.

There followed a series of Awards which adopted and affirmed Award 18305, on the merits of the contracting out question, and in most part (with certain exceptions discussed below) the various Referees also adopted Referee Dugan's conclusion of denying damages if "full employment" was demonstrated on the record. The Referee herein has reviewed the treatment of the damage subject in each Article IV case presented by the parties to the dispute (where no separate finding of a "Scope violation was made), and has noted that in most part the damage denial was without significant comment, end, of significance, no Referee stated or suggested that the Board lacked authority to Award damages, or that the theory that Article IV "conferred no work rights" was a deterrant to en Award of damages.

In Awards 18306, 19153, and 19154 Referee Dugan reaffirmed his Award in 18305. In Award 18687, Referee Rimer stated:

> "We are well aware of the line of awards which have granted punitive damages to the injured party where no pecuniary loss was in evidence; we are equally aware of the many awards which have held that the Board is without authority to assess damages where the Claimant suffered no loss. We will adhere to the latter principle which we consider to be sound...."

Thus, the Referee in Award 18687 clearly recognized the two lines of authority which existed prior to Award 18305 as still offering him en option in an Article IV dispute. While he chose to follow the line contrary to Award 15689, nonetheless he rejected any concept that damages could be awarded only if a specific Scope violation was found.

In Award 18714, Referee Devine did not discuss the "full employment" concept other than to cite Awards 18305 end, (significantly), 18687. The same Referee followed that line of reasoning in Awards 18716, 18860 end 19334.

In Award 18773, Referee Edgett denied damages, but stated:

> "It would be an improper use of this Board's adjudicatory function to declare, in this case, that in no other case could it provide • remedy for Carrier's failure to give the notice required by Article IV. Questions should be determined by the Board on a case by case basis and not by broad general pronouncements. In other words the Board should decide the case actually before it. It should not attempt to lay down rules or propositions as to possible or probable issues, for the guidance of parties not before it, on issues which may arise in the future under a different state of facts."

Clearly, the Referee recognized the Board's authority in this field.

In Award 19552 the same Referee dealing with a demonstrated scope violation in a case which also dealt with a violation of Article IV when Claimants were fully employed concluded that:

> "This resulted in a clear loss of work opportunity to claimants end for this loss the Board may, and should, provide a remedy."

In Award No. 18967, Referee Cull noted:

> "There is building a respectable body of law and awards dealing with lost opportunities for employment. The law is still unsettled, however....." (underscoring supplied)

While Referee Cull denied the money claim, his Award did not suggest that the Board is precluded, in Article IV cases, from granting damages. In fact he noted that had use of outside forces resulted in loss, an award of beck pay would have been made. The same Referee affirmed in Award 18968 and 19305.

In Award No. 19056, Referee Franden noted that it was speculative if bargaining would have had the result of obtaining the work for Claimants, and he denied damages, but only after he stated:

> "The question of damages is difficult. The Carrier's violation deprived the Organization of the right to bargain."

Citing certain Awards discussed above, Referee O'Brien denied claims for damages in Awards 19191, 19254, 19399, 19440 and 19600, without. reference to the Board's authority, as did Referee Cole (19327), Brent (19626 and 19627) and Blackwell (19657).

In Award 19574 Referee Lieberman denied a claim for damages, but stated:

> "We are reluctant to treat blatant violations of contractual rights by simple reprimand. Obviously, calculated violation of the contract, such as in this case, cannot lead to a constructive relationship between the parties, as contemplated by the Act."

However, exceptions to denials of monetary claims emerged. The Board upheld money claims if the question of "full employment" had not been raised on the property; Awards 19426 (Hayes) 19578 (Lieberman), 19724 (Lieberman) and Claims for compensation were allowed when the question of "overtime" work was present; 19155 (Dugan) end 19619 (Blackwell). One Award (19631-Brent) noted that certain positions were abolished in chronological time coincident with the contracting out end held that:

> "If the claimants actually suffered a monetary loss while the contractor was on the property, their claim for pay at their respective straight time rates for an equal proportionate share of the total man hours they lost as a result of the contractor's work should be allowed."

The Carrier's suggestion that a violation of Article IV may not result in a loss of work opportunity certainly does not find authority in the cases cited immediately above. If a violation does not allow for a damage award, under any circumstance then it is of little significance whether the matter of damages was raised on the property; whether there was "overtime" involved; or if positions were abolished. Obviously, Referees Dugan, Blackwell, Brent, Hayes and Lieberman did not adopt Carrier's contention in this regard.

But, a few Arbitrators granted compensation in Article IV violations when there was no specific earning Loss and the exceptions noted above were absent. In Award 16 of Public Law Board No. 249, the Chairman of the Board sustained a claim to the extent of one-half (½) of the amount of compensation requested for each of the Claimants. The Award failed to state any rationale for that method of compensation. Similarly, in early 1973, Referee Hayes, in Award 19635 sustained the claim of the Organization to the extent of granting one-half (½) the amount of compensation paid to outside forces for the work in question. Although the Award justified the granting of damages, (discussed hereinafter) the rationale of an Award of one-half (½) of the amount paid to outside force: was not explained.

Previously, in October of 1971, Referee Rosenbloom, in Award 18792 considered the question of damages concerning an Article IV violation when none of the Claimants suffered pecuniary loss. He agreed with Claimants' assertion that they had lost the opportunity to do the work in question and that the time consumed in performing the work (which was contracted out) should be viewed as a part of the totality of their work opportunities. Because a loss of job opportunity constituted a real loss which might potentially produce actual monetary damage, the Board held that if the Claimants should suffer a reduction of hours (or be affected by a reduction in force) in the future, due to lack of work, at that time a monetary loss would be incurred as a result of the violation there under consideration. The Board concluded that Claimants therein were entitled to monetary damages in the future if and when any of them were involuntarily less than fully employed.

In Award 19635 (Hayes) noted above, the Board departed from prior Awards which held that no damage award was permitted if no specific earning loss could be shown, because ic felt that to follow those Awards would, in effect, invite the Carrier to violate, with impunity, the provisions of Article IV and be subject only to a verbal wrist-slapping by this Division. The Board stated:

> "Where the Carrier's wrongful act of contracting out work without notification to the Employees in breach of contract may have lead to an injury, and the facts are in such a state that neither the Organization nor the Carrier can conclusively prove that an injury did or did not occur as the result of the breach, who should suffer from the difficulty of proof? As one Arbitrator put it, should it be the wholly innocent employees or the employer whose breach of contract has created the possibility of injury? Past awards require the employees to endure the consequences of Carrier's breach but it would seem wiser for the Board to chart a new course less favorable to the initiator of the wrongful act." (Underscoring supplied)

In addition, Referee Hayes felt that prior Awards may have resulted in discouraging good faith compliances with contractual provisions. While this Board does not necessarily "chart new courses", it does feel that a full exploration of the question is in order, and for reasons specified below, we are compelled to conclude that damages should not be automatically foreclosed merely because Claimants were "fully employed" at the time of a violation of Article IV.

Carrier Member of the Board has raised the doctrine of "stare decisis" as a basis for a denial of en award of damages in this case. The Referee, herein, recognizes, and concurs with, that doctrine. Surely a predictability of Awards advances the orderly disposition of labor disputes and lends itself to an identifiable uniformity by this Board.

But, the Article IV Awards fail to distinguish those violations from Scope Rule violations, nor do they offer any basis for different treatment. Accordingly it is appropriate to consider all cases dealing with damage awards, including those which are consistant with 15689 (Dorsey). In that light, surely, as stated by Referee Cull in Award 18967, "The law is still unsettled . . ." We wonder then if, in fact, "stare decisis" is properly before us, and, if so, what line of determinations constitutes the "weight of authority".

Carrier suggests that only cases dealing with Article IV should be viewed in considering "stare decisis" in this dispute. While this Referee disagrees with that contention, nonetheless the result is not altered by so limiting the issue.

As we view the doctrine, one must initially identify a "weight of authority" in terms of "numbers of Awards" and/or years of consistent interpretation and application of a rule, and a confrontation with a long line of precedents which first postulate and then maintain a consistent interpretation. See Award 12240 (Coburn) citing Award 11788 (Dorsey).

There has been no postulation of a basis for denial of damages in these cases, and certainly no "years" of consistent interpretation. We have cited Article IV cases, decided by 14 Referees. Three Referees have granted damages when "full employment" was demonstrated, and one of the three also awarded damage: when the issue wasn't raised on the property (Awards 18792, 19635, 19426 and Public Law Board 11249). Yet when one views the other Awards one cannot discern a solid line of opposition. One Referee denied damages in one case, noting a "reluctance" (Award 19574) but he granted damages in two Awards when "full employment" was not raised on the property. (19578 and 19724).

Another Referee denied damages in Awards 18733, but warned that the question of damages should be determined on a case-by-case basis. Other Referees noted "conflicting authorities" (18687); found the question "difficult" (19056); found the law "unsettled" (18967), etc. Three Referees who failed to grant damage claims in certain cases, did so when "overtime" or "job abolishment" was in issue (19155, 19619 and 19631). Under these circumstances, this Board does not conclude that its Award is precluded by the doctrine of "stare decisis."

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.

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 remandir the Fourth Circuit stated:

"This approach, however, completely ignores the lose 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)

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'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 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 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 reason 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 damage: 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 mote 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 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.

This is not to say that the Board should entertain speculative claims which are not advanced and/or developed on the property. In the instant dispute, the claim is far from speculative. In its initial protest to the Carrier, the Organization described in detail the work which was contracted out, identified the geographic area of the work and specified 13 dates, in December of 1970 when the contracted out work was performed, including hours and minutes on the days in question. Further, it stated the identity of the employee who was qualified and available to perform the work and specified a dollar amount of the claim, which was reasonably related to his straight time hours for the 30.7 hours of contracted out work.

In its initial reply, the Carrier did not dispute the contracting out (although there was some discussion es to which individual or agency did the disputed work), but stated that the individual for whom the claim was made had not been effected end he had "lost no time" es a result of the contracting out.

I" its appeal, the Organization replied directly to the Carrier's "loss of time" statement and specifically stated that the use of unauthorized employees caused a "loss of job opportunities" for Claimant and cited decisions of this Board concerning that question.

For reasons specified above, the Board is of the view that the Claimant shell receive 30.7 hours of pay et his straight time rate.

The Board does not award interest in this case.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record end all the evidence, finds end holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier end 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; end

That the Agreement "es violated.

A W A R D

Claim (1) is denied for reasons stated in the Opinion of the Board.

Claim (2) is sustained.

Claim (3) is sustained.

Claim (4) is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 8th day of August 1973.

DISSENT OF CARRIER MEMBERS
TO
AWARD NO. 19899, DOCKET MW-19790,
(REFEREE SICKLES)

It has often been stated that "No award is stronger than the reasoning and authority behind it." (Awards 4516, 4770, 6303 among others). On this basis alone Award No. I.9899 is a nullity. It is not supported by the record, by the Agreement or precedent awards of the Division. By reason of its author abandoning logic, the Award is replete with contradictions, inconsistencies, and ipsedixitism.

The record in the dispute contained no probative proof by the Petitioner that the work in question has been performed by employes covered by the Agreement to the exclusion of al.1 others on a system-wide basis. Therefore, there was nc violation of the Scope Rule of the Agreement and the Referee correctly denied Part (1) of the claim.

The Referee has , however, entirely misconstrued Article IV of the May 17, 1968 Agreement, which is quoted in the Award. The Concurring Opinion of the Carrier Members to Award No. 18773, setting out the purpose and intent of that Article is by reference incorporated herein. There is nothing in Article IV that restricts in any manner the right of the Carrier to contract out work. To construe that Article as the Referee here does completely ignores the responsibility of the Board to apply the following clear provision thereof:

> "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."

Furthermore, in its submission to this Board the Petitioner clearly set forth the intent of Article IV as follows:

> "The essence of Article IV is in the opportunity it affords the enployes to attempt to persuade the Carrier to assign to them work that it had tentatively decided to contract to outside forces. It is that opportunity which Article IV guarantees and which, in this instance was denied."

Thus the Petitioner itself did not contend that Article IV conferred any work rights. In Award No. 19056, the Board held:

> "The question of damages is difficult. The Carrier's violation deprived the Organization of the right to bargain. Whether the bargaining would have had the result of obtaining the work for the claimants is pure speculation. Awards 18305 (Dugan), 18306 (Dugan), 18687 (Rimer), 18773 (Edgett), 18714 (Devine), and 18716 (Devine), found violations identical to that found herein but awarded no damages in the absence of a finding of pecuniary lobs. Award 18792 (Rosenbloom) damages should be but deferred them until some future time when actual earnings loss could be shown."

In Award 19626 the Board held:

> "This Board finds that nothing in Article IV changes the right of the parties to sub-contract out."

The present referee has gone to great lengths to discuss the loss of work opportunity rationale when no monetary loss was shown. Without conceding the propriety of such a proposition in interpreting Agreements that do not provide for payment under such circumstances, it is axiomatic that before such a doctrine can have any possible application, the employes must first prove a right to the work complained of. The previous awards of the Division, cited by the Referee on Page 3 of the Award (15689 and others) all found a violation of scope rules or other specific rights to work rules. This was also the situation in the case involved in the United States Court of Appeals, Fourth Circuit, in Brotherhood of Railroad Signalmen of America vs. Southern Railway Company, 380 F 2nd 59.

It is unfortunate that the Referee's interest in the decisions of the Federal courts concerning the allowance of damages to railway employees did not lead him to a review of the latest significant decision. In Bangor and Aroostook Railroad Company, et al. v. Brotherhood of Locomotive Firemen and Enginemen, 143 U.S. app. D. C. 90, 99, the United States Court of Appeals for the District of Columbia held that railway employees who could not have done the work involved in the claim because they were fully employed at the time the work had to be done could not be allowed a penalty, and they were not entitled to any damages because the persons who actually lost and were damaged were the people who would have been hired, an indeterminable class.

In the present dispute, however, the Referee finds no violation of the Scope Rule by his denial cf Part (1) of the claim, and hinges the entire case on alleged violation of Article IV.

The prior awards of the Division involving Article IV cases (the referee says 33, decided by fourteen referees) which are cited in Award 19899, all speak for themselves with regard to allowing monetary damages where no loss was shown. Twenty-six denied damages when no loss was shown and the issue was raised on the property. Three allowed damages where the loss issue was not raised on the property, on the proposition that issues not raised on the property may not be considered by the Eoard. One allowed half pay, and two allowed overtime when the claimants were off duty and thus suffered a loss. With such a showing, the doctrine of stare decisis is clearly appiicablc. While the referee recognizes and says that he concurs with that doctrine he then immediately discards it and proceeds to attempt to pick apart the prior awards, in some instances by misrepresentation and in other cases by nit-picking sentences of the awards out cf context.

His reference to the first award dealing with Article IV (18305 - Dugan) is a classical example of misrepresentation. He states that in that award:

> " * * * The Referee merely seemed to adhere to the line of cases which had previously denied damages in any 'full employment' situation, and in essence, he preferred the line of decisions which ran contrary to award 15689, cited above."

This statement is practically a verbatum recital of the argument the Labor Member has made to Referees in every Article IV case subsequent to Award 18305. The capable Referees have all rejected it because it is obvious speculation. It is speculation as to what was in Referee Dugan's mind. A careful reading of that Award 18305 will disclose that it says nothing whatever about 'full employment'. The award contains only one finding that has any tendency to show why the claimants therein sustained no loss, and that is the finding that the work was not reserved exclusively to them by their agreement with the carrier. Clearly, to say that Award 18305 denies damages on any ground other than the mere fact that the involved work was nut exclusively reserved to the claimants by their agreement is simply to add something to the award that dots not appear therein.

As an example of nit-picking, the referee quotes one sentence and part of another from Award 18967 (Referee Cull). It is unfortunate that he did not quote, or at least read that portion of the Award wherein it was held:

> "The parties did not provide for penalties for violation of Article IV where there was no loss of earnings nor does any other section of the agreement. Obviously, had the use of such outside forces resulted in loss an award of back pay to compensate for the loss would be made. In this connection the contract provides under Rule 34(d) that employees discharged in violation of the agreement will be 'reimbursed for any loss of compensation'. If back pay was awarded herein such a person therefore would be treated differently than the claimants who suffered no loss of pay.
>
> "There is building a respectable body of law and awards dealing with lost opportunities for employment. The law is still unsettled, however. The historic role of this Board has been to resolve disputes arising out of agreements. There is nothing in the agreement requiring payment of the monetary claims either as to Claim (2) and (3). Accordingly, they will be denied. (Award 18305 and others)."

The Referee likewise chose to quote two sentences of Award 19056 (Franden), omitting entirely the reasoning of the Referee in that case that "whether the bargaining would have had the result of obtaining the work for the claimants is pure speculation".

As stated by Referee Garrison in Memorandum to accompany early Award 1680, which is frequently relied upon by Petitioners in attempting to persuade referees to follow prior awards:

> "In the case of this Board the composition of the referees is not stable; one goes and another comes. If referee A reverses referee B upon the same set of facts, the same rule, and the same presented data, he is simply substituting his own personal judgment for that of B. If he does so, the identical question,

"arising between other parties, will inevitably be presented to referee C, who will then have to choose between the opinions of B and A. His choice will not determine the matter, for the question will again come up before D, and thus the matter may never end."

And in Award 4569 (Whiting) it was held:

"One of the basic purposes for which this Board was established was to secure uniformity of interpretation of the rules governing the relationships of the Carriers and the Organizations of Employes. To now add further fuel to the pre-existing conflict in our decisions upon this subject would only invite further litigation upon the subject and would be contrary to one of the basic reasons for the existence of this Board."

The Referee herein has ignored these basic principles and rendered an Award that is a maverick *in* itself, not supported by the record, by the rules involved, or precedent awards of the Divisions. We are confident that it will not be followed by competent referees, but out of an abundance of precaution we must register our most vigorous dissent thereto.

P. C. Carter

H. Fred Braswell

G. L. Naylor

W. B. Jones

J. M. Yoder