Award No. 7585
Docket No. MW-5872

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET & EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the effective agreement when they denied Maintenance of Way employes the right to protect and line switches for weed burning machines used in Maintenance of Way work;

(2) The two senior Track Laborers at Waukegan, Gary and South Chicago, be paid at their respective straight time rate of pay for a like number of hours that Transportation Department employes were used to perform this work at each location referred to, subsequent to June 29, 1949.

EMPLOYES' STATEMENT OF FACTS: On June 29, 1949, and on subsequent days thereto, a Maintenance of Way weed burner pulled by a track motor car was used to destroy weeds growing in the track zone at Waukegan, Gary and South Chicago. In addition, these Weed Burners have also been used to melt snow and ice from switches at various locations.

In each instance, two (2) Operating Department employes such as Switchmen, Switch Foremen, Trainmen and Conductors were assigned to line switches and protect the motor car and weed burner against train or switching movements.

Prior to June 29, 1949, Maintenance of Way Track Laborers were exclusively assigned to line switches for and protect weed burners against switching and train movements.

The Employes contended that this departure from past practice constituted a violation of the agreement and accordingly filed claim in favor of the two (2) senior Track Department employes holding seniority at the location where the weed burning work was performed.

Claim was declined.

The agreement in effect between the two parties to this dispute dated December 1, 1945 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

establish the proposition that an employe for whom a time claim is made must be available for work on the day and at the time for which claim is made, and must have lost the day's work, or part thereof, in order to be eligible for any compensation. There is no allegation by the Organization that any particular employes were **available** for the disputed work on the weed-burner and **lost time** as a result of trainmen being used thereon. Consequently, the rendition of an award **unqualifiedly** sustaining part (2) of the claim would be inconsistent with the established proposition that claimants must be available and unused on the day and at the time for which compensation is claimed. Further, an unqualified sustaining award would be unwarranted and without proper basis in this case because there is no rule of the agreement between the parties hereto which provides for a penalty payment merely for naked violation of the agreement. There must be a showing that as a result of an alleged violation, loss was sustained by employes claiming the violation. The Carrier requests, therefore, that the Board, if it awards damages under part (2) of the claim, specify that such damages are to be paid only to employes who were available for call and lost work upon any day for which claim is made.

In addition, the Carrier here quotes the second paragraph of Rule 62 of the agreement effective between the parties hereto, which also bears on the question of damages:

> "Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation."

By the operation of this rule, any claim for any employe who did not actually suffer pecuniary loss is invalid, and the Carrier requests that the Board so specify should it render any award of damages. Under the application of Rule 62, second paragraph, any claimant employe who was actually under pay during the hours a weed-burner was operated to his alleged detriment would be without pecuniary loss, and accordingly would not be entitled to any recovery under the Award.

As a final consideration bearing on the amount of damages to be awarded, in the event the Board should sustain in any degree the claim of the Organization for compensation, the Carrier reiterates its position that there is no proper claim, regardless of any interpretation which may be placed by the Board upon other aspects of the position of the Organization, for compensation for Maintenance of Way employes upon the occasion of use of the weed-burners for melting snow and ice, as such work clearly is not contemplated by any language of Rule 56 II(a).

Material herein has been discussed with the Organization, either in conference or in correspondence.

(Exhibits not reproduced.)

OPINION OF BOARD: In 1945, Carrier purchased and placed in service a Fairmont weed burner. Subsequently, four additional weed burners of this type were purchased and placed in service, one in 1946, one in 1947 and two in 1948. These weed burners are not self-propelled but are towed by motor cars. From 1945 and continuing until the present time, the operations of these weed burners have been supervised by a track foreman, the motor car has been operated by a section laborer and the burner itself has been operated by a machine operator. From 1945 until February, 1949, two section laborers were assigned to line the switches, and give flag protection necessary to the operation of the weed burner. All of these employes are covered by an agreement between Carrier and the Brotherhood of Maintenance of Way Employes. In February, 1949, the Carrier entered into agreements with certain Operating Brotherhoods, providing that members of those Organizations would be assigned to line the switches and give flag protection necessary to the operation of the weed burners.

Apparently, the first instance which came to the attention of the BMW of the use of operating employes rather than maintenance of way employes for this work was on June 29, 1949. The claim is that the work belongs to maintenance of way employes under the terms of their agreement with Carrier, and that the agreement was violated on June 29, 1949 and on all subsequent dates when employes other than maintenance of way employes were used to afford flag protection and line switches for weed burning machines.

The pertinent parts of the rules involved in the dispute are:

"Scope

"Rule 1. The rules contained herein shall govern the hours of service, working conditions and rates of pay for all employes in any and all sub-departments of the Maintenance of Way Department, . . ."

"Classification

"Rule 56. II. Track Department

"(a) All work in connection with the construction, maintenance or dismantling of roadway and track, such as rail laying; tie renewals (except on open deck bridges); ballasting, lining and surfacing track, including the dismantling and replacing of highway crossings and walks required by such surfacing; maintaining and renewing frogs, switches, and railroad crossings; ditching, sloping and widening cuts; right of way fences; snow and sand fences; mowing and cleaning; brush cutting; patrolling and watching; loading, unloading and handling all kinds of track material; and all other work incident thereto, shall be track work." . . .

"(i) All work described under Rule 56 (II) shall be performed by employes of the Track subdepartment (except as provided in memorandum of understanding dated November 8, 1939, and agreement with shop crafts effective April 3, 1922)."

It is the contention of Claimant that all of the work done by the weed burners involved in this case is covered by the above quoted rule; and that lining switches and giving flag protection necessary to the accomplishment of this work is "work incident thereto" and therefore also covered by the rule.

Carrier concedes that the work of weed burning is covered by the rule but maintains that the work of snow removal, which was also done by the weed burner and which is included in the claim, is not; in any case, according to Carrier, lining switches and flag protection is not "work incident" either to weed burning or snow removal and therefore is not covered by the rule.

As to whether the actual work of the weed burner comes under the rule, it is conceded by Carrier that such work is covered when the weed burner is engaged in burning weeds, and that in such case the work of driving the motor car, operating the burner itself and supervising the operation all belongs to maintenance of way employes. Carrier contends, however, that snow removal is not spelled out in the rule as is mowing and brush cutting, and that therefore snow removal does not belong to maintenance of way employes under this contract. Claimant argues that "cleaning" includes snow removal. It appears from the record that in all cases when these weed burners have been used for snow removal, maintenance of way employes have been assigned to drive the motor car, operate the burner and supervise the operation. There is no evidence that any other employes were assigned to the operation of a weed burner when it was engaged in snow removal than were assigned when it was engaged in burning weeds. In view

of this, we find that the work of snow removal when done by weed burners belongs to maintenance of way employes under the quoted rule.

This leaves the question of whether lining switches and flagging in connection with the operation of the weed burners, whether in burning weeds or snow removal, is also covered. The answer to this question lies in the interpretation of the phrase "other work incident thereto."

"Incident" is defined by Webster's New International Dictionary (2nd ed., Unabridged) as "liable to happen; apt to occur; befalling; hence, naturally happening or appertaining, as a subordinate or subsidiary feature."

The meaning of the phrase "other work incident thereto", even with the above definition in mind, is not sufficiently clear and unambiguous as to make the contention of either party to this case necessarily the right one. It is therefore proper to examine into the past practice of the parties in an effort to determine how they have interpreted and applied the disputed language of the rule. It is undisputed that from 1945 until 1949, all of the flagging and lining switches in connection with the operation of the weed burners was done by track laborers covered by the Maintenance of Way Agreement. It is stated by Claimant that prior to the acquisition by Carrier of the weed burners involved in this dispute, chemical weed burners were used and all of the work of lining switches and flagging in connection with the operation of the chemical weed burners was done by maintenance of way employes, both on the main line and in the yards. This statement is not denied by Carrier. In addition, Claimant asserts that maintenance of way employes have always been assigned to line switches and to provide flag protection for maintenance of way track motor cars and loads being towed by them, as, for example, when distributing track material. As specific examples, it is stated that in June of 1951, in connection with the renewal of seven miles of rail, a motor car pulling seven trailers distributed material throughout the area where the rail was to be renewed. Lining switches and flagging in connection with the movements of this motor car and trailers was done by maintenance of way employes. Similarly, for seven months during 1951, a self-propelled tamping machine comparable in size and weight to a weed burner, was afforded flag protection and switches were lined on the main line by trackmen. And extra gangs generally afford flag protection and line switches for the motor cars assigned to them. None of these statements is refuted by Carrier. Carrier's position is that these are merely examples of occasions when such work was assigned to and done by maintenance of way employes at Carrier's discretion; they are not proof that the work was guaranteed to such employes by the contract.

It appears to us that this last contention of Carrier begs the question that is before us. It is in an effort to determine the meaning of the contract that we look to the practice of the parties. In this case, it appears that the parties have consistently, up until the February, 1949 agreement involved herein, followed the practice of assigning the lining of switches and flagging duties to maintenance of way employes when the lining of switches and flagging were in connection with work being done by motor cars operated by maintenance of way employes, including instances when the motor cars were hauling other cars or pieces of equipment. In addition, it appears that in connection with the specific operation of weed burning, this practice was followed both before 1945 with chemical weed burners, and after 1945 with flame throwing weed burners, and continued until 1949.

In view of the fact that the lining of switches and flagging involved here happened as a subordinate or subsidiary feature of the operation of the weed burner, and that the consistent practice of the parties has been to assign the lining of switches and flagging duties to maintenance of way employes when the lining of switches and flagging are in connection with the operation of a maintenance of way motor car or other equipment, we find that such work is covered by rule 56 (II) (a) and that it was a violation of that rule to assign such work to employes not covered by the maintenance of way agreement.

The fact that Carrier contracted in 1949 with other organizations for employes belonging to those organizations to do this work does not excuse the violation. The Brotherhood of Maintenance of Way Employes was not a party to such agreements and work under that Organization's agreement could not be contracted away without its permission.

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

Carrier's motion to dismiss this claim for lack of notice is denied. See Award No. 7387.

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 Agreement was violated.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of *THIRD DIVISION*

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1956.

DISSENT TO AWARD NO. 7585, DOCKET NO. MW-5872

For the reasons outlined in our Dissents to Award No. 7311, Docket No. CL-7214, Award No. 7372, Docket No. CL-7519, Award No. 7487, Docket No. CL-7445, and in our Special Concurrence to Award No. 7387, Docket No. MW-5883, on the question of third-party notice —

We likewise dissent here.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp