Award No. 10748
Docket No. MW-8690

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the agreement beginning on March 24, 1953, when it instructed and required track department employes to discontinue performing the work of lining switches for and protecting track motor cars and push cars used in track-cleaning service and thereupon transferred such work to employes holding no seniority under the Agreement between the two parties to this dispute.

(2) For each day beginning with and subsequent to March 24, 1953, on which such work is assigned to and performed by other than track department employes, the two senior track laborers assigned to each respective section on each of such days be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by such other employes in performing such work on their respective sections.

(3) A joint check of the Carrier's records shall be made by representatives of the Carrier and of the Employes to determine those to whom claims should be paid and the amount due each in accordance with the principles established by Award 330 of this Division.

EMPLOYES' STATEMENT OF FACTS: Prior to March 24, 1953, Maintenance of Way Employes had historically and traditionally performed the work of lining switches for and protecting track motor cars and push cars used by Maintenance of Way Yard Cleaning Crews and other Maintenance of Way forces.

Beginning on March 24, 1953, and on dates subsequent thereto, the Carrier assigned the afore-mentioned work to employes who hold no seniority rights under the effective Maintenance of Way Agreement.

would be without pecuniary loss, and accordingly, in any event would not be entitled to any recovery under the award.

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

OPINION OF BOARD: Two issues are posed in this case: (1) Whether the Carrier violated its contract with Petitioner when, in 1953, it transferred certain switch lining and flag protection tasks from Maintenance of Way Employes to men not covered by the contract; (2) whether the Claimants are entitled to an "equal share of the total man-hours consumed by other employes" in performing the disputed work.

The Alleged Contract Violation

In October 1950 the Carrier placed into operation a self-propelled track sweeper (Yard Cleaner) for the purpose of assisting in gathering and removing debris from yard tracks at four locations. In conjunction with this machine the Carrier operated a dirt train consisting of a heavy duty motor car and a group of trailer-type push cars fitted with material boxes. The sweeper collected material which it conveyed, by a series of belts, to the material boxes for unloading at a convenient point. The equipment (with the exception of the motor car) is not readily removable from the tracks.

In 1951 the Company acquired three more sweeper machines (one in February, two in November). A crew was assigned to operate each sweeper and dirt train, composed of a Track Foreman (in charge), a Machine Operator to run the sweeper, a Section Laborer to operate the motor car propelling the dirt train, and two Section Laborers to perform general duties including lining switches and providing flag protection. These men were from the Maintenance of Way bargaining unit.

In 1950 the Brotherhood of Railroad Trainmen submitted claims to the Carrier stating since that, these dirt trains were a form of work train, the Carrier was obligated to assign a full yard crew (four men) to each train for the purpose of handling switches and affording flag protection. The Brotherhood of Railroad Trainmen also complained that Management was violating the Brotherhood of Railroad Trainmen Agreement by using Maintenance of Way employes.

The Carrier denied any contract violation and, in a 1950 petition to the First Division (Docket 26281) vigorously defended its actions. However, in 1953 (before the First Division could rule), the Carrier entered into a written agreement with Brotherhood of Railroad Trainmen obligating it to assign one Yard Foreman and one Yard Helper to each dirt train. The Carrier then withdrew its First Division petition. Since March 19, 1953, then, two Brotherhood of Railroad Trainmen employes have thrown switches and provided flag protection, tasks theretofore performed by Maintenance of Way Section laborers. The size of Maintenance of Way track forces, however, was not reduced.

The Carrier justifies its actions principally on these grounds: (1) Flagging and handling of switches are inherently work of yard service employes; (2) even if these tasks are "permissibly incidental" to the Maintenance of Way craft, they cannot be deemed exclusively Maintenance of Way work since they primarily accrue to the Trainmen's class; (3) two years'

assignments to Maintenance of Way men do not establish a controlling practice; (4) in light of the possibility that Brotherhood of Railroad Trainmen might have won its claim for four men to be attached to each dirt train, Managements 1953 compromise was jusified, particularly since it had the right to assign the work to either group.

We do not find these arguments persuasive. The basic question here is whether Management was obligated to assign the disputed tasks to Maintenance of Way Employes in accordance with terms of the Maintenance of Way Agreement. Rule 56-II of that Agreement, therefore, is decisive. It provides, in relevant part:

> "(a) All work in connection with the construction, maintenance or dismantling of roadway and track, such as . . . mowing and cleaning . . . and all other work incidental thereto, shall be track work."
>
> "(j)" All work described under Rule 56-II shall be performed by employes of the Track Sub-department (except as provided in Memorandum of Understanding dated November 8, 1939 and agreement with shop crafts effective April 3, 1922)."

There is no doubt that the gathering and removal of debris constitutes maintenance work. This type of work was performed for many years by Maintenance of Way Employes. (The Carrier's Ex Parte Statement to the First Division in Docket 26281 relates in detail the history of yard cleaning since prior to 1939. It points out that this work has passed through three stages and the present (fourth) stage existed, in its general form, for six years prior to 1953. Also, in this regard, Management's characterization of the Brotherhood of Railroad Trainmen claim is revealing: "Consequently it appears that, on this property, it is the theory of the Brotherhood of Railroad Trainmen that, notwithstanding literally generations of customs and practice to the contrary, in the industry as a whole and on the line of this Carrier in particular, yard cleaning should be done by yardmen and not by Maintenance of Way Employes, or at the outside, by yardmen as assisted by Maintenance of Way Employes.")

Further, there is no doubt that lining switches and flagging — in connection with the tasks of gathering and removing debris — constitutes work "incidental" to maintenance work. Customarily, and long before 1951 — 1953, Maintenance of Way men did such incidental work. (This fact is noted by Carrier in Docket 26281, as evidenced by these quotations: "The Maintenance of Way gang then enters upon the track to be cleaned and, after either splicing or blocking the switches at either end, goes about its job . . . A section man . . . customarily throws the necessary switches en route. . . . The general method above described has been employed at East Joliet Yard since 1944, at South Chicago Yard since 1946, at Gary Mill Yard since 1947 and at Kirk Yard since May of 1949. . . .")

The sole purpose of lining switches and providing flag protection is to avert accidents during periods when Maintenance of Way men are engaged in their primary task of track cleaning. It thus becomes "incidental" work within the meaning of Rule 56-II (a). Since neither of the exceptions in Paragraph (j) apply, these tasks fall directly under this Scope Rule and therefore "shall be performed by employes of the Track Sub-department."

Actually the question of "incidental" work was decided in 1956 by this Board in an almost identical case involving the same parties (Award No. 7585). One of the issues in that dispute was whether the Carrier had violated Rule 56-II when it transferred switch lining and flag protection tasks, performed for several years by Maintenance of Way men in connection with operation of a weed burner and similar devices, to employes in other crafts (Conductors, Trainmen, Yardmen). This Board held in relevant part:

> "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 the 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."

This finding is directly applicable to the facts in the present case. While Management would distinguish the two cases on the ground that the size and weight of the yard cleaner (it weighs about 17,000 pounds) are greater than those of machines involved in Award 7585, we do not believe that such factors can alter the principle enunciated in Award 7585 and which is herewith reaffirmed.

To summarize, we find that the Carrier violated Rule 56-II when it removed from the purview of Maintenance of Way personnel the tasks of lining switches for and protecting motor cars and other equipment used in connection with track cleaning operations.

The Claim for Reparations

It is clear, from the record, that when the Carrier added two Brotherhood of Railroad Trainmen employes to each dirt train it did not reduce the size or change the composition of the Maintenance of Way crew. There is no evidence, in other words, that Maintenance of Way men lost jobs or pay as a result of Management's action. Despite this fact Petitioner requests, in the second part of its claim, that the two senior track laborers assigned to each section be paid for "an equal proportionate share" of the man-hours for which Brotherhood of Railroad Trainmen employes received pay. Petitioner views this as a "penalty" for the Carrier's infractions, and distinguishes it from "damages" which, it asserts, represent reimbursement for an actual loss.

The Carrier argues that this part of the claim should be denied on one or more of the following grounds: (1) The Claim is a demand that costly monetary penalties be added to the "feather bedding evils already created by consistent demands of opposing labor groups"; (2) the monetary

allowances demanded are precluded by the express terms of the contract (Rule 62); (3) these allowances are further precluded by ordinary rules of damages applicable to contract cases.

Let us first consider the period from March 1953 (when the violation first occurred) to January 1, 1955, during which time Rule 62 was indisputably in effect. This two paragraph rule provides:

> "Grievances and time claims arising under this agreement shall be barred unless presented in writing to the proper officer within ninety (90) calendar days of the date of events or circumstances giving rise to the grievance or claim.
>
> "Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation."

Petitioner argues that the second paragraph of Rule 62 was not applicable during 1953-55 since the claims herein are not "time claims" within the meaning of the provision. The principal purpose in filing these claims, it notes, was not to collect damages for employes who had lost earnings but, rather, to protest the Carrier's unilateral decision to remove work specifically pre-empted to Maintenance of Way men. Petitioner cites Award 6063 — and others — to show that this Division has allowed similar claims even when claimants lost no actual time. In award 6063 this Board noted:

> ". . . As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the Carrier is concerned for if the agreement is violated, it must pay the penalty therefore in any event."

It is true that there are several awards which hold that assessment of reparations is not barred solely because claimants may have lost no time. Award 6063 is one. Significantly, however, in those cases the applicable contracts did not contain a clause similar to paragraph two of Rule 62. Therefore they are of little assistance in the present matter.

On the other hand, this Division has already decided three cases involving Rule 62 in the contract of this Carrier and this Organization. In Award 7585, cited above, an identical claim was made under almost precisely the same circumstances. The Division held in 1956 that Rule 62 barred the claim since "this provision could hardly be stated in a clearer fashion." When another "penalty" claim covering employes who had lost no time from work came to this Division in Award 10247, we held (on December 13, 1961) that "We must follow Award 7585. There the dispute involved the same Agreement and the same parties. It was held that under Rule 62 payments are limited to the actual pecuniary loss suffered as a result of the violation. We so hold." Again, and quite recently, this Division renewed its holdings in Awards 7585 and 10247 with respect to claims on behalf of men who lost no earnings constituting "time claims" within the meaning of Rule 62. (Award 10574, decided April 27, 1962).

Under these circumstances we must hold the proposition to be firmly established that, under Rule 62 of this contract, claims of the kind submitted in this case are "time claims". We conclude, therefore, that payments for the period prior to January 1, 1955 are limited to actual pecuniary loss (if any) suffered by grievants.

What of the period since January 1, 1955? Petitioner argues that Rule 62 became inoperative on that date since it was superseded by Article V of the August 21, 1954 National Agreement which then became effective. The Carrier, on the other hand, asserts that only the first paragraph of Rule 62 was superseded — the second paragraph remained intact.

To help resolve this disagreement a brief historical summary is required:

1. In May 1953 a group of Carriers — including Elgin, Joliet and Eastern Railway Company — served notice on the non-operating Organizations (under provisions of the Railway Labor Act) of their desire to

> "Establish a rule or amend existing rules so as to provide time limits for presenting and progressing claims or grievances."

2. This request — along with other disputed issues — was submitted to Emergency Board No. 106, where it was identified as Proposal No. 7. During those proceedings the Carriers suggested that the new rule, if accepted, not be made effective on those roads which elected to preserve an existing rule. The transcript of Emergency Board 106's hearing contains these illustrative paragraphs:

> "PROPOSED LANGUAGE OF TIME LIMIT RULE WITH NONOPERATING CRAFTS"
>
> "This rule shall become effective on —— except on such roads as may elect to preserve existing rules and so notify the Employees' Committees on or before ——." (Page 4408, 4409)
>
> "Mr. Macgill: ". . . . A date will also have to be fixed before which the railroads must notify their Employees' Committees if they elect to preserve existing rules." (Page 4421)
>
> "Mr. Day: ". . . . A great many, if not all, of Class I railroads have rules covering the employes in each of the operating groups; that is, the engineers, firemen, trainmen and yardmen, governing the time within which claims or grievances may be filed and progressed to a final conclusion.
>
> "The purpose of the above proposal therefore is to establish a uniform rule with each of the 'non-operating' groups substantially similar to the 'Time Limit on Claims' rule which appears as Section 17 of the August 11, 1948 Agreement between the engineers, firemen, and switchmen and the railroads. . . ." (Pages 4407 and 4408)

3. Emergency Board 106 recommended adoption of a uniform time limit rule, but it did not suggest inclusion of the optional clause suggested by the Carriers.

4. On August 21, 1954 representatives of the "non-ops" and Carriers entered into a National Agreement containing, among other provisions, an article which was the time limit rule previously referred to as Proposal 7. Under this Agreement, affected Carriers were not given the option (as they were in connection with some other provisions) of preserving existing rules

rather than adopting the new one. The effective date for this new rule on all Carriers, it was agreed, would be January 1, 1955.

These facts, according to Petitioner, make it clear that insofar as the Elgin Railway is concerned, Article V (as the new time limit rule was designated) superseded the entire Rule 62 since (1) the Carriers proposed and the Organizations agreed to establish a **new uniform** rule; (2) no Carrier was afforded the option of preserving an old rule (Rule 62 here) in lieu of accepting the new one; (3) if part of Rule 62 is retained, this Carrier's claim and grievance rule will not be uniform with that of other Carriers. In other words, Petitioner argues, this Carrier had "by its request as a participating member in national negotiations, "laid Rule 62 in its entirety on the table of negotiation and in the final analysis agreed to accept Article V without any exception."

Petitioner also argues:

1. Its position with respect to Article V is buttressed by reference to the stand taken on the same question by another Carrier (Chicago, Milwaukee, St. Paul & Pacific Railroad) in Award 10118. In that case the Carrier agreed that Rule 47 (the old time limit rule) "subsequent to the January 1, 1955 effective date of Article V, is no longer applicable in the handling of claims on this property . . . Article V in the language of the Employes . . . 'superseded and nullified any and all provisions of the existing claim and grievance rule.' Or in the language of the Carrier superseded Rule 47 of the currently effective Schedule Agreement. . . ."

2. The Second Division has held that rules set forth in the August 21, 1954 Agreement, if accepted, will entirely supersede existing rules on the same subject (Award 2439).

We cannot agree with Petitioner's contentions.

There is no evidence that Rule 62 **as such** was ever discussed during national negotiations or at Emergency Board proceedings. This Carrier and Organization never entered into an agreement which specifically provided for the replacement of **Rule 62.** The reason is clear: Many organizations and Carriers were involved in the national negotiations. They were concerned with substantive matters, not detailed questions of rule numbers in individual contracts. Their discussions, insofar as the issue here is concerned, centered about a future rule, not past ones.

Of paramount importance is the fact that these discussions were concerned with a single main topic: time limits. At the very outset the Carriers' opening notice was couched in terms of establishing a rule so as to **"provide time limits** for presenting and progressing claims or grievances." Their Proposal No. 7 was entitled "Proposed language of **Time Limit Rule."** References by Carrier spokesmen to this proposal (cited above), all pertain to the subject of time limits. Moreover, the 1954 Agreement itself provides that Carrier's Proposal No. 7 "is disposed of by adoption of" a new rule and Proposal No. 7, as stated, was designed to

> "Establish a rule or amend existing rules **so as to provide time limits for presenting and progressing claims or grievances."** (Emphasis added.)

True, the parties' 1954 Agreement required each signator Carrier and Organization to adopt this new rule and they were not afforded the alternative right to "preserve existing rules or practices" as was provided in connection with some other Carrier proposals. But the significance of this fact, in our judgment, is that affected parties were barred, not from retaining **any** rules, but, rather, were barred from retaining rules pertaining to the subject matter of Proposal 7 and the new rule, namely, time limits.

What does this new rule — Article V in the parties' Agreement — cover? Section 1 specifies how "claims or grievances arising on or after January 1, 1955 shall be handled." Paragraph (a) provides that claims must be presented in writing within 60 days of the occurrence and that disallowances must be submitted within 60 days. Paragraph (b) covers the matter of appeals which, generally, are to be submitted within 60 days of the disallowance. Paragraph (c) is concerned with the time table for appeals on the property and to the Adjustment Board. Section 2 is devoted to the timely handling of claims which arose prior to January 1955. Section 3 establishes the right to file a "continuing" claim at any time (although potential Carrier's liability is limited to a period of 60 days prior to submission), and deals with the type of complaint required in disciplinary cases. Section 4 accords representatives of the Organizations the right to submit claims for their constituents. Section 5 permits employes to use other "lawful action" for settlement of claims if such action is instituted within a specified time period. Section 6 exempts requests for leniency from application of the rule.

It is clear, from this recital, that Article V is truly a "Time Limit" rule. Therefore, it must be deemed to supersede any pre-existing time limit rule.

Rule 62, however, is not exclusively a time limit rule. It has no caption, and its two paragraphs deal with different subjects. The first paragraph does pertain to time limits: it bars claims not submitted within 90 days of the alleged occurrence. But the second paragraph is concerned with a totally different matter: Monetary damages. It confines time claims to the "actual pecuniary loss resulting from the alleged violation."

Significantly, nothing in Article V relates to this topic, nor was the matter of monetary damages negotiated in 1953-54 national negotiations or at related Emergency Board proceedings. Under the circumstances, we can find no warrant for concluding that the parties intended Paragraph Two to be eliminated.

This finding, moreover, does not violate the parties' uncontested desire to establish a uniform time limitation rule. Article V remains intact and identical to time limit rules in other contracts. Nothing has been added or subtracted **in connection with this subject.** Although Paragraph Two of Rule 62, does continue to limit employes' ability to collect monetary awards in certain cases, that serves only to distinguish this Agreement from many others. But, importantly, this distinction existed prior to 1955 and, as already observed, was not bargained away during 1953-54 negotiations.

As for Petitioner's references to certain other cases, we note:

1. In Award 10118, Rule 47, the subject of controversy, was a full-fledged time limit rule. One paragraph limited the Carrier's retroactive

liability for monetary claims to 90 days; the second paragraph required non-monetary claims to be submitted to the Superintendent within 90 days from date of origin. Clearly this is different from Rule 62. (The issue, too, was different, since it concerned the question of which Carrier officer was to receive claims.)

2. Second Division Award 2439 merely supports the conclusion that a 1954 Agreement rule supersedes previously existing rules **on the same subject,** which is consistent with our findings here.

In sum, we find (1) Since Paragraph Two of Rule 62 was not superseded by Article V, it remains in effect and is applicable in the instant grievance; (2) Claimants, therefore, are entitled only to reimbursement for such actual pecuniary loss as they may have suffered as a result of Carrier's violation of Rule 56-II.

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 has been violated.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1962.