Award No. 11937
Docket No. MW-10042

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

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

(1) The Agreement was violated when the work of erecting 325 feet of fence adjacent to the driveway east of the Carrier's passenger station at Knoxville, Tennessee, was assigned to and performed by outside forces who hold no seniority under the effective Agreement.

(2) B&B Employes W. O. Tucker, A. D. Jones, J. C. Quarles, Sr., W. C. Tucker, G. M. Pierce, W. B. Pursky and L. T. Cobble each be allowed pay at their respective straight-time rates of pay for an equal proportionate share of the total man-hours consumed by the outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier decided that it would be desirable to erect 325 feet of fence adjacent to the driveway east of the passenger station at Knoxville, Tennessee for the stated purpose of "to serve as a screen between the driveway entering the passenger station and the adjacent tracks, and to prevent trespassing by outsiders. When rose vines are planted along the fence, it will tend to improve the appearance and also serve as a screen between our office car tracks and the driveway."

In order to accomplish the afore-stated objective, the Carrier contracted with the Elliott Fence & Heating Company to "for a lump sum, furnish all materials and labor for the fence." A so-called "style 500" chain-link fencing of seven foot height was used to construct this fence, using steel posts which were, as is usual with chain link fencing, set in concrete.

Chain link fencing and posts of the style used are available for purchase on the open market for installation by the purchaser if he so desires.

Because the work assignment described above was considered to be in violation of the effective Agreement, the instant claim was presented and progressed on the property in the usual and customary manner. The claim has been denied at all stages of progress on the property.

The Agreement in effect between the two parties to this dispute dated

commonly known as the Taft-Hartley Act, it was made an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other things of value, in the nature of an exaction, for services which are not performed or not to be performed." (Section 8(b)(6)).

Also paragraph (a) (3) of Section 506 of Title V of the Communications Act of 1934, as amended, makes it unlawful "to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee."

While, technically, these two laws do not apply in the railroad industry, nevertheless their express provisions are significant, because in the instant case the Brotherhood is attempting to cause the Carrier to pay or deliver or agree to pay or deliver an unspecified amount of money, in the nature of an exaction, for services which were not performed.

CONCLUSION

Carrier respectfully submits that:

(a) Claim which the Brotherhood here attempts to assert is vague and indefinite in that no dates are stated and no amounts claimed are specified.

(b) The effective Maintenance of Way Agreement in evidence has **not** been violated. Work of the character here involved has heretofore been performed under contract. It was new construction as distinguished from maintenance or repair work—work of the character which Maintenance of Way employes have never heretofore performed exclusively and work which has usually, customarily and traditionally been contracted.

(c) Prior awards of the Board support the Carrier's action in contracting the work in that it is **not** embraced within the scope of the agreement in evidence. Special materials, skills and equipment were required. Then too, Rule 61 is applicable. See Award 6112.

(d) Claimants have no contract right to double pay here demanded. Carrier has **not** contracted to pay them for work not performed. Factually, it has done otherwise in that Rule 49 of the agreement specifically provides that no compensation is to be paid for work not performed.

Claim being absurd, without any basis whatsoever and unsupported by any language contained within the four corners of the Maintenance of Way Agreement in evidence, the Board cannot do other than make a denial award.

All evidence submitted in support of Carrier's position is known to employe representatives.

Carrier, not having seen the Brotherhood's submission, reserves the right after doing so to make response thereto.

(Exhibits not reproduced.)

OPINION OF BOARD: The basic facts giving rise to the dispute are recited in Carrier's Submission as follows:

"In 1956, when making certain changes and improvements to its

passenger station and surrounding grounds at Knoxville, Tenn., Carrier decided to have a style 500 chain link fence, 325 feet in length and 7 feet high, erected adjacent to the driveway leading from Depot Street to the passenger station level to prevent trespassing by outsiders and when covered with rose vines to serve as a screen between the driveway and office car tracks. Carrier, therefore, contracted with Elliot Fence and Heating Company, Knoxville, Tenn., to furnish all special fencing materials and to erect the fence for a lump sum payment. The fencing and heating company, therefore, supplied all manufactured fencing materials, dug the necessary holes for the posts, set the steel posts in concrete in such holes, and stretched the wire fencing onto the posts."

Petitioner contends that the work of erecting the fence was reserved by the Scope Rule of the Agreement to Carrier's B&B employes. In cases involving the same or like scope rules this Division has established principles of interpretation and application which are so well known that we find it unnecessary to repeat them. See, for example, Awards Nos. 7862 and 7216.

The preponderance of the material and relevant evidence in this record supports the finding that the work of erecting fences under the existing circumstances has been performed, historically and customarily, by Carrier's B&B employes. Therefore, since Carrier has failed to prove that its action in contracting out the work came within any recognized exception to the reservation of the work to its B&B employes, we find that Carrier's complained of action violated the Agreement.

Carrier contends, in its Submission, that the claim is "vague and indefinite." This issue was not raised on the property. It, therefore, is not properly before us. Being without jurisdiction, we dismiss it.

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." Award No. 10963, cited by Carrier, is distinguishable from the instant case in that: (1) the Claim in Award No. 10963 prayed for a windfall for unnamed employes all of whom, obviously, could not have been damaged by the violation of the agreement; and (2) Carrier timely denied

the Claim on the property averring, **inter alia,** that it was vague and indefinite.

We will sustain the claim.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of December, 1963.

CARRIER MEMBERS' DISSENT TO AWARD NO. 11937,
DOCKET NO. MW-10042

This award is palpably wrong. Awards 3839, 5304, 5563, 5747, 6112, 6492, 6499, 10592, 10715, 10931, 11128, 11138, 11140, 11141, 11213, 11525, 11598, 11599, 11645 and 11658 denied claims in similar disputes between these same parties. In these many awards, as well as numerous other Third Division awards, the Board has correctly held that where the scope rule of the applicable agreement is of the general type, such as the one involved here, and which does not purport to describe or define the work belonging to employes covered by its terms, the Board must then determine from the evidence whether or not the work in dispute is reserved exclusively to claimants through historical practice, custom and tradition on the property. The burden of proving such exclusive historical and customary practice is upon claimants. (Awards 11128, 10636, 11118, 11525, 11598, 11599, 11645, 11658.) Under these well-established principles the claim herein should properly have been denied.

The conclusion of the Referee that:

> "The preponderance of the material and relevant evidence in this record supports the finding that the work of erecting fences under the existing circumstances has been performed, historically and customarily, by Carrier's B&B employes. * * *"

is not supported by the record. The Petitioner did not cite a single instance where employes covered by the applicable agreement were used to erect chain link fences, much less prove that they had performed such work or any fencing

work exclusively. Throughout the handling on the property the Carrier informed the Petitioner that work of the kind here involved had always been performed by contractors, and in its submission to the Board the Carrier stated:

> "Throughout all the years that the Maintenance of Way Agreement has been in effect, many chain link fences of the type here involved have been erected around buildings, shops, yards, and elsewhere, but most of such work has been performed under contract and **not** by Carrier's Maintenance of Way forces. For example, the following chain link fences have recently been erected without claims or protests from Maintenance of Way employes:

"Location	Erected "Date
Irondale, Ala.—Stock pens	1951
Oliver Yard—New Orleans, La.	1951 & 1952
Citico Yard—Chattanooga, Tenn.	Nov. 1954
Inman Yard—Alana, Ga.	Summer, 1957
Coster Shops, Knoxville, Tenn.	1957
Hayne Car Shop, Spartanburg, S. C.	1957
Spot Car Repair Shop—Citico, Chattanooga, Tenn.	Oct. 1957

> "Thus work of erecting the combination fence and screen east of the passenger station at Knoxville, Tenn. is **not** work of the character usually, customarily and traditionally performed by Maintenance of Way employes. To the contrary, it is work of the character which has heretofore been contracted. The established practice under the Maintenance of Way Agreement has been for such work to be performed under contract. * * *"

The above quoted statement by the Carrier as not denied by the Petitioner.

The Petitioner having failed to meet its burden of proving the exclusive historical and customary practice, the work here involved could not properly be held to be reserved exclusively to claimants. This being the case, there was no obligation on the Carrier "to prove that its action in contracting out the work came within any recognized exception to the reservation of the work to its B&B employes, * * *."

Having erroneously concluded that the work involved was reserved to employes covered by the applicable agreement, the Referee compounds the error by awarding pay to persons who lost no work or compensation. Although the claim is vague and indefinite as to time elements, the Carrier pointed out that the work was performed on dates when the named claimants were on duty and performing the usual maintenance and repair work of their regular assignments. There was no dispute as to this fact. The agreement contains no provision for the imposition of penalties. In fact, it expressly stipulates (Rule 49) that: "Except as provided in these rules, no compensation will be allowed for work not performed." This rule is clear and unambiguous. It means precisely what it says. It excluded the payments claimed here because the claimants did not perform any work in return for the payment sought.

The attempt to distinguish "damages" from "penalties" is highly technical, as is the attempt to distinguish Award 10963 from Award 11937, both of which were written by the same Referee. The fact remains that in this case the named employes suffered no loss.

For the reasons stated, we dissent.

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ W. H. Castle

/s/ T. F. Strunck

/s/ G. C. White