Award No. 11939
Docket No. MW-10090

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated its agreement with its Maintenance of Way and Structures employes when it assigned or otherwise permitted the work of cutting weeds and brush on its right-of-way at Corinth, Kentucky, to be performed by employes of the City of Corinth, Kentucky.

(2) Extra Gang Laborer C. T. White be allowed pay for eighty-three (83) hours at straight time rate account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Mr. C. T. White entered this Carrier's service on September 3, 1953 and holds seniority as an extra gang laborer as of said date.

While the above-mentioned employe was in a furloughed status and available, willing and ready to be called and used for right-of-way cleaning work "Notice was served by the City of Corinth, Ky., that, under a City Ordinance, the weeds and brush on the Carrier's property within the city limits of Corinth, Kentucky would have to be cut. The City was advised to use its employes to cut the weeds and brush and to bill the railroad for the service performed." The City did the work, consuming a total of eighty-three hours in the performance thereof. Consequently, the instant claim was presented and progressed in the usual and customary manner on the property. It was declined at all stages of progress.

The claim was appealed to the Carrier's highest appellate officer in a letter dated February 12, 1957, the acknowledgment thereof reading as follows:

"February 15, 1957.ed

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'The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance.' See Awards 3523, 6018, 5040, 5976."

The Board having heretofore recognized the limitations placed upon it by law, and the fact that it is without authority to grant new rules or modify existing rules, such as here demanded by the Brotherhood, and will therefore not attempt to further restrict Carrier's rights, can make a denial award for this one reason, if for no other, and there are others.

CONCLUSION

Carrier has proven that:

(a) Claim which the Brotherhood here attempts to assert is barred and the Board has no jurisdiction over it and should dismiss it for want of jurisdiction. It was not presented within sixty days from the occurrence on which it is based.

(b) The effective Maintenance of Way Agreement was not violated as alleged. Claimant had no contract right to perform the work here claimed. Claim is therefore not valid.

(c) Claim is clearly not supported by the principles of prior Board awards. Weeds and vegetation were not cut on property used by the Carrier as a part of its railroad operations.

(d) The Board is without authority to grant the new rule or working condition here sought to be established by the Brotherhood.

Claim, being barred by the plain language of agreement rules, should be dismissed for want of jurisdiction. If, however, despite this fact, the Board assumes jurisdiction it cannot do other than make a denial award.

All evidence here 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.

OPINION OF BOARD: Carrier owns four parcels of land in Corinth, Kentucky, which lie between its tracks and a highway. Pursuant to a City Ordinance, Carrier was directed by the City to cut weeds and brush growing on the land. It is unquestioned that Carrier had the responsibility to comply with the Ordinance.

At the request of Carrier the weeds and brush were cut by two City employes on August 13, 14, 15 and 16, and on September 4 and 5, 1956, and the costs ($84.00) billed to Carrier. Thus, the work was contracted out.

Petitioner contends that this work is within the Scope Rule of the Agreement and the work, in the past, was performed by Carrier's MW employes. Carrier contends the parcels of land are not part of its right of way and the land is not used in railroad operations; therefore, MW employes have no contractual right to perform the work. Further, Carrier contends that: (1) the claim was not timely filed in satisfaction of the time limit rule prescribed in Article V 1. (a) of the August 21, 1954 Agreement; (2) Rule 10(c) of the Agreement divests Claimant of any right to the work; and (3) Rule 40 of the

Agreement immunizes Carrier from paying employes for work not performed.

TIME LIMIT RULE

Carrier first raised the time limit rule in its Submission. This Board has held that the rule is procedural and failure to raise its application as an issue on the property constitutes a waiver. See, for example, Awards Nos. 6769 and 9492. We hold accordingly.

THE MERITS

The Scope Rule of the Agreement does not specify the work covered. Where such is the case we have held that to bring specific work within the Rule Petitioner has the burden of providing that the work is of a type or kind which has been performed, customarily and usually, by employes covered by the Agreement.

When, on the property, the claim was appealed to Carrier's Assistant Director of Labor Relations he denied it. As one of the reasons for the denial it was stated:

> "The City was advised, as the practice has been under similar circumstances in the past, to use its employes to cut the weeds and brush and to bill the railroad for service performed."

On appeal to Carrier's highest appellate officer Petitioner states that during conference discussion it emphatically reminded that officer that Carrier's own forces had, in the past, cut the weeds and brush on the four parcels of land. We credit this evidence because in his letter of denial Carrier's highest appellate officer did not include among his reasons for denial that the past practice had been as stated by the Assistant Director of Labor Relations. This constitutes an abandonment of Carrier's past practice defense; and, it leaves in the record, undenied, Petitioner's assertion that the work had been performed by MW employes.

We are persuaded to conclude that MW employes had customarily and usually performed the work because of Carrier's failure to introduce any evidence as to past practice. We find, therefore, that: (1) the work comes within the Scope of the Agreement; and (2) the contracting out of the work violated the Agreement.

RULE 10(c)

Rule 10 of the Agreement is captioned "Notice of Desire to Retain Seniority." Sections (a) and (b) of the Rule prescribe conditions with which an employe laid off in a force reduction must comply to retain his seniority rights. No issue has been raised as to Claimant's compliance with the conditions.

Carrier argues that even though the contracting out of the work be found to be a violation of the Agreement, Claimant "was not subject to recall . . . he had no contract right under the agreement . . . to be recalled to cut the weeds and bushes . . ." It cites Rules 10(c) of the Agreement as supporting the argument.

Rule 10(c) reads:

> "Notice of Desire to Retain Seniority—Rule 10:

(c) A man who has complied with the provisions of paragraphs (a) and (b) of this Rule 10 will be notified to return to the service only to fill a permanent position, expected to last sixty (60) or more working days, on seniority district specified in the notice provided for in paragraph (b) in this rule, and then only in event a senior employe has not applied for the position or is not working thereon; **provided nothing in this Rule 10 shall be construed to prevent the recall to service of employes who have complied with the provisions of paragraph (a) if their services are needed,** but there is no obligation to recall those who do not comply with paragraph (b)." (Emphasis ours.)

Carrier's position is that an employe laid off in a reduction of force has no contractual right to return to service except "to fill a permanent position, expected to last sixty (60) or more working days." Therefore, since the work of cutting the weeds and brush did not meet these conditions, Claimant has no standing. Carrier disregards the proviso of Rule 10(c) which we have emphasized, **supra.** The Rule must be read as a whole.

The purpose of Rule 10, as is evident from its caption, is to provide a procedure by which laid off employes can retain their seniority rights. It is designed for the protection of the employes. It does not waive other contractual rights and obligations.

The meaning of the clause in Rule 10(c) upon which Carrier relies is found in Carrier's own language that a laid off employe "will be **subject** to recall only to fill a permanent position expected to last sixty or more working days." (Emphasis ours.) It protects an employe, who may be elsewhere gainfully employed, from the liability of responding to calls for a few hours or days of work the penalty for failure being loss of seniority.

We find nothing in Rule 10(c) that denies an employe's contractual right to work covered by the Agreement. True, the employe has an election as to whether he will return to service to fill a position expected to last less than sixty days. But, this cannot be construed as vesting an unequivocal right in Carrier to contract out work, covered by the contract, if its performance is expected to take less than sixty days. The proviso in Rule 10(c) supports this conclusion.

We find that Carrier's argument, relative to the interpretation and application of Rule 10(c), is without merit.

RULE 40

Carrier contends that Rule 40 of the Agreement bars this Board from making a monetary award to make whole Claimant for loss of pay suffered due to Carrier's violation. The Rule reads:

"Work Not Performed—Rule 40:

Except as provided in these rules, no compensation will be allowed for work not performed."

We have held that such a rule does not exempt a carrier from payment of compensatory damages. See our Award No. 11938.

CONCLUSION

Upon the basis of the foregoing findings of fact and conclusions of law

we find that Carrier violated the Agreement. 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. 11939, DOCKET NO. MW-10090

Our dissent to Award 11937 is equally applicable here and is, by reference, made a part hereof.

In addition to the misapplication of the well-established principle that under the agreement here involved the work reserved to employes covered thereby is only that which by historical tradition, custom and practice they have exclusively performed, and that the burden of proving such exclusive historical custom and practice is upon Petitioner, the Referee chose to ignore the basic fact that the parcels of land on which the work was performed are not part of Carrier's right of way; are in no way used in its operation as a common carrier, and, therefore, the work performed thereon was not subject to the agreement. (Awards 3626, 4783, 5246, 6329, 7442, 7443, 7444, 10592, 10722.)

The discussion, under the caption "The Merits." is so confused as to border on the ridiculous. In the first paragraph the Referee says that the Petitioner has the burden of proof. In the second paragraph he quotes the decision of the Carrier's highest appellate officer, the Assistant Director of Labor Relations, showing that the past practice had been to handle the weed cutting in the same manner as it was handled in 1956. The Referee then refers to conference discussion with the Carrier's highest appellate officer and accepts an unsupported statement of the Petitioner as to what transpired in that conference. The statements that:

> "We credit this evidence because in his letter of denial Carrier's highest appellate officer did not include among his reasons for denial that the past practice had been as stated by the Assistant

> Director of Labor Relations. This constitutes an abandonment of Carrier's past practice defense; and, it leaves in the record, undenied, Petitioner's assertion that the work had been performed by MW employes."

are incredible in the face of the record. In the first place, the Carrier's highest appellate officer and the Assistant Director of Labor Relations are one and the same. Both letters referred to were signed by the same person—the Assistant Director of Labor Relations. In the second place, there was no abandonment of Carrier's past practice defense as previously outlined by the Assistant Director of Labor Relations; in fact, the letter confirming the conference concluded:

> "In these circumstances, this will reaffirm declination of the claim on the basis indicated in my letter to you of March 28, 1957."

The conclusion that:

> "We are persuaded to conclude that MW employes had customarily and usually performed the work because of Carrier's failure to introduce any evidence as to past practice."

contradicts the finding in the first paragraph that the burden of proof is on the Petitioner, and is contrary to the well-established principle that the burden of proving the exclusive historical custom and practice is upon Petitioner.

The award is not supported by the record, is palpably erroneous, and we dissent.

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ W. H. Castle

/s/ T. F. Strunck

/s/ G. C. White