Award No. 12328
Docket No. MW-11633

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, 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 continues to violate the effective Agreement in assigning other than Maintenance of Way employes to line switches and flag for weed burners used to destroy weeds or to remove snow and/or ice from switches.

(2) For each date subsequent to December 31, 1957 on which other than Maintenance of Way employes are used to line switches and flag for weed burners used to destroy weeds or to remove snow and/or ice from switches at various locations on both the Gary and Joliet Divisions, each track laborer employed on each respective section on which said violations occur shall be paid at this respective straight time rate for an equal proportionate share of the total man-hours consumed by such other forces in performing Maintenance of Way Department work, claim to continue until the work is permanently restored to our forces.

(3) A joint check be made of the Carrier's records to determine the dates on which other forces were used, the total time so consumed and the identity of the section laborers assigned to or furloughed from each respective section on dates on which violation occurred thereon.

EMPLOYES' STATEMENT OF FACTS: On January 1, 1958 and on various dates subsequent thereto, Maintenance of Way Weed Burners were used to remove snow and/or ice from switches at Joliet and Waukegan, Illinois and at other locations on the Joliet Division and at South Chicago, Kirk Yard, Mill Yard and at other locations on the Gary Division. In addition, these weed burners were and are used to destroy weeds growing in the track zone at various locations on both the Joliet and Gary Divisions.

In connection with both of the aforesaid operations, Train Service employes, who hold no seniority rights under the provisions of this Agreement, were and are assigned to and perform the work of lining switches and providing flag protection for these Weed Burners.

Board together with the Organization and the Carrier. Following this, the merits of this case should be considered by the Board in light of the respective agreements of these two unions together with the usage practice and customs of the industry.

In addition, the Carrier demonstrated that these claims were barred by the operation of the National Time Limit on Claims Rule. Since the Railway Labor Acts specifically sets out the manner in which cases will be submitted to the various divisions of the National Railroad Adjustment Board, it is clearly evident that the requirements of the Time Limit Rule are not satisfied until a case has been submitted to the Board with a full statement of facts and position in accordance with Section 3, First (i) of the Railway Labor Act. This case is also barred by the Time Limit on Claims Rule in that the Organization failed to identify by name the individual claimants on whose behalf this claim was filed and progressed. This point is probably best examined in light of the following hypothetical case: To whom would the Carrier have paid the claims had the Carrier failed to comply with the time limit requirements of that Rule in handling the progress of this case? The Time Limit on Claims Rule, in such event, provides that the Carrier will pay the claim on a no precedent basis. The Rule does not permit the Organization to amend claims or come in with additional evidence to establish the identity of the claimants. Therefore, if the claim is not sufficient on its face, it is void from the start and of no effect whatsoever.

In addition, the Carrier has demonstrated that the claim brought to this Board, as well as the claims progressed on the property, are vague and indefinite and have not been supported by any evidence or recitation of facts. In view of this and in light of the long precedence cited by the Carrier before this as well as other divisions of the National Railroad Adjustment Board, these claims should be dismissed.

In addition to the foregoing, the Carrier has demonstrated that the claim is invalid on its merits. The Organization cannot gain before this Board what they have not gained at the bargaining table. Further, the Carrier has demonstrated that the Organization has not submitted any evidence to the effect that any person has suffered any pecuniary loss as a result of the alleged violation. In view of this, there is no monetary award that can be made under the provisions of Rule 62 of the basic agreement between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD:

JURISDICTIONAL ISSUES

Several procedural issues raised by Carrier need to be resolved before this claim may be considered on the merits. First, Carrier states that the claim should be dismissed because the Claimants are not identified as required by Article V, 1(a) of the National Agreement of August 24, 1954. The claim is on behalf of each track laborer who worked in the Gary and Joliet Divisions subsequent to December 31, 1957 when Carrier allegedly violated the Agreement. There are a long line of Awards of this Division which hold that claims which are of a general nature and fail to name the Claimants except as a class are not a bar to the disposition of the claims. This claim is on behalf of track laborers who worked from identified places of the Carrier. This Division of the Board also has a well established principle that a claim is valid if Claimant can be readily identified and ascertained. The Claimants

in this dispute are within this category. Further, Petitioner requested a joint check to determine the identity of the Claimants and to ascertain other information relevant to the successful prosecution of this claim. Carrier refused to comply with this request. The information is exclusively within the knowledge of Carrier. The identity of Claimants is readily ascertainable.

Second, Carrier contends that the claim is barred because proceedings were not instituted before this Division of the Board within nine months after Carrier's highest officer rendered his decision. Carrier's Vice President of Personnel declined the claim in a letter dated November 21, 1958, addressed to Petitioner's General Chairman. Petitioner's notice of intent to file this dispute was received by the Secretary of this Division of the Board on August 19, 1959. This notice was received within the nine month period. It is in compliance with the requirements contained in Article V, 1(c) of the National Agreement of August 21, 1954.

Third, Carrier argues that the Board has no jurisdiction because the claim is vague and indefinite. We do not agree. Carrier is fully aware of the nature of the claim. The record is replete with statements by Carrier showing full well that Carrier knows and understands the issue in this dispute. Similar claims involving the same issue have previously been considered by this Division of the Board.

The Division of the Board has jurisdiction to consider the merits of the claim.

CLAIM FOR VIOLATION OF THE AGREEMENT

Claims involving the same parties, the identical issue, and the same Agreement have been considered and ruled on by this Division of the Board. See Awards 7585 and 10748. In Award 7585 we sustained the claim and held that the operation of the weed burners when used in burning weeds and when removing snow, as well as lining switches and flagging in connection with the operation of the weed burners, is covered by the Agreement. This Award held that Rule 56 II, which is the Rule involved in the instant dispute, covers such work for Maintenance of Way employes, and that "it was a violation of that rule to assign such work to employes not covered by the maintenance of way agreement." We also said in that Award:

> "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."

Award 10748 affirms the principle enunciated in Award 7585 and concludes as follows:

> "To summarize, we find that 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."

Carrier argues that Petitioner does not have the exclusive right to operate the weed burning machines whether to burn weeds or remove snow and ice from switches, to flag for the weed burners, and to line switches. The

precise issue was decided in Award 7585. Carrier made the same argument in that case. We held that Rule 52 II(a) specifically gave this work to maintenance of way employes. The fact that employes not covered by the Agreement may also have done this work does not contravene the explicit terms of that Agreement.

The two cited Awards fully discuss all of the factual issues raised by Carrier in this case. These Awards are well considered. There is no reason to reiterate here the application of those principles to the dispute here considered. They are the same. We affirm those principles as applicable to the facts in this claim.

THE CLAIM FOR MONETARY RECOVERY

Carrier contends that the monetary claims as they appear in paragraphs (2) and (3) of the Statement of Claim are barred by the second paragraph of Rule 62 because the "claimants in this case who were employed and fully compensated in their respective positions during the time an alleged violation of the nature covered by this case occurred did not suffer any pecuniary loss as a result of such alleged violation." This paragraph states:

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

Petitioner replies that "Rule 62 was superseded in its entirety by the adoption and acceptance of Article V of the August 21, 1954 Agreement. This precise issue involving the same parties, has also been considered and ruled on by this Division of the Board.

At the outset it should be stated that the sustained claim in Award 7585 arose more than five years prior to the consummation of the August 21, 1954 Agreement.

The best and fullest discussion of this issue is in Award 10748. We held, in substance, (1) that Article V of the August 21, 1954 Agreement is a "Time Limit" rule which superseded the first paragraph of Rule 62 also a "Time Limit" rule, (2) that the second paragraph of Rule 62 is concerned solely with monetary damages, and (3) that the parties did not intend to eliminate the second paragraph of Rule 62. This finding was affirmed in Award 10828.

Petitioner urges consideration of Award 10706 wherein we held that Article V of the August 21, 1954 Agreement did supersede Rule 62. We have read and studied all of the Awards dealing with this subject. Award 10748 is more persuasive and is more consistent with the evidence in the record. It has since been followed and affirmed by Award 10828. We conclude that Article V of the August 21, 1954 Agreement did not supersede the second paragraph of Rule 62 and that it is applicable to this dispute.

It is, perhaps, unfortunate that we are obliged to rule that Carrier violated the Agreement and assess no specific damages. But that is not our making. While the Agreement may not be violated with impunity, we are obliged to hold that under Rule 62 Petitioner is obliged to show actual pecuniary loss resulting from the violation. Claimants are entitled to recover only such actual pecuniary loss as they may have suffered as a result of Carrier's violation of Rule 56 II of the Agreement.

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 is 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 13th day of March 1964.