Award No. 10574

Docket No. MW-8819

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

James P. Carey, 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 effective agreement when, on April 8 and 9, 1954 and on May 4 and 5, 1954, it assigned other than Maintenance of Way employes to remove and replace the brick on Boiler No. 64, at Joliet Terminal;

(2) Mason G. T. Saxon and Mechanic Helper J. E. Valek each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed in the performance of the work referred to in part one (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: For countless years prior to November 8, 1939, and for more than thirteen (13) years subsequent thereto, it has been the unchallenged right to have work in connection with removing and replacing fire brick on stationery boilers performed by Bridge and Building employes of the Maintenance of Way Department.

Because representatives of the Boilermakers claimed that Maintenance of Way Employes were often performing Boilermaker's work, a Memorandum of Understanding between the Boilermakers, the employes of the Maintenance of Way Department and the Carrier, regarding division of work, was consummated on November 8, 1939, the pertinent portion of which reads as follows:

"BOILERMAKERS:

Boilermaker's special rule 67 is construed to mean that the boilermakers are entitled to work of fabricating all metal parts necessary to repairs of coal chutes, turntables, coal hoppers, tanks, boxes, lockers, etc. The work of installing such parts is the work of M. of W. employes. M. of W. employes may continue their present practice of making repairs in place to coal chute aprons, angle irons, coal hoppers, tanks, boxes, lockers, etc., but if the repairs necessitate replacement of certain parts, these parts will be fabricated by boilermakers,

as the practice of submitting time claims has existed. As is evident in Exhibits "A" and "B", Claimants satisfied two of the pre-requisites of Rule 62, that is, (1) they filed a time claim (2) for an alleged violation. However, Claimants and the Organization have continued to insist that Claimants are entitled to the payment of money without satisfying the third pre-requisite of Rule 62, that is, demonstrating **the actual pecuniary loss** resulting from the alleged violation. The Carrier submits that this rule can have only one meaning; the Claimants must show in this case that **as a direct result of the alleged violation they suffered an actual loss in pay received from this company.** Claimants actual loss in this case has been shown to be nothing, therefore, the Carrier submits that in the event the Board finds that part (1) of the claim submitted by the Organization is sustained, that part (2) should be denied under the requirement imposed by Rule 62, that only the actual pecuniary loss can be recovered.

V. CONCLUSION

The Carrier is confident that the Board will find that in this submission the Carrier has established the following points:

1. The work of removing and replacing fire brick in Carrier's stationary boilers is not covered by Rule 56 I (a), the bridge and building sub-department scope rule.

2. The tri-partite agreement of November 8, 1939, establishes that repairs to all boilers on Carrier's property shall be made by boilermakers.

3. In the event it is determined that the work of removing and replacing the fire brick in Carrier's stationary boilers is covered by the bridge and building sub-department scope rule, then Rule 56 I (j) is effective and constitutes an exception to this scope rule by providing that such work shall be performed in the manner provided by the tri-partite agreement of November 8, 1939.

4. The practice cited by the Organization as supporting its position cannot alter or amend the unambiguous rule of the November 8, 1939 tri-partite agreement which governs this work.

5. In the event part (1) of this claim is sustained, then part (2) of the claim must be denied because Rule 62 of the schedule agreement confines time claims to the actual pecuniary loss resulting from the alleged violation, and Claimants sustained no such loss.

In view of the foregoing, the Carrier respectfully submits that a denial award should be made.

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

(Exhibits not reproduced).

OPINION OF BOARD: For almost 14 years following the 1939 Tripartite Agreement between the Carrier, Maintenance of Way Employes and the Boilermakers' Organization, and for many years preceding that Agreement, accepted practice on this property was to assign the work of removing and replacing fire brick in stationary boilers to B & B employes.

The pertinent portion of the 1939 Tri-partite Agreement provides:

"Boilermaker's special rule 67 is construed to mean that the boilermakers are entitled to work of fabricating all metal parts

necessary to repairs of coal chutes, turntables, coal hoppers, tanks, boxes, lockers, etc. The work of installing such parts is the work of M. of W. employes. M. of W. employes may continue their present practice of making repairs in place to coal chute aprons, angle irons, coal hoppers, tanks, boxes, lockers, etc., but if the repairs necessitate replacement of certain parts, these parts will be fabricated by boilermakers, and M. of W. employes will discontinue doing this work. Boilermakers will make necessary repair to all boilers regardless of where located on the line of road."

The material portions of Rule 56 of the Maintenance of Way Agreement are:

"I Bridge and Building sub-department.

"(a) All work of construction, maintenance, repair or dismantling of buildings, bridges, including the renewals on open deck bridges, tunnels, wharves, docks, coal chutes, smoke stacks and other structures built of brick, tile, concrete, stone, wood or steel, cinder pit cranes, turntables and platforms, highway crossings and walks, but not the dismantling and replacing of highway crossings and walks in connection with resurfacing or track, signs and similar structures, as well as all appurtenances thereto, loading, unloading and handling of all kinds of bridge and building material, shall be bridge and building work.

"(j) All work described under Rule 56 (I) shall be performed by employes of the B&B sub-department, except as provided in Memorandum of Understanding dated November 8, 1939, and agreement with shop crafts effective April 3, 1922."

On the dates mentioned in the instant claim, the Carrier transferred the brick work mentioned above to Boilermakers, on the ground that the last sentence of sub-paragraph (a) above of the 1939 Tri-partite Agreement necessitated such action. The Carrier maintains that past practice on the property may not properly be interposed to alter an unambiguous rule such as is found in the Tri-partite Agreement of 1939. We think that in the situation disclosed of record, the Carrier has misinterpreted and misapplied the rule of construction on which it relies, insofar as the removal and replacement of fire brick in boilers is concerned. The language of the 1939 Agreement and of Rule 56 is not clear and unmistakable in respect of the removal and replacement of those items. It makes no mention of them. In the absence of other facts and circumstances revealing a contrary intention, fire brick may properly be regarded as an integral part of a stationary boiler, but in the record before us we are confronted with an admitted past practice in which the parties have by their conduct indicated a disposition to treat fire brick separately from the metal shell and other appurtenances which, in the aggregate, represent the boiler. If the contracting parties had intended to remove fire brick work from the B & B Department and assign it to Boilermakers, they could readily have done by simple and express language to that effect. The fact that they did not, but for more than 13 years after 1939 continued to regard such work as belonging to B & B employes is, we think, persuasive evidence of an intention to leave the removal and replacement of fire brick in stationary boilers with them. We are therefore required to find that the Carrier violated the Agreement as claimed.

This claim has been advanced on behalf of two named Maintenance of Way Employes to whom payment at their respective straight time rates is sought for an equal proportionate share of the total man-hours consumed by

boilermakers and helpers in performing the brick work in question on the dates shown. It is unquestioned that at all of the times involved, these Claimants were performing other work for the Carrier. The generally accepted rule is that the true measure of damages for breach of contract is the direct loss shown to have been sustained as the proximate result thereof. Penalties or punitive damages are not customarily allowed for simple breach of an Agreement, except in special circumstances such as statutory or contractual authorization therefor or where malicious intent is shown. None of these elements is found in this record. Award 6303 relied on by the Employes, authorized a penalty payment for Agreement violation on another property. However, that Agreement did not contain a provision similar to Rule 62 of the Agreement in the instant case. Rule 62 provides:

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

These Claimants sustained no direct or consequential loss as the result of the breach of the Agreement. In support of their position that Rule 62 does not preclude penalty payment, the Employes refer to other instances in which this Carrier settled similar claims by penalty payments in spite of Rule 62. Those dispositions do not impair the plain language of Rule 62.

The Employes also maintain that these claims are not time claims within the meaning of Rule 62. The claims initially submitted by the Employes specifically stated that each Claimant was "time claiming" on account of work belonging to Claimants and performed by Employes of another craft. Apart from terminology, however, these are claims for penalty payment for breach of contract in support of which there is no evidence of pecuniary loss to the Claimants. In view of Rule 62, and other facts and circumstances of record, we hold that punitive damages are not proper in this case. See our Award Nos. 7585 and 10247.

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1962.