Award No. 10750
Docket No. MW-9550

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 effective Agreement when it assigned other than Bridge and Building employes to perform the work of dismantling and replacing the protective metal covers on the sand conveyor at East Joliet, Illinois;

(2) Bridge and Building Carpenters D. French, D. Bellus and J. Johnson each be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by the other employes in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On or about March 22, 1955 the Carrier assigned the work of dismantling and on April 5, 1955, the replacement of the protective metal covers on the sand conveyor at East Joliet, Illinois, to Mechanical Department employes who hold no seniority rights under the provisions of this Agreement. Approximately twenty-four (24) man hours were consumed in the performance of the above referred to work.

The above referred to sand conveyor is a structure within the intent and purpose of the Agreement rules, having been originally constructed by the Carrier's Bridge and Building employes.

The Claimant Bridge and Building employes were available, fully qualified, and could have performed the work described above, had the Carrier so desired.

The Agreement violation was protested and a suitable claim filed in behalf of the instant Claimants.

in the scope of this rule; nor may it be interpreted as being included in the scope of this rule by reference to its inclusion in the meaning of the term "structure".

Further, even if the protective covers on the sand conveyor were construed to be a "structure", the routine removal and reapplication of these covers certainly would not, in and of itself, involve construction, maintenance, repair or dismantling as is required in order to be covered by the scope of Rule 56 I (a).

The tri-partite agreement of November 8, 1939, and in particular the previously quoted section with which we are here concerned, has reference only to the fabrication of parts, the installation of such parts or later repairs. Since the instant claim is concerned merely with the removal and reapplication of protective covers and not fabrication, installation or repair of such covers, the tri-partite agreement has no bearing.

Regardless of the Carrier's foregoing arguments, this claim is barred by the second paragraph of Rule 62 of the effective agreement between the parties which reads:

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

Since there was no pecuniary loss incurred by any Maintenance of Way employes as a result of boilermakers removing the protective covers of the sand conveyor, the above quoted rule necessitates that this claim be denied.

In view of the foregoing, the Carrier asks that the claim in this case be dismissed in its entirety.

All material data included herein have been discussed with the Organization either in conference or in correspondence.

OPINION OF BOARD: In March 1955, Machinists from the Mechanical Department were assigned the task of repairing shafts and gears on the mechanism of a sand conveyor at East Joliet, Illinois. In order for the machinists to gain access to the mechanism it was necessary to remove the protective metal covers from both top and bottom of the conveyor. This chore was assigned (on about March 22) to Boilermakers in the Mechanical Department. After the repairs were completed, (on or about April 5) they replaced the protective covers. The Boilermakers spent about 24 man hours in removing and replacing the covers, a task which the Petitioner claims should have been assigned to its members.

The Sand Conveyor was originally constructed and installed by Petitioner's members who are employes in the Bridge and Building Department. The conveyor and its housing mechanism is located outside and attached to one wall of the sand house. The conveyor itself, of steel construction, has a concrete foundation and is about 25 feet high, 20 inches wide and 30 inches deep. The internal mechanism is used to lift wet sand from a pit to a hopper in the sand house where the sand is stored for drying.

Rule 1 (Scope) of the Agreement covers all employes "in any and all sub-departments of the Maintenance of Way Department . . ." Rule 56.I,

concerned with the Bridge and Building Sub-department, provides in part as follows:

"Rule 56. I Bridge and Building Sub-department

"(a) All work of construction, maintenance, repair or dismantling of buildings, bridges, including tie 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 of track, signs and similar structures, as well as all appurtenances thereto, loading, unloading and handling 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."

The first question to be resolved is whether the task assigned to Boilermakers, in March and April 1955, should have been assigned to men in the Bridge and Building Sub-department. The Carrier argues, in essence: (1) Rule 56.I(a) does not delegate to Maintenance of Way employes the right to remove and replace protective covers, since such work (a) is not spelled out in the scope of this rule, (b) is not covered by the term "structure"; (2) Even if these covers are deemed to be a "structure," their removal does not constitute construction, maintenance, repair or dismantling, under Rule 56; (3) Since neither the conveyor nor the covers constitute "structures" for purpose of repair (under the 1939 Tri-Partite Agreement), they cannot be considered "structures" for purpose of dismantling (under Rule 56); (4) Removal and replacement of these covers may properly be assigned to the craft which performs the necessary repair or maintenance work on the mechanism.

These contentions, in our judgment, are not persuasive. Rule 56.I(a) states that "all work of . . . dismantling of building, bridges . . . tunnels, wharves, docks, coal chutes, smoke stacks and other structures built of . . . concrete . . . or steel . . . as well as all appurtenances thereto . . . shall be bridge and building work." The sand conveyor is built of steel and concrete. It is a "structure" in the same sense that smoke stacks, coal chutes, and the like, are structures. True, the covers themselves are not structures, but Rule 56 contemplates "dismantling" of a structure, the task performed here by Boilermakers.

"Dismantling," according to Webster's New College Dictionary, means "1. To strip of dress or covering; to divest. 2. To strip of furniture or equipment; as, to dismantle a house." The term can reasonably be applied in the case at hand. Moreover, Rule 56.I(a) covers "appurtenances", which the dictionary defines as "That which belongs to something else; adjunct . . . Syn. Appendage." The steel covers here, in our opinion, were appurtenances.

While not necessarily controlling (and recognizing there is some dispute on the question) the record, in our judgment, supports Petitioner's assertion

that M. of W. employes constructed the conveyor in the first place, thus reflecting recognition of its status as a structure. Carrier indicates this was done pursuant to the 1939 Tri-Partite Agreement which provided, in part:

> "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."

But, as may be seen, this Tri-Partite Agreement refers only to "making repairs in place" and "replacement of certain parts." The **original** construction and installation of the sand conveyor, presumably, required neither repairs nor replacements. Therefore it is fair to assume that M. of W. men were asked to construct and install the conveyor because it was a "structure" within the meaning of 56.I(a).

Carrier also argues that even if **removal** of the steel covers constituted "dismantling" under 56.I(a), there is nothing in that Rule which requires M. of W. men to **replace** the covers (the chore performed on or about April 5). This represents a strained interpretation of the Agreement, in our opinion, particularly in the light of the fact that M. of W. employes constructed the structure in the first instance. It is more reasonable to believe that the parties intended "construction" to represent the obverse of "dismantle" in Rule 56.

It is true, of course, that there would have been no need to remove or replace these covers had it not been necessary to repair the internal mechanism and in that sense the task was incidental to the repair job. But that cannot change the fact that Rule 56.I(a) gives to Maintenance of Way men the right to dismantle a structure — partially dismantle in this instance — which they had constructed and installed. (It is not unusual under this Agreement, we note, for jobs to be divided between M. of W. men and Boilermakers. Thus, the parties have construed Boilermakers' special Rule 67 to mean that boilermakers are entitled to **fabricate** metal parts for repair of coal chutes, tanks, lockers, etc., while M. of W. employes will **install** such parts.) While Second Division Award 1790, cited by the Carrier, held that removing and replacing a 30" x 20" sheet, held in place by screws, is similar to moving a hinged door designed to expedite inspections or repairs and hence is a task incident to mechanics' repair work, we not that in the case at hand: (1) the removal and replacement chore was not just a moment's work — it required three man days; (b) There is no evidence that the steel covers performed the same function as the sheet referred to in Award 1790.

We find, in sum, that the work in question was improperly denied to M. of W. employes. What, then, of Petitioner's second claim that two Carpenters and a Helper in the Bridge and Building Sub-department each be compensated eight hours' pay? The Carrier argues that even if its assignment of Boilermakers was incorrect, no back pay should be awarded since Rule 62 provides that "Time Claims shall be confined to the actual pecuniary loss resulting from the alleged violation." Petitioner affirms: (1) This contention should not be considered by the Board since it was not made on the property; (2) Even if the argument is considered, it should not be sustained since Rule 62 is no longer in the Agreement, having been superseded by Rule V on January 1, 1955.

The information in the record relevant to these considerations is as follows:

1. On April 20, 1955 Petitioner entered its claim on behalf of three men. This was subsequently denied at all steps.

2. On January 2, 1957, in its Ex Parte Submission to this Board, Petitioner reiterated its claim, stating in part: "The Claimant Bridge and Building employes were available, fully qualified, and could have performed the work described above, had the Carrier so desired."

3. On April 1, 1957 Carrier, in its Ex Parte Submission to the Board, stated in part: "Regardless of the Carrier's foregoing arguments, this claim is barred by the second paragraph of Rule 62. . . . Since there was no pecuniary loss incurred by any Maintenance of Way employes as a result of boilermakers removing the protective covers of the sand conveyor, the above quoted rule necessitates that this claim be denied." This was the first time Carrier contended the claim was not allowable because claimants were fully employed on the dates in question.

It is significant, in our judgment, that there is no evidence of Carrier's having raised the matter of damages on the property. Under Rule 62 there is a **factual** question to be determined: did claimants actually suffer a pecuniary loss? To resolve such question one must obtain information on such matters as (1) the precise dates on which the alleged violation occurred, (2) what claimants were doing that day, (3) whether the disputed work could have been performed by them during their regular shift or whether it would have required overtime, and the like. When the question is not raised until long after the event, however, (two years in this case), Petitioner may well find its position prejudiced with respect to its need to uncover relevant facts. Moreover, assuming (without deciding) that Rule 62 was part of the Agreement in 1955 when this grievance arose, Petitioner might conceivably have been persuaded to alter its course had Carrier then presented facts showing that no pecuniary loss had been suffered by M. of W. men.

Accordingly, it is our conclusion that the question of pecuniary loss was raised too late in these proceedings to bar the granting of this claim. We reach this conclusion, moreover, without in any way determining the more basic question of whether Rule 62 was superseded by Article V.

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.

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.

CARRIER MEMBERS' DISSENT TO AWARD 10750, DOCKET MW-9550

This award represents a misinterpretation of the contract and cannot for that reason be given any legal effect.

The Majority holds that a sand conveyor is a "structure" within the meaning of Rule 56 I(a) which reads:

> "All work of construction, maintenance, repair or dismantling of building, bridges, including tie 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 of tracks, signs and similar structures, as well as appurtenances thereto, loading, unloading and handling of all kinds of bridge and building material, shall be bridge and building work."

and that Claimants have the right to remove and replace the covers of the conveyor under the authority of the words "construction" and "dismantling" used in the foregoing rule although admittedly they have no right to repair the mechanism within. In short, the Majority says the removal and replacement of a cover to gain access to the mechanism within is the "construction" and "dismantling" of the "structure". This interpretation is just as absurd as it sounds. To get to the point where it could say without appearing too illogical that the "replacement of a cover" could be equated with the word "construction", the Majority attempted to soften the approach by holding that "removing the cover" was "dismantling" and "construction" was the obverse of "dismantling". When an interpretation is correct, there is no need to twist and distort the language to reach a result.

The Majority also concluded the Sand Conveyor was a "structure" within the meaning of Rule 56, although the repairs of the Sand Conveyor mechanism was accomplished by employes from the machinist's craft without objection. If it was not a "structure" for "repairs", under Rule 56 the Majority cannot consistently hold it is a structure for the purposes of "construction or dismantling" under that Rule.

The Majority further holds

> "True, the covers themselves are not structures . . ."

If the covers are not structures then where was the construction performed? The sand conveyors were already there, obviously they were not constructed again. If the covers are not structures then there was no construction performed on a structure.

Finally, the Majority lamely attempted to distinguish this case from **Second Division Award 1790,** when it says:

> "While Second Division Award 1790, cited by the Carrier, held that removing and replacing a 30" x 20" sheet, held in place by screws, is similar to moving a hinged door designed to expedite inspections or repairs and hence is a task incident to mechanics' repair work, we note that in the case at hand: (1) The removal and replacement chore was not just a moment's work — it required three man days; (b) There is no evidence that the steel covers performed the same function as the sheet referred to in Award 1790."

The function of the door in **Award 1790** was designed to expedite inspections inspections of repairs. Here that is precisely the reason why the cover was removed — to make repairs to the internal mechanism. The Majority so held when they said:

> "It is true, of course, that there would have been no need to remove or replace these covers had it not been necessary to repair the internal mechanism and in that sense the task was incidental to the repair job. * * *"

It is clear therefore, the steel cover performed the same identical function as that in **Award 1790.** Moreover, the incidental nature of the work to the job performed by the mechanics, is not affected by the time consumed in performing that work. Are we going to hold a stop watch on a job to determine whether it is incidental when it takes very little time, but not incidental when it consumes a longer period? What will be the yardstick? Who will determine it? This Award begets error, it does not correct it.

For the reasons stated above, we must dissent.

/s/ W. F. Euker

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ G. L. Naylor

/s/ O. B. Sayers