Award No. 14853
Docket No. MW-15712

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

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 Carrier violated the Agreement when it assigned and/or permitted individuals outside the scope of the Agreement to perform the work of cutting brush on the right-of-way of its Washington Division. (Carrier's File MW-20186)

(2) The Carrier further violated the Agreement when it assigned and/or permitted individuals outside the scope of the Agreement to perform the work of cutting brush on the right-of-way of its Memphis Division. (Carrier's File MW-20187)

(3) Tractor Operators H. L. Gibson and J. L. Goss each be allowed pay at his straight time rate for an equal proportionate share of the total man-hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

(4) Tractor Operators C. J. Johnson and J. W. Knight and Track Laborer Mose Watkins each be allowed pay at his respective straight time rate for an equal proportionate share of the total man-hours consumed by outside forces in performing the work referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: Beginning on July 22, 1963, employes of Contractor Andrews, who hold no seniority under the Agreement, performed the work of cutting brush and small trees on the right-of-way of the Carrier's Washington Division, Eastern Lines. Work commenced near Mile Post 53. Two (2) employes of the contractor performed the work, using two (2) crawler tractors equipped with rotary mowers, generally referred to as "bush hogs."

Beginning on July 22, 1963, employes of the Bankhead Welding Company, who hold no seniority under the Agreement, performed the work of cutting brush and small trees on the right-of-way of the Carrier's Memphis Division,

operators and Mose Watkins as track laborer beginning July 22, 1963, and on unspecified dates thereafter because of our having contracted for a bush hog to cut brush, small trees, etc., on our right-of-way on the Memphis Division near Milepost 540.

The facts in connection with this matter were explained to you in considerable detail by Mr. Moore in his letter to you of May 26, 1964. I agree with the decision given you by Mr. Moore in that letter.

I do not agree with the interpretation which you are attempting to place upon the awards cited by you. As you know, the Board has recognized on many occasions our right to contract work when special materials, special equipment, special skills or special tools are required. A special machine was required to perform the here involved work. It is a machine not owned by the Railway Company and which the company would not be justified in purchasing for use on the rare occasions that it would be needed. In these circumstances we were fully justified in contracting for the bush hog to cut the brush, small trees, etc. on our right of way.

Contrary to your allegation the equipment now being used by employes of the contractor is not owned by the Railway Company, nor is such equipment leased to outsiders in order to circumvent agreement rules as you allege.

The agreement has not been violated and there is no basis for the monetary claim which you attempt to assert. Moreover as already explained, the claimants were regularly employed during the period involved. Claim being wholly without basis and unsupported by the agreement is declined."

On December 18, 1964 the claim which the Brotherhood's General Chairman had presented was discussed in conference between the Brotherhood's General Chairman and Carrier's Director of Labor Relations, following which on December 21, 1964 Carrier's Director of Labor Relations addressed the following letter to the Brotherhood's General Chairman:

"In our conference on December 18 we discussed the claim for unearned compensation on behalf of C. J. Johnson and J. W. Knight as tractor operators and Mose Watkins as track laborer beginning July 22, 1963, and on unspecified dates thereafter because of our having contracted for a bush hog to cut brush, small trees, etc., on our right-of-way on the Memphis Division near mile-post 540.

The facts in connection with this case have already been explained. Contrary to your allegation the bush hogs are not owned by Southern. As you know, the Adjustment Board has recognized on numerous occasions our right to contract for machines to do certain jobs. Here special machines were used to do a particular type of work, and the company does not own such machines, nor have Southern's maintenance of way forces ever operated machines of this type.

Claim being without basis and unsupported by the agreement, I confirm my previous declination of the same."

OPINION OF BOARD: The first issue to be resolved is whether the work of cutting brush, trees and undergrowth on Carrier's right-of-way is

reserved to its maintenance of way employes. The Scope Rule of the Agreement is general in nature. Therefore, Petitioner has the burden of proving that the work has been performed historically and customarily by maintenance of way employes. From the inception of the Claim throughout its handling on the property Petitioner averred:

> "Prior to July 22, 1963, all right-of-way adjacent to tracks was either cut by tractor mower or by track gangs using such tools and equipment furnished them by the Railway Company. The work of maintaining or repairing the Carrier's tracks, including the cleaning or cutting of right-of-way adjacent thereto, is work of the character that has heretofore been usually and traditionally performed by Carrier's track sub-department employes."

The averrment stands undisputed in the record as made on the property. Therefore, we hold that Petitioner has met the burden of proof and find that the work is reserved to maintenance of way employes in the absence of a recognized exception.

Carrier cooperated with outsiders in the development of large rotary cutting machines designed on the same general principles as a rotary lawn mower. These rotary cutters were mounted on tractors equipped with crawler treads so that they could operate over most any type of terrain. The rotary cutters are mounted on the crawler tractors in such manner that the cutting blades can be raised and lowered. This assembly is called a "bush hog." Although the tractors were originally owned by Carrier and the rotary appliances and modifications were attached thereto by employes of Carrier, Carrier divested itself of ownership and the "bush hogs" came into the hands of a contractor. Thereupon Carrier entered a contract to have the contractor, by use of the "bush hogs," cut the brush, trees and undergrowth on the right-of-way. It was this contracting out of the work which gave rise to the claims in paragraphs 1 and 2 of the Claim. In defense Carrier says that its action did not violate the Agreement because this Board has established the right of a Carrier to contract out work which requires special machines. True, that principle has been established. But, we find that the tractors with attached appliances, here involved, are not "special machines" within the contemplation of the principle. Consequently, having found that the work of cutting comes within the Scope Rule, we find that Carrier violated the Agreement when it contracted to have the work performed by persons not covered by the Agreement. We will sustain paragraphs 1 and 2 of the Claim.

Issue is raised as to whether Claimants have been damaged. Recent opinions of the courts have held: (1) this Board has no power to assess a penalty; (2) monetary damages are to be determined as in contract law; and (3) the party pleading for the payment of damages has the burden of proof. See and compare, **Gunther v. San Diego & AER Co.**, 382 U. S. 257 (1965); **Brotherhood of Railroad Trainmen v. Denver & RGWR. Co.**, 10 Cir., 338 F. 2d 407 (1964), cert. den. 380 U. S. 972 (1965); **Brotherhood of Railroad Signalmen v. Southern Railway Company**, United States District Court for the Middle District of North Carolina, Civil Action No. C-2-G-65 and Civil Action No. C-9-G-65, May 25, 1966.

Throughout the handling of the Claim on the property Carrier, **inter alia**, initially and consistently denied it for the given reasons:

". . . claimants were regularly employed during the period involved . . . Thus your claim in their behalf is for double pay. **They do not have a contract right to be so paid. . . .**" (Emphasis ours.)

This put Petitioner to its proof that the named Claimants suffered **de facto** monetary damage from the alleged violation of the Agreement. Petitioner chose to ignore the issue and failed to adduce any evidence to prove monetary damages. Failure of proof compels us to dismiss paragraphs 3 (except as to Claimant Gibson) and 4 of the Claim.

It is admitted that Claimant Gibson was on furlough the first period of September 1963. Therefore his availability and loss of work stands proven for that period. We will sustain paragraph 3 of the Claim as to Gibson for one day's pay at pro rata rate for each day the "bush hog" was operated during said period.

The argument has been presented that when work has been wrongfully removed from employes in the collective bargaining unit it logically follows that damages have been incurred. It does, indeed, give rise to a suspicion. But, we may not speculate. The pronouncement of the courts are that the monetary damage suffered by each particular employe claimant must be proven.

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 as alleged in paragraphs 1 and 2 of the Claim.

That paragraphs 3 and 4 of the Claim must be dismissed for failure of proof of damages, except as to Claimant Gibson who shall be made whole to the extent set forth in the Opinion.

AWARD

Paragraphs 1 and 2 of the Claim sustained.

Paragraph 3 of the Claim sustained in part and denied in part as set forth in Opinion;

Paragraph 4 of the Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1966.

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