

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James H. Wolfe, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF
AMERICA**

THE PENNSYLVANIA RAILROAD

STATEMENT OF CLAIM: "(a) Protest of F. W. Behr, signal helper, Regional Telegraph and Signal Gang, against retention of G. L. Keeler as Foreman in charge of Regional Telegraph and Signal Gang, on July 2, 1938 and subsequent thereto.

"(b) Claim of F. W. Behr for all compensation lost subsequent to July 2, 1938 while on furlough or required to work in a lower seniority class account of Keeler being retained as a Foreman in Regional Telegraph and Signal Gangs."

EMPLOYEES' STATEMENT OF FACTS: "Regional Telegraph and Signal Gangs assigned to the Western Region of the Pennsylvania Railroad comprise a separate seniority district from the other divisions in that territory.

"G. L. Keeler, who holds no seniority in that seniority district and only holds rights on the Fort Wayne Division, has been assigned and is now holding position of foreman in charge of one of these gangs.

"There are several other employees working positions of signalman on this seniority district who have been reduced from positions of foreman and are fully qualified to again be so assigned.

"The retention of Keeler as foreman caused one of the other qualified foremen to be reduced to a mechanic and thereby, due to the exercise of displacement rights, Behr was furloughed and/or required to work in a lower seniority class."

POSITION OF EMPLOYEES: "Prior to September 1, 1931 and for many years before, the Regional Telegraph and Signal Gangs were maintained as a separate unit of the department and were assigned wholly to the construction and maintenance of telegraph and signal pole lines and equipment (including office) and to the installation and maintenance of telegraph and telephone cables and equipment. All employees in these gangs, as well as all gang foremen and assistant foremen, were employees holding rights only in that seniority district.

"On September 1, 1931 the carrier abolished all such gangs and also abolished practically all division signal gangs. At this time an understanding was negotiated with a committee representing the employees whereby regional composite gangs were established. These gangs performed the various phases of the work in the department and the employees were recruited for the gangs from the regional and several division seniority districts in accordance with the above mentioned understanding.

Section 3 (i) of the Railway Labor Act limits the jurisdiction of the National Railroad Adjustment Board to 'disputes . . . handled in the usual manner up to and including the Chief Operating Officer of the Carrier designated to handle such disputes.' The claim for compensation clearly does not satisfy this requirement nor can it successfully be argued that this claim is but a part of the general protest and entertainable as such. The Carrier has never had an opportunity to discuss the application of Regulation 7-A-2 and cannot anticipate the argument the employees propose to make in this connection. Moreover the Carrier has not been apprised as to the theory upon which the Claimant is seeking compensation.

"It is respectfully urged, therefore, that the claim for compensation should be dismissed.

CONCLUSION

"The Carrier has shown that the position of Foreman Regional Gang in the instant case is not within the scope of the 'Regulations and Rates of Pay' nor the Supplemental Agreement dated December 7, 1936, effective January 4, 1937, and need not be filled by an employee having seniority in the Regional Gang seniority district.

"Therefore the Carrier respectfully submits that the use of Mr. Keeler as Foreman in the Regional Gangs was not in violation of the Agreements to which the Claimant is a party and respectfully requests your Honorable Board to dismiss the claim of the employee in this matter.

"The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same."

OPINION OF BOARD: The record shows that G. L. Keeler, with seniority rights only on the Fort Wayne Seniority District, was assigned by the management as a Signal Foreman in the Western Regional Telegraph and Signal Gang. The Western Region Signal Gang has a separate seniority roster from that of the rosters of any of the divisions geographically contained within it and hence the Fort Wayne Division seniority rights are not interchangeable. They must be accumulated within the Regional District or in that division.

The Carrier has an agreement with the Signal Maintainers and lower rated employees, effective September 1, 1921, revised July 1, 1928. This agreement does not govern Foremen or Assistant Foremen. The Carrier has another agreement governing Foremen and Assistant Foremen, dated September 8, 1921. Neither of these agreements specifies how or from where a Foreman or Assistant Foreman may be selected. The Carrier contends that it may act according to its will as freely as before any agreements were made, except where the agreements are restrictive on its action. The Brotherhood does not directly dispute this contention, but maintains that, by Rule 3-D-2 of the Signalmen's Agreement (September 1, 1921), read in conjunction with a supplemental agreement dated December 8, 1936, effective January 4, 1937, the Carrier was required to advance an employee on the Regional Roster to a position of Foreman on the Regional Gang when there was available a person fit for such work. It is not disputed that on the Regional Gang there were employees who were qualified to act as Foremen. In fact, there were several employees working positions of Signalmen in the Regional seniority district who had formerly held Foremen's positions.

The Supplemental Agreement reads, insofar as material here, as follows:

"1st—Regional gangs to be on the same basis as existed prior to September 1, 1931.

"2nd—The force in regional gangs to be recruited, so far as practicable consistent with the requirements of the service from employees with seniority in the regional gang seniority district."

The rules (3-D-1 and 3-D-2) of the Signalmen's Agreement, upon which claimants rely, in addition to the above, as far as material here, read as follows:

"3-D-1. When force is reduced, the senior employees in a class on the seniority district capable of doing the work shall be retained."

"3-D-2. Seniority of employees to new positions or otherwise vacancies will, unless otherwise agreed, be restricted to a Superintendent's Division. * * *"

It is said by the Carrier that there are separate agreements covering Foremen and Assistant Foremen on the one hand and Signalmen on the other, and that each agreement covers only the respective classifications purported to be covered by them and since neither the Signalmen's Agreement nor the Supplementary Agreement covers Foremen, the Carrier is at liberty to appoint whom it desires as such. This may be admitted, but it fails to sense the real problem involved. The Foremen's Agreement deals with regulations for the government of Foremen and Assistant Foremen; the Signalmen's Agreement covers the regulations and rates of pay for the government of the classifications named therein, but neither specifies how a person is inducted into these classifications. After an employee is inducted in the classification that set of rules which applies to his classification governs him, but the problem presented is as to whether there is any restriction on the Carrier as to how Foremen and Assistant Foremen should be selected.

We think there is such restriction. It is found in Rules 1 and 2 of the Supplementary Agreement, effective January 4, 1937, and above quoted viewed in the light of the history leading up to the formulation of such agreement.

For years prior to September 1, 1931, Regional Telegraph and Signal Gangs and all employees in those gangs, as well as gang Foremen and Assistant Foremen, held seniority in this regional district.

The Brotherhood states that the Foremen and Assistant Foremen were selected as such from such seniority roster. The Carrier does not deny this fact, but states that it has not checked on the accuracy of the statement that prior to 1931 Foremen of the Regional Gangs were selected from among the employees having seniority in the gangs. It goes on to state—"However, if this is true, the selections were made by the Carrier from choice and not because some agreement required it to do so." The Carrier should be in a position to know if such was the practice before September 1, 1931 and a "failure to check the accuracy," is tantamount to an admission. Furthermore, if before said date the practice was to select Foremen from the Regional Gangs and such employees held regional seniority the inference is quite strong that the selection of such employees did not chance to happen throughout by free choice, but because the carrier felt an obligation to do so.

On September 1, 1931 the Carrier abolished all Regional Gangs and practically all division signal gangs. Thereafter, by understanding, composite gangs were established and the employees were recruited from the regional and several division seniority districts in accordance with the alleged understanding referred to. This arrangement continued in force until July 1, 1936, at which time all of these gangs were abolished. After several months of negotiations the Supplemental Agreement, effective January 4, 1937, was executed.

The first paragraph of this Agreement states that Regional Gangs are—"to be on the same basis as existed prior to September 1, 1931." The problem therefore, resolves itself into determining what basis existed prior to

September 1, 1931. As above stated, it appears that prior to September 1, 1931, Foremen and Assistant Foremen were selected from the regional seniority lists. Hence the Regional Gangs would hardly be established on the basis upon which they existed before that date if we omitted this important feature.

This conclusion gives a content to the expression in the second paragraph of the Supplemental Agreement, reading—"For force in Regional Gangs, * * *." "The force" must include Foremen and Assistant Foremen.

This interpretation furthermore is completely harmonious with Rule 3-D-1 of the Signalmen's Agreement, since Foremen coming from the seniority roster of the region will be scaled down on that roster.

The parties have had much to say in regard to whether the Brotherhood did or did not represent the Foremen in the formulation of their agreement. That whole matter may be dismissed as beside the point. Regardless of who represented whom the case turns on what the parties really agreed to in regards to the method of filling Foremen's jobs. As above stated the Supplementary Agreement incorporated in paragraph one the method used before 1931, which was to select regional Foremen from the regional seniority roster.

There remains the question of reparation. The Carrier urges that Behr simply made a protest and made no claim for reparation until ex parte submission to this Board, hence failed to comply with Rule 7-A-2 of the Signalmen's Agreement (Regulations and Rates of Pay, effective September 1, 1921, revised July 1, 1928) and Section 3 (i) of the Railway Labor Act. The employees counter with statement that under many decisions of the Pennsylvania System Telegraph and Signal Department Reviewing Committee claims were in the form of protests. Be that as it may, it appears to us that the railroad was sufficiently apprised that Behr was not making a protest purely for altruistic reasons or even for the benefit of his group in order merely to test out the legality of the action of the railroad in appointing Keeler. It could reasonably be inferred from Behr's letter of July 12, 1938, to Roughley, that he was protesting because he himself was affected even tho the letter made no mention of actual mathematical loss. However, there is not evidence before this Board sufficient to determine what Behr lost by being furloughed, or whether the furlough in any event was due to Keeler's appointment, which seems to have antedated the furloughing of Behr about four years. But the claim is sufficient to save it under Rule 7-A-2, and certainly the claim in the form it was, went the course required by Section 3 (i) of the Railway Labor Act. The awards cited by the Carrier all pertain either to a failure to go through channels or to a failure to present the claim in the time provided by the rules. In this case the claim progressed through the proper channels and seems to have been presented within ten days. Its sufficiency only is in question. As to that, we again state it was sufficient reasonably to appraise the Carrier that Behr was asking reparation.

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 Employees involved in this dispute are respectively Carrier and Employees 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 G. L. Keeler was wrongly retained as Foreman in charge of Regional Telegraph and Signal Gang "B" at least after July 2, 1938; that the case is remanded to the field for investigation as to the questions of whether the retention of Keeler resulted in the furlough of Behr and, if so, the amount of loss suffered by Behr by reason of such furlough.

AWARD

Claim (a) Sustained; Claim (b) remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of December, 1940.

Dissent to Award No. 1308—Docket No. SG-1315

This award is in error in that it is predicated upon Sections 1 and 2 of a Supplemental Agreement, effective January 4, 1937, between the carrier and its signalmen, as being applicable to the position of Foreman.

In reaching a conclusion in this dispute, the word "force" as used in the second Section of the Supplemental Agreement, "to be recruited * * * from employes with seniority in the regional seniority district," coupled with the requirement contained in Section 1 that "Regional gangs to be on same basis * * *," was expanded to include the position of Foreman, a position not covered by the Agreement between the carrier and its signalmen.

At the time of the effective date of the Supplemental Agreement the positions of Foremen were covered by a separate agreement antedating such Supplemental Agreement with the signalmen, whose representatives (agents and/or members of the Brotherhood of Railroad Signalmen of America), signers of this Supplemental Agreement, were without authority to legislate, negotiate, or represent in any way the Foremen, who by action independent of the Brotherhood had entered into the previously negotiated Foremen's agreement with the carrier.

The disregard of these important facts, controlling in any proper interpretation of contractual agreements into which the respective parties had entered, has led into an award of unwarranted extension to the Signalmen's agreement, improper encroachment upon the Foremen's agreement and thus consequent illegal punitive imposition upon the carrier—a party to both of those agreements. Such an award is outside the authority and powers of this Board as they are defined by Section 3, First (i), of the Railway Labor Act.

s/ C. P. Dugan
s/ A. H. Jones
s/ R. H. Allison
s/ C. C. Cook
s/ R. F. Ray

SUPPLEMENTAL STATEMENT OF REFEREE

A dissent has been filed to this award which states that the award "is predicated upon Sections 1 and 2 of a Supplemental * * * as being applicable to the position of Foremen." What was intended to be said by the Board's Opinion was not that the Supplemental Agreement was applicable to Foreman but that Sections 1 and 2 read in the light of the "basis" which existed before 1931 created in the members of the regional gang an inchoate right, if competent, to get into the Foreman class, after which they would be subject to the Foreman's agreement.

/s/ JAMES H. WOLFE

January 8, 1941.