

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

**THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY**

STATEMENT OF CLAIM: (a) Claim is made by the Brotherhood that the Carrier violated the Scope of the Agreement between the Carrier and the Brotherhood when on or about May 21, 1945, it farmed out, assigned, or otherwise allotted a portion of the work specifically enumerated in said Scope to persons not covered by the Agreement.

(b) Claim is made by the Brotherhood in behalf of the signal employees holding seniority rights on the Plains and Slaton Seniority District for the difference in rates of pay account of not having been promoted due to contractor's employees performing signal work.

(c) Claim is made by the Brotherhood in behalf of senior signal employees of the Plains and Slaton Seniority District by classes, at their respective overtime rates of pay, for all hours worked by the contractor's employees while the contractor's employees were performing signal work.

EMPLOYEES' STATEMENT OF FACTS: An Agreement bearing an effective date of June 1, 1939 (revised February 1, 1946) between the Atchison, Topeka and Santa Fe Railway Company; Gulf, Colorado and Santa Fe Railway Company; panhandle and Santa Fe Railway Company; and the Brotherhood of Railroad Signalmen of America was in effect when this dispute arose which covered all of the employees of this Carrier who perform generally recognized signal work.

The Agreement governs the rates of pay, hours of service, and working conditions of all employees performing the work covered by the Scope of the Agreement.

The Agreement covers all classes of generally recognized signal work and there are no exceptions which permit the diversion of any work covered by the Agreement. It also covers the construction, maintenance, and repair of signal apparatus and, specifically, it includes centralized traffic control.

During the period involved in this dispute, persons not covered and who held no seniority under the Agreement, performed generally recognized signal work when they constructed a signal pole line as a part of a centralized traffic control project on the Plains and Slaton Seniority District between Amarillo, Texas and Waynoka, Oklahoma.

Starting on or about May 21, 1945, and continuing until the project was completed, persons not covered by the Agreement were performing signal work covered by the Agreement on the Plains and Slaton Seniority District.

occurred, are barred from consideration. Time claims will be restricted to a period commencing not earlier than sixty (60) days prior to the date they are formally presented to the Railway Company." (Emphasis supplied.)

In conclusion the Carrier asserts that the instant dispute is entirely without merit or schedule support and should for the reasons heretofore expressed be either dismissed or denied in its entirety.

(Exhibits not Reproduced.)

OPINION OF BOARD: The parties are agreed as to the general fact situation in this case, the incident which brought the claim into being and of the contract rules involved.

The Organization contends that under the Scope Rule of the Agreement certain work belonging to employes was contracted out to persons not covered by the Agreement.

Starting on or about May 21, 1945, and continuing until the first week in December, 1945, the Carrier constructed a Centralized Traffic Control System between Waynoka, Oklahoma, and Amarillo, Texas, a distance of approximately 199 miles, on the main line of Carrier's Plains Division between Waynoka, Oklahoma, and Clovis, New Mexico, embracing a territory of about 862 miles. The Plains Division, together with the Slaton Division, constitutes the "Plains and Slaton Seniority District," which extends approximately 1,169 miles.

In connection with the Centralized Traffic Control System, the Carrier contracted for construction of a pole line including the stringing of wire thereon. The contractor employed 20 men in May, 50 in June, 64 in July, 86 in August, 79 in September, 82 in October, 65 in November and 6 in December, all in 1945. This made an average of 71 persons so employed during this period.

During the same period Carrier employed 19 Signalmen, 4 Assistant Signalmen, 11 Signal Helpers, or a total of 34 employes, under the Agreement, in May, 1945. A total of 42 were employed in June, 45 in July, 84 in August, 73 in September, 75 in October, 97 in November and 82 in December, 1945, the total number of employes under the Agreement averaging about 67 in all classifications for this period.

Prior to the contracting of the work in question, the Carrier made efforts to get the Organization to secure assistance and also contacted the Railroad Retirement Board and other sources in order to augment its signal forces. However, by reason of the manpower shortage during this period of the war effort, the attempts were largely unsuccessful.

The Organization contends that the Agreement was violated in that positions necessary to the performance of this new construction work were not bulletined to employes of the Plains-Slaton Seniority District for seniority choice. Therefore, they contend that Carrier violated the Scope Rule and other provisions of the Agreement, as it did not exhaust all reasonable and possible means of performing the work with its own employes and denied them the opportunity for promotion to which they were entitled by virtue of their accrued seniority. Section 4(a) of Article 4 of the Agreement provides:

"Section 4-(a).—New positions will be bulletined within fifteen (15) days previous to or following the dates on which such positions are established. * * *."

The Carrier contends that sufficient information relative to available men, classification, identification of employes, etc., was not given to it prior to the filing of claim with this Board. In answer to this, the Organization shows that the reason this was not done was because of Carrier's failure to comply with the provisions of Section 4(a) of Article 4 of the Agreement, as above set out, and that, therefore, it was impossible for the Organization

to process this claim on the property and that this was true through no fault of the Organization, but due directly to the indefinite manner in which the Carrier handled the matter. By reason thereof, the Organization contends it met the requirements of Article 3(i) of the Amended Railway Labor Act; that the Carrier has sought to change the seniority district in its presentation of factual data; that it should be comprised of the Slaton Division and the Plains Division of the Seniority District; that the entire right to work, seniority, promotion, and transfers is predicated on seniority districts, and not on operating divisions.

It is further contended on the part of the Organization that the first knowledge of the proposed new construction work came to the General Chairman on May 3, 1945, in the form of a telegram; that no information was given except that conference was suggested; that the General Chairman answered the telegram the day it was received, requesting information, and agreed to meet on May 22, 1945, at Amarillo, Texas. However, it was not until May 16, 1945, that the requested information was received, and the contractor started work on May 21, 1945, the day preceding the conference.

The Carrier contends that the work in question was of an emergency nature in compliance with the utmost effort for the war in that the hostilities had ceased in the European theatre of activity and the war effort was to be speeded up in the Pacific theatre of operations, necessitating improved methods to meet the demand in movement of war ordnance and all other necessary transportation facilities to aid the situation. They contend that all employees under the Agreement had been upgraded and that the Organization has at all times failed to present the names of individuals directly affected by the work in question in the matter of upgrading and that it was impractical to work additional overtime by reason of the fact men were working 7 days a week, 8, 9 and 10 hours and the distance involved was too great to use Organization personnel in additional overtime work. It is admitted that the work in question by outside forces was a violation of the Scope Rule, but that, by reason of the fact situation, it was only a technical violation; that the record shows conclusively the Carrier had increased its own forces by at least 100% and consequently the Organization members were working to the maximum of their abilities.

Both parties cite numerous awards of this Division of the Board and some of the First Division of the Board. These awards are somewhat in conflict on the proposition as to whether or not like situations were in their nature technical violations, or more than that, the factual circumstances largely controlling. See Awards 3251, 3423, 3687, 2983 and 3823.

In the instant case, the claim must be sustained as to (a). There was a violation of the Agreement. Extensive arguments have been presented with reference to compliance with the provisions of Article 3(i) of the Amended Railway Labor Act. In the opinion of the Board the facts indicate sufficient compliance therewith.

The question presented by (b) and (c) of the claim is more difficult of solution. By reason of failure to bulletin, and all factual data surrounding the progress of the matter under consideration, it must be held that the violation of the Agreement is more than technical in its nature.

The Carrier relies on the war emergency situation. In this connection it must be kept in mind that hostilities in both the European and Pacific theatres of action had ceased some three months prior to the completion of the work under contract.

The problem of eligibility and availability to perform the work is of importance to a proper solution. In the matter of availability the great distances involved, i. e., length of seniority district, must be considered. For holding dealing with availability, see Award 3687, and on the proposition of impractical situations and impossibility of performance, see Award 3251. In the case last cited, it is said in part:

“ * * * We think it would be unreasonable for the Organization to insist that work of great magnitude be performed on overtime,

or to insist that work be performed as overtime where it would bring about serious complications in the efficient performance of the work or require excessive overtime hours. Neither party can be required to do the impossible, nor will they be permitted to assume an unreasonable position in such matters with impunity. * * *

For a recent award holding on the question of availability, see Award 3823, rendered during the current year. Also, see the holding in this award relative to promotions.

Division (b) of the claim will be sustained, however, on the basis that any difference in pay meet the requirement of reasonableness by a showing that a difference would be the reasonable sequence of events had the Carrier not violated the contract and it is to be considered on an individual basis by the making of an adequate showing to warrant the same, and only in accordance with rates of pay under the Agreement at the time in question. This holding is by reason of the Carrier's failure to negotiate on the matter and its failure to bulletin the positions.

Division (c) will be sustained, however, on an individual basis, taking into consideration the physical ability to perform such overtime work with relation to the distances involved and availability to perform such overtime in accordance with proximity to the work being performed, on a pro rata basis.

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 employee 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, as indicated in Opinion.

AWARD

Claims (a), (b) and (c) sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of December, 1948.