Award No. 4712
Docket No. SG-4428

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

THE BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: (A) Claim of the Brotherhood that the Carrier violated and continues to violate the Signalmen's agreement when on or about April 14, 1947, it farmed out, removed or otherwise arranged or assigned generally recognized signal work to persons not covered and who held no seniority rights under the provisions of the Signalmen's agreement.

(B) Claim that signal employes entitled to this work under the Signalmen's agreement shall be compensated at their regular rate of pay on the basis of contractor's employes assigned to such work in violation of the agreement; that each employe involved holding seniority under the agreement during the period signal work was improperly assigned to persons not covered by the Signalmen's Agreeemnt shall receive compensation for his proportionate share of the total time worked by the contractor's forces..

EMPLOYEES' STATEMENT OF FACTS: There is an agreement dated August 1, 1939 between the parties to this dispute, the Scope of which reads as follows:

> "Scope: The following rules apply to employees classified in Article 1, performing the work generally recognized as signal work, superseding all rules, working conditions and practices in conflict herewith."

The scope rule, above quoted, makes no provisions for contracting or farming out work, nor in any manner provides that persons not covered by the Signalmen's Agreement shall be required or permitted to perform work covered by that Agreement.

On or about April 14, 1947, the carrier contracted with the Union Switch and Signal Company, a concern not a party to the Signalmen's agreement to install a Car Retarder System at Cumberland, Maryland. The contractor completed work on or about April 12, 1947.

The work assigned or contracted to the Union Switch and Signal Company always has been and still is a part of the work generally recognized as signal work. The Contractor's rates of pay ranged from $1.03½ per hour for helper to $1.33½ per hour for signalmen as compared with .99½c per hour for helper to $1.34½ per hour for gang foreman under the agreement which unilaterally established improper wage rates covering signal work

In substance the carrier argued that:

"That was not a case which falls into the category of farming out work for economical reasons to the detriment of Carrier forces: it was only a question of having a special job properly done which this Carrier was unable to do with its own organization, material, equipment and bridge department employes."

The Board in its Opinion held:

"Employes contend, on the other hand, that the equipment could have been found somewhere on the railroad system and that employes sufficiently skilled to have done the work were available. Such assertions however, unsupported by factual data, are not sufficient to overcome the managerial judgment of the Carrier in contracting the work, when such judgment was exercised after consideration of facts such as are shown by this record. It must ever be borne in mind that the Carrier is charged with the safety of its men as well as that of the public in using its transportation facilities. Its managerial judgment ought not to be lightly disregarded in matters of this kind. While it is generally the rule that a Carrier is not permitted to farm out work which can be performed by its employes, yet, where the evidence, as here, is sufficient to warrant the exercise of managerial judgment as to whether the Carrier has the men, equipment and facilities to perform the work, the contracting of the work by the Carrier cannot be said to constitute a violation of the agreement. The proof is insufficient to sustain an affirmative award." (Underscoring added).

The Division, together with Referee Edward F. Carter, found that the current agreement was not violated and the claim was denied.

Yet if this Division here now sustains the protest as made by these employes, and the carrier submits this cannot properly be done, then the carrier desires to specify that even in this event the wage claims for punitive rate of pay are not valid. In support of this argument the carrier desires to refer to a portion of the Opinion of the Board in Award No. 3251 reading:

"* * * 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 could 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."

The Division in Award No. 3251, together with Referee Edward F. Carter, sustained the wage claims at the pro rata rate only.

On the basis of all that is contained hereinabove, the carrier requests the Division to find this protest and these wage claims as being without merit and to deny them both accordingly.

(Exhibits not reproduced).

OPINION OF BOARD: On June 12, 1946 the Carrier entered into a contract with a manufacturer of signal and other electrical equipment for the purchase, installed, of a car retarder system for its Cumberland, Maryland, hump classification yard, for a stated lump sum price of $209,480.00. The installation, the Carrier contends, was at the risk of the manufacturer, title to pass upon completion and acceptance in place. These retarders, operated from a central tower at the apex of the hump, regulate the speed of cars as they descend.

The Organization contends that contracting the installation of this car retarder system is a violation of the Scope of the Agreement as well as of rules pertaining to seniority, overtime, promotion and new positions. It is contended much of the work could have been done on an overtime basis. The Scope of the Agreement, Revised August 1, 1939, reads:

> "The following rules shall apply to employes classified in Article 1, performing the work generally recognized as signal work, superseding all rules, working conditions and practices in conflict herewith."

This statement appears to have been unchanged since 1922. We find no further description or specific identification of what constitutes "work generally recognized as signal work" except on the cover of the Agreement in evidence: "Rules and Working Conditions governing Employes Specified Herein Engaged in the Maintenance, Repair and Construction of Signals, Interlocking and other Signal Apparatus." No reference is made to car retarders; at the time this Agreement was executed there were no car retarders on this property.

In addition to the brief references to car retarder construction and operation in the record, there has been submitted, in behalf of the Organization, a technical booklet entitled "American Railway Signaling Principles and Practices, Chapter XXI, Hump Yard Systems, published by the Signal Section, A.A.R., September, 1948." This booklet deals comprehensively with the origin and historical development of car retarder systems with respect to their technical design, installation, and operation, and with hump classification yards and their layout for efficient operation when retarders are installed.

The first mechanical car retarder appears to have been invented and patented by Hannauer and Wilcox, officials of the Indiana Harbor Belt Railroad, and installed on that property in 1923. As the art of hump yard operation and car retarder use advanced, other types have been developed; among them the electromatic or the electro-pneumatic type involved here.

The retarder itself is part of a system that includes car retarders, switch machines, skate machines, control machines, power plant, signal system, etc. Installation of these modern systems is usually accompanied, as was the case here, by a general rearrangement of the classification yard.

The booklet referred to, read with the record, leaves little doubt either as to the need for skill and experience in signal work during many phases of construction and operation, or the overall organizational knowledge and experience required for an initial installation.

In defense of its action in making a contract with the Union Signal and Switch Company for the manufacture and installation of a complete car retarder system, the Carrier contends that none of its employes had had previous experience with the installation and operation of such a car retarder system—neither its engineers nor other supervisory forces, nor its signalmen. The installation required about four months. The Carrier contends also that the arrangement relieved it of risk; title remained in the manufacturer until the system was completely installed and accepted.

It is a well-established rule that a Carrier may not let out to others the performance of work embraced within an agreement with its employes unless it can be established the work requires equipment and skill which the Carrier itself cannot otherwise provide, or that it possesses unusual characteristics of magnitude or novelty. Award Nos. 757, 2338, 3823, 4584.

The Organization maintains that much of the work of installation of a car retarder system is less complicated than that customarily done in connection with signalmen's regular duties. This is not disputed in the record. The question of whether or not the Agreement embraces car retarder system installation seems to have been resolved, in some measure, at least, by the parties them-

selves in actions taken before the instant installation was completed, and later when another car retarder system was installed at Carrier's Willard, Ohio yard.

In the instant case, as a result of the protest of the employes, the Carrier persuaded the manufacturer to modify his contract and employ some of Carrier's minor signal employes on construction. That all work claimed by the signal employes subsequent to the completion and acceptance of the system, including some new positions, was assigned to them, seems not to be in question.

With respect to the Willard installation, done later and not involved here, and referred to only because both parties invoke it in their submissions and rebuttal statements, the Carrier maintains the "installation . . . was handled by an outside signal engineering firm on a contractual basis comparable to the Cumberland situation . . . The contractor furnished the necessary supervisors and force in much the same manner as the contractor did at Cumberland." Whatever else may be implied from this statement, the Organization says: "The installation (Willard, Ohio) was accomplished in conformance with the Signalmen's Agreement". We do not here attempt to disturb that apparently mutually agreeable interpretation of the rule. We confine our conclusions to the instant case.

A car retarder system is the key to modern hump yard operation. The Cumberland installation was the first patented system on this property. As a practical matter it is hardly a type of construction that we could reasonably expect the Carrier to undertake with such employes as could be spared from their regular assignments or on an overtime basis at such hours, day or night, as they could devote to it. Initial installation of mechanical and electrical equipment of the character here involved seems to us to require special knowledge, experience, continuity, and concentration on the part of engineers, supervisors, and workmen alike. General familiarity with the theory or phases of it, which some or all of the signal employes undoubtedly had, is helpful but not enough to guarantee assured practical commercial installation and operation of a coordinated system with which they had no previous experience. Apparently it was such assured experience that the Carrier sought when it contracted with the manufacturer to make the installation at his own risk.

To insist that the Carrier had no right to buy or contract for the installation of this first car retarder system on its property from a responsible, experienced manufacturer, under the circumstances set forth in this record, would be equivalent, in our considered judgment, to telling it not only how to organize its engineering, design, research, and other supervisory services, but to deny it access to operating guarantees its own employes, only acquiring skill in this special field as the work progressed, could not reasonably be expected to give, whether they were engineers or signalmen technically proficient in the work they are accustomed to do.

We conclude on the whole record that inasmuch as neither any of its officials nor employes covered by the Signalmen's Agreement had had any previous experience with the installation or the operation of the car retarder system here involved, or any similar system, the Carrier was justified, on the basis of prudence and good judgment, in transferring the risk to an experienced, responsible manufacturer for the first installation of a car retarder system on its property.

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 we are not warranted in holding the Agreement was violated.

AWARD

Claims (A) and (B) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of February, 1950