Award No. 5044
Docket No. SG-4993

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: (a) The carrier violated the signalmen's working agreement when it failed and/or declined to apply the Scope, Hours of Service, and Seniority rules or other provisions of then current signalmen's working agreement, bearing effective date of April 1, 1942 as to rules, and December 1, 1941 (as subsequently revised) as to rates of pay, by not assigning generally recognized signal work to employes covered by the working agreement. Specifically, the signal work involved is the fitting-up and wiring of signal instrument and relay housings which are necessary parts used in connection with repairs and alterations of interlocking plants located in the vicinity of Decatur, Ala.

(b) The employes of this carrier who are covered by the then current agreement and were then working in a signal gang under the supervision of signal foreman F. R. Lefler and the regularly assigned signal maintainer and his assistant at Decatur, Ala., at the time of the violation, be compensated for their proportionate share at their respective overtime rates of pay for all hours worked by persons not covered by the signalmen's working agreement in performing the improperly diverted signal work as described in claim (a).

EMPLOYES' STATEMENT OF FACTS: The signal work involved in this claim constitutes only a portion of the repairs and alterations of interlocking facilities in the vicinity of Decatur, Ala.

An agreement bearing effective date of April 1, 1942 as to rules, is in effect between the parties to this dispute which covers all the employes of this carrier who perform generally recognized work as defined in the Scope rule of the current working agreement. This agreement governs the hours of service and working conditions of all employes performing the signal work covered by the Scope of the agreement. It also covers all classes of generally recognized signal work including the fitting-up and wiring of instrument housings. There are no exceptions which permit the diversion of any of the Scope work to persons not covered by the agreement.

Request is made that the agreement bearing effective date of April 1, 1942, as to rules, and December 1, 1941 (as subsequently revised), as to rates of pay, by reference be made a part of the record in this dispute.

During the period involved in this dispute, persons not covered and who hold no seniority under the working agreement performed generally recognized signal work when they fitted-up and wired instrument cases. Such

Also see Awards Nos. 309, 1451, 1516, 1604, 1789, 2099, 2171, 3523, 3755 and others where it has been held that the burden of proof of alleged agreement violations rests upon the claimant and that respondent's duty is not to develop the claims.

(3) UNDER THE RAILWAY LABOR ACT THE NATIONAL RAILROAD ADJUSTMENT BOARD, THIRD DIVISION, IS REQUIRED TO DECIDE DISPUTES IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE PARTIES, IN THIS CASE THE AGREEMENT EFFECTIVE APRIL 1, 1942, AND IS NOT EMPOWERED TO LEVY FINES OR PENALTIES.

It is a well established principle that penalties are not awarded under a contract unless the contract so specifically provides. The contract here in evidence (the Signalmen's Agreement effective April 1, 1942) does not so specifically provide, nor is there any implication in it that any penalty or fine is to be paid as a result of a violation.

Section 3, First (i), of the Railway Labor Act, confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The Third Division, National Railroad Adjustment Board is, therefore, empowered to decide a dispute only in accordance with the agreement between the parties to it. There being no provision in the Signalmen's Agreement here in evidence calling for any fines or penalties in case of violations and there being nothing in the Railway Labor Act giving the Adjustment Board authority to levy a fine or penalty against respondent for a breach of the agreement, the Adjustment Board has no authority under the contract here in evidence or the Railway Labor Act, to award the penalty or fine here claimed by the Brotherhood.

In conclusion, respondent respectfully submits that it has the unrestricted right to purchase completely assembled and wired signal appurtenances and appliances, such as the four instrument cases here involved and that the purchase of such signal appliances and appurtenances fully assembled and equipped with instruments did not constitute the farming out of work coming under the scope of the Signalmen's Agreement here in evidence; that there has been no failure on its part to fully comply with all provisions of the agreement; that the practice under the agreement as evidenced by the record has been to purchase instrument equipped cases from the manufacturers; that what was done in this instance was in line with past practices; that the claim is simply a demand for money awards to unnamed men for unnamed dates for no specific amounts and is not the sort of dispute the Adjustment Board can decide; that claim is barred by Rule 21 (i); that there has been no showing by the Brotherhood that any signal employe was adversely affected as the result of the purchase from the manufacturer of the four welded steel instrument cases with instruments in place; that there is no authority under the agreement here in evidence or under provisions of the Railway Labor Act for the Adjustment Board to levy the fine or penalty here claimed; that the claim is wholly without merit and is unsupported by any provision of the agreement and should, therefore, in all things be denied and the Board should so hold.

(Exhibits not reproduced).

OPINION OF BOARD: In 1936, Carrier replaced its manually operated interlocking plant and signal apparatus near Decatur, Alabama, with a remotely controlled electrically operated interlocking plant and signal system. In 1948, it became necessary to remove certain signal and interlocking devices at this point and to replace them with new and more extensive appliances and devices. The replacements purchased consisted primarily of four welded steel instrument cases assembled and equipped at the plant of the manufacturer, General Railway Signal Company, Rochester, New York, with relays, rectifiers, transformers, arresters, terminals, etc. In addition thereto,

Carrier purchased the electrically operated control machine, power switch machine and signal mechanism, fully wired and assembled. The signal and electrical engineering in connection with the interlocking plant and the signal apparatus used in connection therewith, was performed by the General Railway Signal Company. This company then manufactured the component parts, assembled them in accordance with the plans and specifications prepared by its engineers, and sold the completed unit to the Carrier. The installing of the new portions of the interlocking plant and signal system was performed by the signal employes of the Carrier. This work included the installation and connecting up of the four instrument cases, the control machine, the power switch machine, automatic signals, batteries, power track and pole line circuits, etc. No complaint is made by the Organization as to the work performed on the premises of the Carrier and it is not an issue here. Nor is complaint made concerning the engineering work performed by the General Railway Signal Company. The claim here is that the Carrier violated the scope rule of the Signalmen's Agreement when it purchased from the General Railway Signal Company the factory fitted and wired signal instrument and relay cases hereinbefore described which were installed and used in connection with the interlocking plant and signal system at Decatur in accordance with the plans and specifications provided by the General Railway Signal Company. The basis of the claim is that the relays, rectifiers, transformers, arresters, terminals, and similar appliances, are stock items, the wiring and assembling of which is work covered by the scope rule of the Signalmen's Agreement. The applicable portion of the scope rule provides:

> "* * * Signal work shall include the construction, installation, maintenance and repair of signals, either in signal shops, signal storerooms or in the field, and shall also include necessary signal work or interlocking plants, automatic or interlocked highway crossing protection devices and their appurtenances, wayside train stop and wayside train control equipment, car retarder system, excluding track maintenance in connection therewith, centralized traffic control systems, as well as any other work generally recognized as signal work. It having been the past practice, this scope rule shall not prohibit the contracting of larger installations in connection with new work nor the contracting of smaller installations if required under provisions of State or Federal law or regulations, and in the event of such contract this rule is not applicable. It is not the intent by this provision to permit the contracting of small jobs of construction done by the Carrier for its own account." Rule 1, Current Agreement.

The dispute hinges around the meaning of the first sentence of the rule as we have quoted it. The exceptions stated in the sentence following have no application to the present dispute and neither of the parties so contend. In other words, is the factory wiring and assembling of the appliances and devices in the four welded steel instrument cases "the construction, installation, maintenance and repair of signals" within the meaning of the scope rule.

The intent of the parties must be determined before the rule can be correctly applied. The wiring of relay houses by a manufacturer is not specifically spelled out as work within the Signalmen's Agreement. The Organization points out that the electrical appliances used were stock items that could be purchased and used indiscriminately for the purposes for which made. It is the integration of the various appliances and devices used, the method of wiring, and their regulation and adjustment within their functional range which produces the result sought. It seems to us that a Carrier, in the exercise of its managerial judgment could properly decide to purchase the engineering skill of the seller of railroad equipment, the benefits of its research and experience, the expertness of seller's employes, and a guarantee that it would operate efficiently and economically. Award 4712. To deprive a Carrier of this fundamental right of management is not contemplated by the rule. On the other hand, if Carrier chose to purchase the component parts of an intricate electrical system and have it assembled on

the property, for reasons of economy or otherwise, it would clearly be the work of signalmen to perform in the absence of specific agreement to the contrary. The purchase of equipment is a function of management. It may purchase by item or in quantity; it may purchase with or without warranties as to its functional operation; it may purchase by stock items or by having it built to order; it may purchase equipment wholly or partially assembled; all without infringing upon the work contracted to signalmen. When material or equipment is purchased and delivered to the property of the Carrier, any construction, installation, maintenance and repair growing out of its use on the property of the Carrier within the scope of the generally recognized work of a craft or of work specifically assigned to such craft, it is work which belongs to the employes of that craft.

There is no contracting or farming out of work belonging to these claimants in the present case. The equipment was never purchased and delivered on the property of the Carrier for use until after the work claimed had been performed at the factory. The rights of employes never attached until the Carrier acquired possession of it. We quite agree that if the equipment has been delivered to the Carrier in such a manner that the rights of claimants under the scope rule attached, that a contracting of the wiring and assembly of the unit would then be a farming out of work belonging to these employes. We fail to see, however, that a purchase of new equipment in whatever form it may exist, can constitute a farming out of work under the Agreement for the fundamental reason that it never had been under the Agreement. That which was never within the scope of an agreement cannot be farmed out.

This construction of the rule is consistent with past practice on this Carrier. The record discloses a number of instances where factory equipped instrument cases have been purchased without complaint on the part of the Organization. It is a clear indication that the Organization itself did not construe the Agreement to include the assembling and wiring of instrument cases by a manufacturer as the work of signalmen. As we have previously stated:

> "The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made." Award 2436.

We conclude therefore that the contract as interpreted by the parties on this Carrier adds support to the interpretation that we have herein announced.

The Carrier cites Award 4662 in support of its position. In that case the Board said:

> "This Board cannot agree with the contentions of the Claimant. The purchase and delivery to the Carrier of any manufactured piece of signal equipment or device cannot be a violation of the scope rule. The rights of Employes under that rule are confined to work generally recognized as telegraph, telephone and signal work in connection with the installation and maintenance thereof, and such wiring as may be necessary on the property of Carrier in the installation of such devices. The Employes performed all the work necessary in installation and wiring of the equipment involved here after its purchase from the manufacturer."

The Organization argues that this award is distinguishable on the facts and applicable rules. We think it is clearly in point on principle and we adhere to what the Board there said.

The Organization argues just as persistently that Award 4713 controls the result in the present case. We think the same principle is involved in

that case as in Award 4662. There appears to be a divergence of views in Awards 4662 and 4713. In the former it was held that the purchase and delivery of any manufactured piece of signal equipment or device cannot be a violation of the scope rule of the Signalmen's Agreement. In the latter case, the holding is directly to the contrary. The writer of this Opinion is in accord with Award 4662. It is the correct interpretation to be applied.

The contentions advanced by the Organization amount to an encroachment upon the prerogatives of management in one of its most important functions. Management should not be limited in its managerial prerogatives by placing a strained construction upon a rule that was never mutually intended by the parties. Such limitations upon the primary functions of management can be obtained only by negotiation, a function in which this Board can take no part.

For the reasons stated, we are of the opinion that there was no violation of the Agreement and that a denial award is required.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
BY ORDER OF FIRST DIVISION

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of September, 1950.