Award No. 6921
Docket No. SG-7025

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Louisville and Nashville Railroad Company that:

(a) Claim that the carrier violated and continues to violate the scope of the agreement effective February 16, 1949, when during the months of April and May, 1951, it contracted, farmed out, assigned or otherwise allotted a portion of the work specifically enumerated in said scope to persons not covered by said current agreement.

(b) Claim of the General Committee of the Brotherhood that Signal Department employes entitled to this work under the Signalmen's agreement shall be compensated at their regular rate of pay on the basis of time and one-half for an amount of time equivalent to that required by employes of the Perma-crete Products Corporation while those employes performed the work of constructing forms, mixing and pouring concrete, setting of anchor bolts, finishing of concrete foundations, and handling for shipment the finished concrete foundations used in connection with highway crossing signals at or near Woodbine, Kentucky, and four such foundations used in connection with cable post installations at or near Chaska, Tennessee; that each employe holding seniority under the agreement during the period signal work was improperly assigned to persons not covered by the Signalmen's agreement shall receive compensation for his proportionate share of the total time worked by persons not covered by the agreement.

EMPLOYES' STATEMENT OF FACTS: The Scope work involved in this dispute constitutes concrete and form work in connection with signal and interlocking systems which has heretofore been performed on the property by employes covered by the Louisville and Nashville—Signalmen's Agreement.

Specifically, the concrete and form work which was purchased from the Perma-crete Products Corporation was used in connection with highway crossing signals near Woodbine, Kentucky, and in connection with cable post installations near Chaska, Tennessee.

The Carrier's act in purchasing these prefabricated concrete foundations constituted a violation of the Scope rule which specifically covers and includes all concrete and form work.

"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." (Emphasis added.)

The Board's attention is also invited to Award No. 5276.

The pre-cast foundations have proven entirely satisfactory. They are particularly adaptable to small installations where only a few foundations of different dimensions are needed. As heretofore shown the foundations used are stock items of manufacturer, shipped to the Carrier disassembled. When received, all work in connection with assembling and installation is performed by the Carrier's signal forces. Any repairs, inspecting, testing or maintenance of the foundations are also performed by signal employes. The pre-cast foundation may be dismounted and moved if necessary, or it may be taken apart and stored for future use if no longer needed as originally installed.

The agreement with the petitioning organization was in no way violated by the Carrier in purchasing the pre-cast foundations. As the agreement was not violated, the claim must be denied. Furthermore, the organization has not shown that any employe covered by the agreement was adversely affected by the purchase of the finished product from the manufacturer.

All factual data submitted in support of the Carrier's position has been presented to duly authorized representatives of the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: We have here a dispute, which is made more difficult for solution due to delays which ensued after handling on the property and before docketing same with the Board. The nature of the claim as stated under (b) above further complicates handling at this level.

The basis of the claim is the Carrier's act in purchasing from the Permacrete Products Corporation pre-cast sectionalized concrete foundations for use in connection with four cable post installations at Chaska, Tennessee, during April, 1951, and in connection with installation of automatic crossing signals at Woodbine, Kentucky, during May, 1951.

Petitioner contends that Carrier's action was violative of the scope rule of the Parties' Agreement, especially that portion thereof which provides:

"* * * concrete and form work in connection with signal and interlocking systems (except that required in buildings, towers and signal bridges); * * *."

As an aid to interpreting and construing the foregoing language same should be read in conjunction with that part of the scope rule spelling out the basic services which the Employes have a right to perform, namely:

"* * * the construction, installation, repair, inspection and maintenance of all * * * power operated gate mechanism, automatic or other devices used for protection of highway crossings; * * *."

The Carrier denies the violation and this makes up the general issue on the merit of the dispute. The claim, according to the Carrier, involves its fundamental right to buy through its Purchasing Department, on purchase order from a supplier, manufactured items offered generally for sale by catalogue advertising, such items being shipped to Carrier's Stores Depart-

ment and taken into stock, to be issued to various departments upon requisition, and to be used again and again as needs and demands require.

Before we are privileged to deal with the merits, however, the Carrier's contention of undue, unseasonable, and unreasonable delay, first requires attention. Claim was denied on the property and Carrier advised that its decision was not acceptable well within the period provided by Rule 54 (d), the final step of the agreed on rule for "Time limits for handling claims". No exception is taken to the handling on the property in accordance with said rule.

Complaint is that the claim was not forwarded to this Board until some 27 months after Carrier was notified the declination of the claim was not acceptable, and, therefore, the Carrier says it had a right to believe that its final decision was accepted. We cannot agree.

If, as the Carrier would have us believe, it was lulled into a sense of security, same must have been due in part to its lack of diligence. It knew from and after January 18, 1952, when so notified in writing that its declination of the claim was not acceptable, that it was charged with a contract violation. With precise notice of the existing and pending dispute, said notice continuing over the period of months in question, Carrier did not seek to avail itself of information that was readily available to it as to the exact status of the claim at all times.

Carrier and Employe representatives are not strangers to each other. We are not the naive ones to believe that they were not in contact over the many months that the claim was pending. The simple expedient of inquiring whether the Organization had abandoned the dispute would have elicited a ready answer.

Although admitting that the Railway Labor Act does not serve as a statute of limitations for progressing claims to this Board, the Carrier, nevertheless, urges that delays such as the one in question are contrary to the spirit and intent of the expressed purpose of the Act to provide a forum for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. While the usual order is for the Employes to bring the dispute here, we know of nothing in the law that serves as a bar to the Carrier progressing a dispute if and when it elects to do so. Some disputes are and all can be brought here by joint submission. Therefore, we know of no reason to put the onus entirely on the Employes to bring disputes to the Board's attention, and will not set up a roadblock on a street that both parties can travel, because one does not start the journey and the other is slow of foot. The law exacts no certain degree of promptness and we know of no such express power vested in the Board.

That the Board does not look with favor upon delays (although it, too, is subject to criticism for the same thing it is here asked to condemn) is evidenced by denial awards in some cases on a showing of what amounts to laches or on other equitable grounds.

It comes quite hard for the Board to say it does not deal in equity and at the same time deny claims for unreasonable delays account of undue burdens suffered. That it has done so and will continue to do so there can be no doubt. In this case, however, we will not disturb Rule 54 by adding another step to the Parties' Agreement in order to provide a time limit for progressing unsettled disputes to the Board. The Carrier and its Employes did not do so when they had the subject up for negotiations and it would be unbecoming of us to supply what is now an omission in the rule, by dismissing the claims in this docket for failure to promptly progress the dispute after its handling on the property was complete. We hold that the claims are not barred and will undertake to settle the dispute on its merits.

It is unfortunate that collective agreements made by and between the employer and its employes have been known to stand in the way of progress. Yet, railroading today has kept pace and in step with modern improvements in transportation, with safety, and with technological changes. This must have been, at least in some small measure, due to cooperative efforts of Carrier Officers and Employe Representatives, but the Board still gets disputes like the one at issue evidencing some lack of understanding of reciprocal rights and duties under the working agreements which govern the employer-employe relationships between the parties.

We entertain no doubt that in the situation which confronts the Carrier it has found a more practical, expeditious, and economical method for supplying concrete foundations for its signal equipment. The prefabrication of structures, large and small, is a growing and progressive thing in the construction business, and in this case offers advantages about which the Employes share the same knowledge possessed by the Carrier, yet there has been a failure of any attempt at meeting, conferring, and undertaking to settle their differences over changes in the work covered by contract.

The dispute has been thrust upon this Board which has limited powers and authority to do anything about it, and, in turn, the Board has called for assistance from a referee who can only be expected to lack the wisdom and knowledge of the contracting parties. The only purpose that can be served by bringing the dispute to this Board is to ask that the agreement be interpreted and applied according to its terms and conditions, when the parties should be better able to apply their agreement than is the Board with assistance of a referee.

In our opinion the Agreement has been violated. A clear intent is evidenced by negotiated rules that the Carrier will not allot all or any portion of the concrete work connected with making concrete foundations for highway crossing signals and cable post installations on its property to persons not covered by the Agreement it holds with its Employes. The parties have agreed on express exceptions involving concrete work and we now are being asked to write in another and later exception when the parties themselves have not undertaken the task at hand.

Certainly it does not admit of dispute that when the present rule was written through joint efforts of the parties, following conference and negotiation, neither the Carrier nor Employe Representatives knew or could foresee that a new and modern process might make the doing of the work according to contract, possibly more cumbersome, expensive, time consuming, and in the end have a product less adaptable or available for general utility. But this is only one of the known hazards and perils of contracting in a progressive age. If needed there is yet a way open to the parties for them to amend, change, and modify the rule they once were able to agree on. We leave them to their own resources for overcoming any difficulties now posed by doing work for which mutual agreement exists.

The Employes do the Board and themselves a disservice by bringing claims here, stated as is (b) above. We are now being asked to dismiss the claim because of its generality and indefiniteness. While we will not do so, because we regard the dispute as a "class action" brought by one of the contracting parties for the use and benefit of all persons covered, the Petitioner hereafter may likely be denied the enforcement powers of the courts, if we should sustain it in the general terms stated, and the Carrier should refuse payment.

It would have been better for all concerned had some or all the many months of delay in getting to the Board been utilized in marshalling evidence as to dates, amounts claimed, seniority rights, etc., in order for the Board to better know what it was sustaining. As it is, we must now make definite and certain, so far as we can do so, that which is indefinite and uncertain,

by directing a course of action, which means more and greater delay and possibly further dispute.

Part (b) of the claim is being remanded to the property for a joint check by the Carrier and Employe Representatives to establish the amount of time equivalent to that required by employes of the Perma-crete Products Corporation, while engaged in performing work of:

(1) constructing forms
(2) mixing and pouring concrete
(3) setting anchor bolts
(4) finishing of concrete

Handling for shipment, under no stretch of the imagination, can be considered here. It likely will be learned that methods and work procedures for pre-fabricating concrete foundations are more advanced than methods used on the railroad and that total time consumed will be considerably less. It may be that time devoted to one or more of the items listed above will not be capable of ascertainment, and in either or both events the loss rests with the employe or employes affected.

All time will be paid for at pro-rata and not punitive rates of pay.

The compensation will be apportioned in accordance with the claim.

The Board will retain jurisdiction until notified by joint letter that all requirements of the remanded portion of the claim have been met and satisfied, or basis for continuing the dispute in connection with (b) above is certified and finally settled by the Board.

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 violated.

AWARD

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 21st day of March, 1955.

DISSENT TO AWARD NO. 6921, DOCKET NO. SG-7025

The Opinion of the Majority in this dispute is predicated upon an alleged violation of that part of the Scope rule reading:

"* * * the construction, installation, repair, inspection, testing and maintenance of all * * * power operated gate mechanism;

automatic or other devices used for protection of highway crossings; * * * concrete and form work in connection with signal and interlocking systems (except that required in buildings, towers and signal bridges); * * *."

The Scope rule between the Carrier and its Signal employes covers work to be performed within Carrier's right-of-way limits on Signal equipment owned and controlled by Carrier on its property.

The error in the Award lies in the attempt of the Organization to expand the provisions of the Scope rule beyond the right-of-way limits to include items manufactured and shipped to the Carrier's Storehouse, which material did not become the property of Carrier until received and accepted, after which it was issued by the Storehouse on requisition. All other Signal work in connection with the use of this purchased material was performed by Signal Department employes.

The Carrier purchased from the Perma-crete Products Corporation stock items, i. e., sectional concrete foundations, which were shipped on order to Carrier's Storehouse. They were not constructed to Carrier's specifications, but were carried by the manufacturer as stock items. After these items have served their purpose, they are dismantled and shipped to Carrier's Stores Department, for further use as needed.

This Award attacks the right of the Carrier to purchase such items, notwithstanding Awards of this Division upholding a Carrier's prerogative to purchase materials to carry in its Stores Department for use as required.

The Majority express doubt that the relief sought in part (b) of the claim is sufficiently definite and certain to be granted in an Award which would be enforceable under the provisions of Section 3, First (p) of the Railway Labor Act. They say:

> "* * * Petitioner hereafter may likely be denied the enforcement powers of the courts, if we should sustain it in the general terms stated, and the Carrier should refuse payment."

The Majority's doubts are well founded. In **Award 4713** the Organization's claim was similar to the present part (b). There, the claim was sustained and the Carrier refused to comply with the Award. The Organization brought an enforcement suit; however, the Court refused to enforce the Award on the basis that the Award and Order were too indefinite and uncertain to support such an action. See **Brotherhood of Railroad Signalmen of America** vs. **The Atchison, Topeka and Santa Fe Railway Company**, 23 L. C. 67, 494.

In an attempt to make definite and certain that which admittedly is "indefinite and uncertain," the Majority have amended the claim by directing a course of action not sought in part (b) of the original claim. "It is not our prerogative to amend the claim beyond that actually made and presented on the property." **Award 5226.**

The Carrier is not obligated to search its records or to develop claims for unidentified Signalmen on unspecified dates. This Division cannot require the Carrier to go hundreds of miles off its property to explore the manufacturing methods of an outside concern, nor can the Carrier, or the Division, compel the Perma-crete Products Corporation to divulge its methods and costs of operation.

The plan produced by the Majority is a conjured attempt to save an unenforceable Award and the creation thereof does violence to the jurisdiction of this Division.

For the above reasons, we dissent.

/s/ C. P. Dugan
/s/ R. M. Butler
/s/ W. H. Castle
/s/ E. T. Horsley
/s/ J. E. Kemp