Award No. 7789

Docket No. MW-7522

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to assign Painters in the Maintenance of Way Department to paint signal poles, order boards, telephone boxes and concrete foundations on the Pennsylvania Division during the period August 8 to 31, 1949, but in lieu thereof, assigned the work to employes not covered by the Maintenance of Way Agreement;

(2) The four senior Maintenance of Way Painters who were on furlough at the time the painting work was performed, be paid at their respective rates of pay for an equal proportionate share of the hours consumed by the individuals who were assigned to perform the painting work.

EMPLOYES' STATEMENT OF FACTS: During the period August 8 to 31, both inclusive, the Carrier assigned employes holding no seniority under the effective Agreement to paint signal poles, order boards, and concrete foundations.

Work of this nature has heretofore been performed by employes on the painters' roster who hold seniority under the effective Agreement. During the time the work in question was performed, a number of painters holding seniority under the effective Agreement were furloughed.

A claim for pay was filed in behalf of the same number of furloughed painters as were used by the Carrier in performing the disputed work for the same number of man-hours consumed.

Final decision was considerably delayed at the final stage of appeal and after tracing for replies, the following letter was received by the General Chairman:

As to the merits of the claim, it is the carrier's position that the incidental painting work performed by signalmen is in accordance with the practice which has existed since the Maintenance of Way Agreement and the Signalmen's Agreement became effective in 1939, and carrier respectfully requests that claim be denied.

Carrier affirmatively states that all matters referred to in the foregoing have been discussed with the Committee and made a part of the particular question in dispute.

OPINION OF BOARD: The confronting claim is made in behalf of the four senior furloughed painters covered by the Maintenance of Way Agreement, therein alleging that they should have been recalled to perform certain painting work between August 8 and 31, 1949, that was performed by employes not covered by said Agreement.

It was asserted that the painting work in question inured to the employes in question inasmuch as they are classified as painters under rule 36(a) and as such are entitled to perform, within the meaning of the Scope Rule, the work here at issue. It was further contended that prior Awards 4845 and 4846 involving the parties hereto as well as this Carrier's position relative to this issue in Award 5599 clearly support the contention advanced.

The Respondent took the position that the work here involved was incidental to the maintenance of signal apparatus and as such did not come within the Scope Rule of the Maintenance of Way Agreement, which specifically exempts signal employes. It was asserted that this work had always been performed by Signal Department thus creating both a past custom and practice as well as an interpretation of the Scope Rule.

Before considering this dispute on its merits, it is necessary to dispose of a Motion in this docket to the effect that action be withheld pending the giving of notice of hearing to other parties involved.

In view of a number of awards of this Board and the decision of the Supreme Court of the United States in the case of Whitehouse vs. Illinois Central Railroad, and the finality of this matter (No. 131, October Term of U. S. Sup. Ct., 1954), followed by the dismissal of the cause of action by the United States District Court, the Board now has jurisdiction over the only necessary parties to this proceeding and over the subject matter hereof.

The painting in question took place at different locations over approximately 34 miles of territory, and between the dates in question was performed 4 hours daily for a total of 80 hours. Painting was done on signal poles, order boards, concrete foundations, and possibly telephone boxes. In connection with telephone boxes it is noted that they are not mentioned in the record, the only reference thereto appearing in the claim. We are of the opinion that the sole issue that requires determination here is whether or not the work in question was incidental to the maintenance of signal apparatus. The Carrier here concedes that all "general" or "programmed" painting, even including signals and signal apparatus belongs to the Maintenance of Way forces. The Carrier conceded in its submissions to Award 5599 that the painting of buildings used for housing signal apparatus likewise belonged to Maintenance of Way forces. This was in effect what this Board held in part in Award 4845. This Award went further in distinguishing the type of work (including painting) that pertained to the installation and maintainance of **electrical appurtenances,** which was **not** properly maintenance of Way work. While Award 4845, in addition to being concerned with housing for signal apparatus, was also concerned with short arm gates. Award 4846 had at issue the repair and maintenance of crossing gates with a distinction between those which were lighted and those which were not.

We are of the opinion that the question of whether or not this work was "general" or "programmed" work while material is not controlling. We think the question at issue here, in light of Award 4845 is whether or not

signal poles, concrete foundations, order boards and perhaps telephone boxes are electrical apparatus or appurtenances. Certainly none of these objects are electrical apparatus, and only a signal pole could conceivably be considered as a signal appurtenance.

We think this distinction was made in Awards 4845 and 4846 and we see no reason for departing therefrom here. A sustaining award is warranted.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 15th day of March, 1957.

DISSENT TO AWARD 7789, DOCKET NO. MW-7522

In **Dissent to Award 7311,** Docket No. CL-7214, we showed that the United States District Courts uniformly hold that awards rendered without regard to the mandatory provisions of Section 3, First (j) of the Railway Labor Act are illegal and void. That Dissent is equally applicable here because the record in this dispute clearly showed that Employes represented by the Brotherhood of Railroad Signalmen of America claimed and usually performed the same type of work that is involved in this dispute. The majority's flagrant disregard of its statutory duty to give the Signalmen "due notice" and an opportunity to be heard nullifies the purpose for which the Board was established and creates disharmony in the industry.

In addition to the foregoing error, the majority's conclusions on the merits are manifestly wrong and absurd. The Scope Rule under which this claim was made clearly provides that the entire collective bargaining agreement does not apply to:

"3. Signal, telegraph and telephone employes."

The majority recognized that if the work belonged to signal employes the claim would have to be denied and correctly stated the issue as whether or not the painting of signal poles, train order boards, and concrete foundations was incidental to the maintenance of signal apparatus. Then, by the same devious reasoning used in Award 6346 where they found that a wharf at which a ship docked and discharged cargo was not a "waterfront facility", the majority simply found that a **signal** maintainer can not touch up rust spots on **signals,** because **signals** are not electrical apparatus or appurtenances. In effect, the majority says a signal is not a signal.

It is obvious that the principal duty of a signal maintainer is to maintain signals. This requires him to maintain many appurtenances which are not

directly connected to electrical circuits, such as signal masts and ladders, signal cases, pole line guy wires, etc.

The principal purpose of a signal system is to display electric light or semaphore arm indications which safeguard life and property entrusted to the Carrier. That simple indication is dependent upon the operation of many appurtenances—all of which must function properly.

In **Award 6063** we defined an appurtenance as something incident to the chief or principal thing, that is, something which is an appendage or adjunct thereto. We have long recognized that a signalman was a composite of many trades, and could use any of his skills as long as the work was on signals. It is totally unrealistic to hold that an employe who is paid to maintain signals does not have the right to "touch-up" rust spots on signals, or to entirely paint an isolated signal, when such work is done to protect the Carrier's property until such time as the signals are completely painted by painters engaged in programmed or general painting. In failing to take cognizance of the fact that for more than 40 years signal maintainers on this property as testified to in this record, have been furnished paint and paint brushes for use in spot painting and touch-up work, and that no rule of the Maintenance of Way Agreement has abrogated this practice, the majority has again demonstrated a complete disregard of the statutory limitations on this Board by making a new rule for the parties—a function which is specifically reserved for the parties to achieve by negotiation, or other manner as prescribed by law.

For the foregoing reasons this is an improper award and we dissent.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen