Award No. 9552

Docket No. MW-7945

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, 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:

(1) The Carrier violated the provisions of the effective Agreement when, subsequent to October 30, 1951, when it assigned Signal Department employes to construct and assemble forms and pour concrete for foundation of a signal bungalow at Oneonta, New York.

(2) Affected Maintenance of Way employes, carried on the various seniority rosters, Susquehana Division, be paid at their respective straight time rate, an equal number of hours as were consumed by the employes of the Signal Department in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Subsequent to October 31, 1951, the Carrier assigned Signal Department employes, who hold no seniority rights under the effective Maintenance of Way Agreement, to construct and assemble forms and pour concrete for the foundation of a signal bungalow at Oneonta, New York, a point on the Carrier's Susquehana Division.

The Employes claim that the Carrier violated the Agreement when it assigned this work to employes of the Signal Department. The Carrier has denied the claim.

The Agreement in effect between the two parties to this dispute dated November 15, 1943, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

EMPLOYES' POSITION: Maintenance of Way work consists of, among other things, construction, maintenance, repairing and dismantling of the Carrier's buildings and structures. However, as pointed out in the Employes' Statement of Facts, subsequent to October 30, 1951, the Carrier has assigned work in connection with constructing and assembling forms and pouring concrete for the foundation of a signal bungalow at Oneonta, New York. These forms were constructed at Green Island by Signal Department employes and shipped to Oneonta, where they were assembled by this class of employes.

Following the consumation of the above quoted Memorandum of Agreement, conference was held between the two (2) parties for the purpose of endeavoring to dispose of the instant claim on the basis of the provisions contained in the Memorandum of Agreement. The Carrier, however, refused to recognize such Memorandum of Agreement as the proper basis for settling this dispute

We respectfully request that our claim be allowed.

It is hereby affirmed that all data herein submitted in support of our position have heretofore been presented to the Carrier and are hereby made a part of the question in dispute.

CARRIER'S STATEMENT OF FACTS: Signalmen working under the scope of an agreement held by the Brotherhood of Railroad Signalmen of America made precast signal foundations by assembling pre-constructed forms which were filled with ready-mixed concrete furnished by a local firm. Claim of Maintenance of Way employes for this work was denied by the highest officer designated to handle grievances on the property on February 24, 1953.

POSITION OF CARRIER: Foundations for signals, including the precast foundations as involved in this claim, have always been built by signalmen.

The carrier's position relative the right of signalmen to perform all work in connection with installation of signal foundations is covered by its submission to the Third Division dated August 5, 1955, in case identified locally as Case No. 8.51 M.W., docket number not yet assigned, and the carrier asks that the argument and evidence presented in that submission be considered in deciding the instant case.

Any award rendered in this case which affects the rights of signalmen will be invalid unless the Brotherhood of Railroad Signalmen of America is given notice of hearing by the Adjustment Board in accordance with Section 3, first (j) of the Railway Labor Act.

Management 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 facts and precedents are somewhat confused.

The Claim states that the work in controversy concerns construction of a "foundation for a signal bungalow". The Carrier responded in its Submission that the work involved "pre-cast signal foundations".

The Employes' Oral Argument replied:

> "The Carrier's contention that 'Foundations for signals, including the pre-cast signal foundations as involved in this claim, have always been built by signalmen' is neither a true nor an accurate statement of fact. It is true, of course, the signalmen have been assigned to and have performed some of such work, but it is equally true that protests and claims have been filed in each and every one of such instances which were detected by the Employes, with the Carrier allowing and

paying several of such claims without any qualifications or reservations whatsoever. * * *"

In the Carrier's Oral Statement the work had become "installation of flashing light signals".

In its written reply to the Oral Argument, the Employes narrowed the present controversy to "flashing light signals".

We believe that by the statements quoted above, the Employes adopted the Carrier characterization of the work as "pre-cast signal foundations" for "flashing light signals".

As a result this case has not been shown to be within the principle established by Award 4845 (Carter) which concerned construction of foundations for small buildings housing signal equipment.

The "closely associated" Award 4846 (Carter) involved the maintenance and repair of crossing gates. To a considerable extent the sustaining award in favor of the Maintenance of Way employes was a result of the fact that the Agreement listed the positions of Gate Maintainers and Gate Maintainers Helpers, which overcame a show of some prior practice that Signalmen had performed some gate maintenance work.

The precise nature of the work involved in Award 8091 (Lynch) is not shown by the Claim or Award. The Employes' Submission did describe the work in dispute as "to excavate, install concrete forms and pour concrete, in connection with the erection of foundations for various signals . . ." (Docket MW-7680 the case in which Award 8091 was rendered). However the Award itself did not specify the work but treated it, as pointed out in Award 8755 (Sempliner)—same Agreement, as work related to the construction of buildings.

It may be that the foundation work for small buildings and signals are so similar that logically they go together and "should be" under the exclusive jurisdiction of the same craft.

But logic is not the determinative factor in such case. The manner in which a specific job is done on different properties is the outgrowth of the needs, experience, methods and resources on each over a long period of development. It is no downgrading of logic that it should take second place to history.

In a case such as this where the Scope Rule does not describe the nature of the work covered by the Agreement, proof of custom and practice is necessary. Award 9001 (Murphy).

The Organization has not proven on the record that the claimed work had been performed by employes of the classes specified in its Agreement. Award 8091 would seem to confer such jurisdiction, not because of custom and practice but rather by an unexplained extension of Awards 4845 and 4846.

Award 8755 (Sempliner) reached a contrary conclusion, in part because the issue was posed more precisely as involving foundations for flashing light signals. In addition, the Board in the latter case ruled certain affidavits describing practice as admissible while in MW-7680, which resulted in Award 8091, the affidavits were excluded as untimely. However, Award 8755 made

clear that even without the affidavits the practice of foundation construction for flashing light signals by Signalmen was established.

The same exhibits, which were presented for the first time in this case at the Oral Argument, although bearing dates prior to the original submission, do not meet the requirements of Circular No. 1 for ex parte submissions that carrier set forth "All relevant, argumentative facts, including all documentary evidence . . .". The exhibits were submitted in support of a contention made earlier, i.e. in the Carrier's Ex Parte Presentation. They should have been presented then. Their later offering was untimely.

But, the Carrier did not have the burden of proving practice. The Claimant has the burden of proving all essential elements of the Claim. Under a Scope Rule such as that here it had the burden of showing that, at the time the Agreement was made and subsequent thereto, the practice was for work of this kind to be performed exclusively by employes in the classifications covered by the Agreement.

Claimant having failed to prove the requisite custom and practice, and in reliance upon the most recent award on the subject on this property, Award 8755, the Claim must be denied.

We do not reach the question whether the Memorandum of Agreement between the parties dated October 9, 1959, which was made in settlement of Award 8091, affects this case.

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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 16th day of September, 1960.