

Award No. 9675

Docket No. SG-8692

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

**NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the New York, New Haven and Hartford Railroad that:

a. The Carrier violated the Signalmen's Agreement effective September 1, 1949, as amended, when on or about May 1953 it transferred, contracted, farmed out, or otherwise assigned generally recognized signal work covered by the Signalmen's Agreement, which was heretofore assigned to and performed by this Carrier's signal employes, to persons not covered by the New York, New Haven and Hartford Railroad Company's Signal Employees Working Agreement.

(Specifically, the generally recognized signal work cited above consists of the complete installation of a centralized traffic control system between Braintree and Buzzards Bay, Mass.)

b. Claim that signal employes who were entitled to be considered, or who have been adversely affected due to the Carrier's failure to upgrade and assign them to this signal work in violation of the Signalmen's Agreement, be compensated at their respective overtime rates of pay for a number of hours equivalent to the number of hours worked by the employes who were not covered by the Signalmen's Agreement of this Carrier, while performing the transferred, contracted, farmed out, or generally recognized signal work.

EMPLOYES' STATEMENT OF FACTS: The signal work involved in this unsettled claim consists of all the construction and installation work involved in the installation of a complete C.T.C. system between Braintree and Buzzards Bay, Mass.

The Signal Section, Association of American Railroads, defines centralized traffic control as follows:

"A term applied to a system of railroad operation by means of which the movement of trains over routes and through blocks on a

Second. There were practically no qualified employees available for promotion. A check of the situation was made at the time which disclosed only one rostered assistant eligible. The balance either had theretofore refused promotion under the rules of the schedule or had had insufficient training in service.

It will be observed that the organization did not take a stand in the conferences, possibly for the above reasons. President Clark did not state the position of the union as promised in his letter of May 29, 1952. It was only after the contract was let that protest was filed.

Carrier undertook a complete review of its problem with petitioners. No feasible or well premised suggestions were made. After waiting many months for the promised statement of the position of the organization, which was not forthcoming, the project was progressed.

Carrier submits it has satisfied any possible schedule obligation. The work was delayed a year in an effort to work out a mutually satisfactory solution. No progress was made nor did the shortage of trained personnel abate. This was the first installation on the New Haven, its schedule employees, engineering forces and supervision being without prior experience. It was for this reason this particular program was selected for contract, rather than one of the many other authorized projects.

In all of the circumstances, Carrier submits allowance of the claim would result in the imposition of a penalty when the organization after full consultation in advance was unable to suggest any alternate approach. A denial award is indicated.

All of the facts and arguments used in this case have been affirmatively presented to Employees' representatives.

(Exhibits not reproduced)

OPINION OF BOARD: The claim is that the Carrier violated the Agreement when it had a CTC system installed between Braintree and Buzzard's Bay, a distance of forty-four miles, under contract with the manufacturer, General Railway Signal Company; and that "signal employees who were entitled to be considered, or who had been adversely affected due to the Carrier's failure to upgrade and assign them to this signal work, in violation of the Signalmen's Agreement, be compensated at their respective overtime rates of pay for a number of hours equivalent to the number of hours worked by the employees who were not covered by the Signalmen's Agreement of this Carrier, while performing" the work in question.

The Scope Rule provides as follows:

"This agreement covers rates of pay, hours of service and working conditions of employees, except engineering and clerical forces, and supervisory forces above the rating of Foremen, engaged in the construction, repair, inspection, testing, and maintenance either in the railway signal shop or in the field of all railway signal equipment used in connection either directly or indirectly with train operation regardless of its type or how actuated, including all kinds of interlocking, block signals, car retarder systems, remote control of switch and signal systems, wayside train stop and cab signal systems, all signal circuit wiring signal storage batteries and signal storage

battery charging systems, signal substation for generation or change of characteristics of current and all appurtenances necessary to such systems, also all highway crossing protection devices electrically operated and automatically controlled by track circuits or in conjunction with wayside signal system except work of erection and removal of signal masts and platforms in the electric zone. All other work generally recognized as signal work.

* * * * *

The scope rule is predicated upon conditions and practices as in effect on this property. It does not add anything to the work which signal forces have heretofore performed on this property or take away from them work which they have heretofore performed."

On behalf of the Carrier it is argued that the provision does not include CTC systems because they were "unknown on the property" when the Rules were adopted. However, they were not unknown to the industry, and in any event the Rule could hardly be more general. It includes:

"* * * all railway signal equipment used in connection either directly or indirectly with train operation regardless of its type or how actuated, including all kinds of * * * block signals, * * * remote control of * * * signal systems, * * * all signal circuit wiring, * * * and all appurtenances necessary to such systems, * * *."

The final paragraph of the scope rule provides that it "does not add anything to the work which signal forces have heretofore performed on this property". But the first paragraph of the rule makes sweeping reference to "all railway signal equipment", "all signal circuit wiring" and "all appurtenances", and even to "remote control of * * * signal systems"; and the final paragraph does not qualify that reference, nor limit it to the exact kinds of signal equipment, circuits and systems in use when the scope rule was adopted. Certainly the parties never contemplated that the Agreement could be nullified in whole or in part by the adoption of new or improved signal equipment, circuits or systems, and we are unable to read any such provision or intent into the Rules.

Before the work was contracted there were negotiations and correspondence between the Carrier and the Organization, for more than a year, in which the latter refused to approve the project. It contended that the Carrier was to blame for the shortages of forces because of layoffs and demotions during 1949; and that the necessary help could be obtained by bulletining positions, upgrading Carrier's forces and hiring the necessary Signal Helpers. It stated that if the Carrier followed that plan the Organization would work with it in obtaining any additional men then found necessary.

The Carrier pointed out to the Organization that the scheduled signal work for the year, including the proposed CTC installation, would total 61,430 man days; that the force available for all this work consisted of forty signal construction men and forty other employees, whose total man days for the 244 working days of 1952, in which Carrier originally proposed to install the CTC system, amounted to 19,520 or less than one-third of the time required for the work. The available force for 1953 was substantially the same; in each year there were vacancies in the signal force because men were not available; except for military service there were no men on furlough.

The Organization stated that from sixty to eighty employees had been laid off or demoted, and named sixty-three whose positions had been abolished in 1949, three of them Signal Foremen's positions. It added: "From the above cited abolishments, it will be noted that these positions could have been filled by the issuance of bulletins since there were demoted Foremen, Signalmen, Assistants and Helpers who were forced to demote themselves due to force reductions and abolishments".

In reply to the contention that the shortage of men resulted from reduction of forces in 1949 or thereafter the Carrier showed that there were 429 Signal Department positions on January 1, 1949; 384 in August, 1949; 390 in September, 1949; 403 in April, 1952; and 405 in May, 1953. Thus the net reduction by the end of 1949 was only 39, and by May, 1953, was only 24. In substantiation of this the Carrier submitted a list the authenticity of which the Employees do not question, allegedly showing the status of each employee whose position was abolished, or who was displaced in the 1949 force reduction. With reference to the three Foremen whose positions the Employees say were abolished in 1949, the Carrier's list mentions two, Foremen Hoffman and Bardo, but does not mention Foreman Somers, and does not show the status of any of the three in 1953.

The Carrier states, and it is not denied, that no signal forces were furloughed after November, 1949; that of those furloughed all but one had been recalled to service before the discussions concerning the CTC installation, and that none were then on furlough except for military reasons; that there were not sufficient men available for upgrading; that in the Signal Construction force there were ten rostered Assistant Signalmen, four with seniority from 1926 to 1942, one from 1950, one from 1951, and four from only 1952; that two of them were promoted to Signalmen, three refused promotion, and the five with least seniority were not qualified for promotion for lack of the two to four years' necessary experience; that on the Boston Division there were positions for five Assistant Signalmen, one of which was vacant; that there were only four Assistant Signalmen, of whom two were promoted to Signalmen, one refused promotion, and one was not qualified; that with regard to Helpers, there were two vacancies on the Signal Construction roster and one on the Boston Division roster. The Carrier added:

"The senior men on each roster had either refused promotion or refused it unless the job was at their then headquarters.

It is abundantly clear promotion and hiring offered no solution. This was all explained and the detail given the General Chairman, Vice President Cone and President Clark in the discussions had with them.

Why it still is suggested the recall of furloughed forces offered a possibility, we do not know. In any event, Carrier had no furloughed force. The existence of unfilled vacancies on both rosters, and the seniority dates on those rosters, are convincing evidence that Carrier made no wholesale layoffs as alleged by Employees and that it has not been derelict in hiring additional men.

Finally, Employees propose overtime as an approach to the problem. To quote again from Award 3251:

'We think it would be unreasonable for the Organization to insist that work of great magnitude be performed on over-

time, 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.'

The project here in dispute required on the order of 18,000 man-hours over a total spread of five months. In July, August and September about 5,000 hours a month were required. The work was, we submit, of the magnitude not practicable of handling by overtime within the clear meaning of the above quotation.

Now, as at the time the Company was negotiating with the organization, no solution practicable of adoption is advanced for performing the job with employees represented by the organization.

Third. In evaluating the general arguments as to contracting on pages 4, 5 and 6 of the supplemental statement it should be remembered that all rostered employees on the entire railroad were fully occupied with essential maintenance, repair and construction work. On the Boston Division in the latter category was automatic signalling on a double track line from Boston to Braintree, reconstruction at two interlockings, and numerous automatic signals and gates at highway crossing under mandatory orders from the Massachusetts Department of Public Utilities. Carrier had not reduced its force. Men were being constantly recruited as shown by the figures quoted above, yet there were still unfilled vacancies. Men in lower grades were being promoted as fast as they acquired experience. Senior men, both Assistants and Helpers refused to accept promotion or leave their headquarters."

Thus it seems clear from the record that there was already a shortage of signal forces for the performance of the regular work; that there were no laid off employees to be recalled; that with the possible exception of the two or three Signal Foremen demoted during 1949, whose status during the contract work in 1953 is not shown, upgrading could not have supplied the necessary workers. While, as the Organization pointed out, Signal Helpers might under the Rules have been recruited from outside, the already existing shortage of forces indicates that few, if any, men were available; in any event, there would have been no point in recruiting Helpers in view of the lack of Signalmen and Assistants. It is obvious, also, that the tripled man days required for the regular signal work and the large construction job could not have been supplied on an overtime basis and should not have been so attempted. (Award 3251).

The Organization contends that the Carrier should have built up and maintained the force necessary to perform all its work. But certainly it cannot be blamed for not tripling its force over the preceding years so as to accomplish the installation of CTC, even if it had foreseen the project and men had been available. It is clear that the Carrier's only practicable alternatives were to cancel the proposed project or to have it done under contract.

This Board said in Award 3251:

"Where work is within the scope of a collective agreement, and not within any exception contained in that agreement or any exception recognized as inherently existent as hereinbefore discussed, we feel obliged to adhere to the fundamental rule that the work belongs to the employees under the agreement and that it may not be farmed

out with impunity. Where unusual conditions intervene, such as a labor shortage, so that the work cannot be performed in the manner contemplated by the agreement, the carrier is required to negotiate the matter with the Organization before it can justifiably assert that a contracting of the work constitutes only a technical violation of the agreement. This is so because the carrier has already solemnly contracted the work to the employees covered by the agreement. If negotiation be attempted, and either party assumes an unreasonable attitude, this Board may give primary consideration to such fact in determining, if the carrier elects to contract the work, whether the violation was technical only. 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."

In this instance the Carrier negotiated the matter with the Organization and the record shows that the work could not have been performed under the Agreement. We feel therefore that this claim comes within the principles of Awards 1453, 1610 and 3251, and that the violation is only a technical one except to the extent that employees covered by the Agreement were thereby prejudiced. As noted above, the claim is that "signal employees who were entitled to be considered, or who have been adversely affected due to the Carrier's failure to upgrade and assign them to this signal work in violation of the Signalmen's Agreement, be compensated * * *".

It appears from the record that the only persons possibly prejudiced by the Carrier's failure to upgrade them under the circumstances were Signal Foreman Somers, Hoffman and Bardo. The Employees allege that they were demoted in 1949 and should have been upgraded for this work. The Carrier does not show that they had already been restored to Foremen's positions. If not the Carrier should under the circumstances have made every effort to have them used in that capacity, either in connection with the General Railway Signal Company contract or otherwise. Not having done so it is not fully in position to contend that they were not injured in the premises.

The loss of the three demoted foremen was the difference between what they actually earned and what they would have earned as Signal Foremen during the installation of the CTC system, and the claim should be allowed to that extent. While the Carrier complains that they were not expressly named as claimants they are clearly identified in the record.

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 Employees involved in this dispute, are respectively Carrier and Employees 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 to the extent outlined in the final paragraph of the Opinion of Board.

AWARD

Claim sustained to the extent outlined in the final paragraph of the Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1960.