Award No. 13236
Docket No. SG-13078

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Railway Company et. al. that:

(a) The Carrier violated the current Signalmen's Agreement when it permitted employes of the Andrews Contracting Company of Columbia, South Carolina, and employes of the South Carolina Electric and Gas Company to perform recognized signal work on the installation of highway crossing signals at U. S. Highway 301, Allendale, South Carolina. This work included the erection and assembly of the brackets to the signal mast, digging trenches for signal cable, installing foundations for signals and instrument cases, and erecting signal masts, and performed for a total of one hundred and twenty-two (122) hours, as follows:

Sept. 26, 1960—Three	(3)	men four	(4)	hours each—Andrews Contracting Co.
Sept. 27, 1960—Three	(3)	men six	(6)	hours each—Andrews Contracting Co.
Sept. 28, 1960—Three	(3)	men eight	(8)	hours each—Andrews Contracting Co.
Sept. 29, 1960—Three	(3)	men eight	(8)	hours each—Andrews Contracting Co.
Oct. 3, 1960—Two	(2)	men eight	(8)	hours each—Andrews Contracting Co.
Oct. 4, 1960—Three	(3)	men four	(4)	hours each—Andrews Contracting Co.
Oct. 5, 1960—Three	(3)	men two	(2)	hours each—Andrews Contracting Co.
Oct. 5, 1960—Five	(5)	men two	(2)	hours each—S. C. Elect. & Gas Co.

(b) The Carrier now be required to compensate Crossing Signal Maintainer B. H. Bradshaw, Signalman B. G. Stubblefield, and Assistant Signalman M. H. Hensley, Jr., on a proportionate basis for all time worked by the persons not covered and who hold no seniority or other rights under the Signalmen's Agreement, at their respective hourly rates of pay on the basis of time and one-half for all time involved, as herein specified. [Carrier's File: SG-15676]

EMPLOYES' STATEMENT OF FACTS: During the period involved in this dispute, the Claimants held the following assignments:

B. H. Bradshaw, Crossing Signal Maintainer, headquarters Batesburg, S.C.

B. G. Stubblefield, Signalman, headquarters Columbia, S.C.

The reasoning of the Board in the above disputes should be followed in this dispute.

Messrs. Bradshaw, Stubblefield and Hensley, here claimants, performed all "generally recognized signal work" for Southern, 90 percent of which was for account of and at the cost and expense of the State of South Carolina, in connection with the installation of automatic electrically controlled and operated highway crossing protective devices at the crossing by U. S. Highway No. 301 of Carrier's track and that of the Atlantic Coast Line at Allendale, South Carolina. They clearly have no contractual right to the digging and lifting here complained of which was performed by machines and equipment owned and operated by Andrews Contracting Company and South Carolina Electric and Gas Company, nor were they adversely affected in any manner, nor is there any basis for the demand that they be additionally compensated. Claim on their behalf should be denied.

CONCLUSION: Carrier has shown conclusively that:

(a) The effective Signalmen's Agreement was not violated as alleged by the Brotherhood and does not support the claim and demand here made. 90 percent of the work was for account of and at the cost and expense of the State.

(b) Exclusive rights are not granted by the effective Signalmen's Agreement. That agreement has to be interpreted in the light of the established and recognized practice throughout the years. The evidence of record shows conclusively that the employes have recognized throughout the years that they do not have monopolistic rights to all work in connection with installation of highway crossing protective devices. They have recognized Carrier's unrestricted right to have work performed by machines in situations such as here involved at its discretion throughout the years. That exclusive rights are not granted signalmen by the agreement is also recognized in the language of the scope rule.

(c) The principles of prior Board awards fully support Carrier's action.

(d) The named claimants were on duty and under pay when the involved machines were used. In fact, they worked with the machines. Prior awards of the Board have denied claims without even considering the merits of same in situations where, as here, the claimants were on duty and under pay when the complained of functions were performed.

In view of all the evidence, the Board has no alternative but to make a denial award because claim is not supported by the agreement and established and recognized practices thereunder.

(Exhibits not reproduced).

OPINION OF BOARD: Claimants were assigned to installation of automatic, electrically controlled and operated, flashing light highway crossing signals, with cantilever brackets, at U. S. Highway 301, Allendale, South Carolina. Certain work required in making the installation, hereinafter set forth, was performed by workers not employed by Carrier—this, Signalmen aver, violated the Agreement.

PERTINENT PROVISIONS OF AGREEMENT

The following provisions of the agreement are pertinent:

"Scope—Rule 1. (Revised—effective October 23, 1953)

This agreement covers the rules, rates of pay, hours of service

and working conditions of employes hereinafter enumerated in Article II—Classification.

Signal work shall include the construction, installation, maintenance and repair of signals, either in signal shops, signal storerooms or in the field; signal work on generally recognized signal systems, wayside train stop and wayside train control equipment; generally recognized signal work on interlocking plants, automatic or manual electrically operated highway crossing protective devices and their appurtenances, car retarder systems, buffer type spring switch operating mechanisms, as well as all 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 Scope Rule 1 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."

"Classification—Rule 2" includes:

"(f) Signal Helper: (Revised—effective January 16, 1948) An employe assigned to perform work generally recognized as helper's work assisting other employes specified herein shall be classified as a signal helper. A signal helper, when working alone, or two (2) or more helpers working together, may perform such work as cleaning and oiling interlocking plants, drilling rail with hand drill, mixing concrete, excavating, digging holes and trenches, handling material, and performing all other work generally recognized as signal helper's work, but shall not be permitted to do work recognized as that of other classes covered by this agreement."

WORK INVOLVED

Carrier contracted with Andrews Contracting Company, herein called Andrews, to cut through pavement, open a trench 100 feet long across the highway, dig trenches and required foundation holes, lift and place prefabricated foundations for instrument case and signal mast in holes, lift signal mast on to the foundation, refill holes and trenches, pave over trench opened across highway.

Carrier arranged with South Carolina Electric and Gas Company to have one of its heavy duty trucks, equipped with power crane, to lift the cantilever bracket. The Gas Company did this without charge.

CONTENTIONS OF PARTIES

Petitioner contends that the work performed by employes of Andrews and the Gas Company is work of a kind usually performed by Carrier's employes in the installation of crossing signals for Carrier.

Carrier contends: (1) employes covered by the Agreement, the Claimants, did all the skilled work in the installation; (2) the work performed by em-

ployes of Andrews and the Gas Company is work of common labor and has never been "exclusively" performed, on the property, by Signalmen; and (3) to prevail Petitioner has the burden of proving that the work has been performed "exclusively" by Signalmen.

RESOLUTION

We will accept the Carrier's averment that Signalmen have not performed all the work of digging holes, cutting trenches, lifting, etc., on Carrier's property. But, the issue herein narrows and is concerned with whether Signalmen perform those tasks when required in the installation of signals.

Carrier seeks to persuade us that the only work reserved to Signalmen is skilled work. The inclusion in the Agreement of the classification "Signal Helper" convinces us that the Agreement covers common labor work incident to the skilled work.

Carrier's premise is that we are here confronted with a Scope Rule which does not specifically vest Signalmen with the right to the work here involved. From this it argues that to prevail Signalmen must prove that the employes covered by the Agreement have in the past "exclusively" performed such work throughout the property; and, not only to the extent it is an incident to the skilled work of Signalmen. We believe this to be a misapplication of the exclusivity doctrine.

The exclusivity doctrine applies when the issue is whether Carrier has the right to assign certain work to different crafts and classes of its employes—not to outsiders.

We are here confronted with contracting out of work—not assignment of work to employes. That the Gas Company did the work without charge is immaterial.

The employes of the Carrier, in any craft or class, which have performed the work, Signalmen in this case, have a contractual right to the work, against non-employes, unless Carrier proves: (1) an emergency; (2) lack of skill; (3) special tools and equipment; (4) lack of employe manpower. In the record before us Carrier has failed to prove the existence of any of these conditions.

Carrier has, in the record, raised two other defenses to the Claim. It says that it is a management prerogative to have the work performed by modern methods and at the least costs to Carrier. We need say, as we so often have, that the economic consequences of a contract are of no concern to this Board. Having entered into the Agreement, the inherent prerogatives of management are circumscribed by its terms.

We find, on the record that the work here involved has been performed by Signalmen; and, Signalmen's claim to the work, as against non-employes, is well founded. We find Carrier violated the Agreement.

MONETARY AWARD

The Agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The record contains no evidence that the Claimants suffered actual monetary loss or hardship from the violation of the Agreement. Therefore, since the "Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the

Railway Labor Act . . . recovery is limited to nominal damages." **Brotherhood of Railroad Trainmen** v. **The Denver and Rio Grande Western Railroad Company,** (C.A. 10, decided Nov. 19, 1964). Accordingly, we will award each Claimant nominal damages of ten dollars ($10).

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 Carrier violated the Agreement.

AWARD

Paragraph (a) of the Claim is sustained.

Paragraph (b) of the Claim is denied except that Carrier shall pay each Claimant nominal damages in the amount of ten ($10).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION
ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1965.

CARRIER MEMBERS' DISSENT TO AWARD NO. 13236, DOCKET NO. SG-13078

Award 13236 is palpably wrong. The Scope Rule of the Agreement provides, for the purposes of this dispute, that signal work shall include:

> " * * * generally recognized signal work on interlocking plants, automatic or manual electrically operated highway crossing protective devices and their appurtenances, car retarder systems, buffer type spring switch operating mechanisms, as well as all other work generally recognized as signal work."

By the language "generally recognized signal work," the rule recognizes that employes of the signalmen's class or craft do not have a contract right to perform all work on, or in connection with, the installation of automatic electrically operated highway crossing protective devices and their appurtenances. To determine whether the work here complained of was "generally recognized signal work," we must look to tradition, custom and practice on the Carrier involved to determine whether the complainant employes have, to the exclusion of all others, performed the work in dispute, and Awards are legion in number holding that the burden of proving such exclusive historical and customary practice is upon claimants. In this docket there was no such proof by the claimants. On the other hand, there was conclusive proof by the Carrier that work of the nature here involved has not, through tradition, custom and practice been performed by signal employes and, therefore, was not "generally recognized signal work" reserved to employes covered by the Agreement.

The Referee recognizes the exclusivity doctrine but is confused as to its proper application. It is axiomatic that if the work complained of its not reserved exclusively to claimants, then it is not a violation of the Agreement for it to be performed by other than claimants, regardless of who may perform it. The conclusion that the exclusivity doctrine does not have application to work contracted is contrary to logic and to the basic principle enunciated by this Division in Awards too numerous to require citation.

The Petitioner having failed to meet its burden of proving that the work involved was "generally recognized signal work" and reserved under the Scope Rule to employes covered by the Agreement, there was no obligation on the Carrier to prove "(1) an emergency; (2) lack of skill; (3) special tools and equipment; (4) lack of employe manpower."

For the reasons stated, we dissent.

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ R. E. Black

/s/ T. F. Strunck

/s/ G. C. White

SPECIAL CONCURRENCE TO AWARD 13236, DOCKET SG-13078

The award correctly finds that the Agreement was violated but then regarding reparations ill advisedly, I think, takes off into the realm of legalism which might best be left to the courts if and when resort to court is made.

The better approach would have been to find, as was done by the same Referee in Award 11938, that Claimants are entitled to be paid what they would have earned absent a violation of the Agreement.

G. Orndorff
Labor Member