

Award No. 15497
Docket No. SG-14876

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the Brotherhood of Railroad Signalmen on the Southern Railway System Lines (Eastern Lines, Mr. J. M. Stanfill's territory), that:

(a) The Carrier violated the Scope and other applicable rules of the Signalmen's Agreement when it arbitrarily contracted out, arranged and/or permitted recognized signal work to be done by person or persons who held no seniority or other rights to perform signal work by installing, moving or changing crossing signals at Hill Street, Smith Street, and West Lake Drive, in or near Greensboro, N. C., during the months of February and March 1963, in violation of the provisions of the Agreement.

(b) The Carrier now compensate R. H. Brown, Crossing Signal Maintainer, Greensboro, N. C.; J. A. Cox, Signal Maintainer, Greensboro, N. C.; and P. D. Yelton, Signalman, with headquarters at Greensboro, N. C., together with other signal employees who may have filled vacancies or other positions at Greensboro, N. C., during the period of February and March 1963, at their respective hourly rates of pay on a proportional basis for the total number of man-hours worked by the contractor and his forces, or by persons not covered by the Signalmen's Agreement, as indicated in this claim, and on the basis of days worked by the respective signal employees involved.

EMPLOYEES' STATEMENT OF FACTS: This dispute, like numerous others from this property which have either been decided by this Division previously or are awaiting adjudication, involves signal work which Carrier contracted out to persons not covered by the Signalmen's Agreement. During the months of February and March, 1963, for a total of 728 man-hours, Carrier contracted out, arranged for and/or otherwise permitted recognized signal work to be performed on its property by persons who held no seniority or rights under the effective Signalmen's Agreement. During this period a contractor and his force installed highway crossing signals at Hill and Smith Streets, and they relocated existing facilities at West Lake Drive in Greensboro, North Carolina.

- (c) To construct such culverts and other drainage facilities upon said right of way as may be necessary in connection with said work.

As a result of the above referred to construction work proposed by the city of Greensboro, Carrier was required by the city to make certain changes in and additions to its track facilities in the area as the construction work progressed, and when called upon by the city to do so. As the construction work was for the sole account and benefit of the city of Greensboro, that city entered into an agreement with Carrier which provided, among other things, that:

"Railroad shall be exempt from all charges or assessments of any kind or character on account of said project, except the portion of the cost of raising the track and trestle at West Lake Drive in excess of \$3,000."

Specifically, under the agreement with the city of Greensboro Carrier **was required to:**

- (1) Install portions of the street crossings between the rails of said tracks and to the outside ends of the cross ties thereof at the crossing of said tracks by West Lake Drive, Hill Street and Smith Street.
- (2) Remove and relocate the side track serving the pumping station of the city.
- (3) Raise the main track and rebuild the trestle at West Lake Drive.
- (4) Relocate the crossing signals at West Lake Drive.
- (5) Install new crossing signals at Hill Street and Smith Street.
- (6) Lower the track serving the City Lumber Company.
- (7) Make other changes in drainage facilities on its right of way for the project.

As clearly evidenced above, the work required of Carrier by the city of Greensboro in connection with its street construction involved a major construction project. In accordance with the established practice throughout the years, Carrier contracted work such as moving of earth in raising or lowering the various tracks, constructing drainage systems, tearing out the old street crossing at West Lake Drive, constructing new street crossings at West Lake Drive, Hill Street and Smith Street, removing old trestle and constructing new trestle at West Lake Drive and installing crossing signals at West Lake Drive, Hill Street and Smith Street.

Claim presented to the Board involves only a part of the work contracted. It involves only the installation of new crossing signals at West Lake Drive, Hill Street and Smith Street.

OPINION OF BOARD: Brotherhood's claim is based on the fact that a sub-contractor and his forces worked a total of 728 man hours between

February 18 and March 25, 1963 on signal work which the Brotherhood claims should have been assigned to signal employees covered by the Agreement. Carrier did not deny that the work in that amount was done on the days specified by the Brotherhood. After arguing that the Claim is barred because of improper handling, Carrier denies violating the Agreement in so contracting out the involved work for a number of reasons: 1. Carrier claims that because the work involved was a "large installation in connection with new work" it was not covered by the Scope Rule; 2. Carrier claims that the work was beyond its capacity to perform and that it could not, using its own employees, have completed it on time, and that, thus subcontracting was justified; 3. Carrier claims that none of the Claimants nor any other signal employees were damaged or lost any pay because of the subcontracting and that none are therefore entitled to the pay asked for in the Claim.

THE ALLEGED IMPROPER HANDLING

The original claim named as Claimants R. H. Brown, J. A. Cox and P. D. Yelton and identified as additional claimants "other signal employees who may fill vacancies or other positions at Greensboro, N.C."; Carrier's reply on May 22nd said, among other things, that Yelton had been transferred from the Greensboro headquarters in February before the first date covered by the claim. On June 7, 1963 Brotherhood in its letter appealing Carrier's decision in its May 22nd letter, agreed that Yelton had been so transferred and eliminated his name from the claim; in the same letter Brotherhood informed Carrier that Cox had been off duty after March 8th on account of a disability, and added T. N. Thompson as a claimant who from March 11 filled Cox's vacant position through the balance of the time covered by the claim. Brotherhood also indicated a willingness to substitute a group of eight signal employees who had moved into a town 22 miles from Greensboro as having been available to perform the involved work.

The Claim as it reaches us identifies by name, and in the case of Thompson by description, the same claimants as were identified in the claim as filed originally on March 30, 1963. We do not agree with Carrier that that claim was abandoned by the June 7th letter. We will not consider Yelton a proper claimant, since he was acknowledged to have been transferred from Greensboro before February 18. We will consider that Thompson was properly named a claimant, within the identification of claimants appearing in the original claim: "other signal employees who may fill vacancies or other positions at Greensboro"; but the other eight named in the June 7 letter do not fit into that identification and are not considered claimants. Carrier was not prejudiced by the naming of a claimant who was at first only identified by description and was not prejudiced by Brotherhood's offer to substitute other claimants for Yelton.

We find no failure by Brotherhood to handle the matter properly and in the usual manner on the property, and will deal with the Claim on its merits.

THE MERITS

There is no question that the involved work (installing and relocating crossing signals) was reserved for Brotherhood under the Agreement unless Carrier can show that in this particular case it was excepted. On the face of it, the job does not prove itself to be a "large installation," and the Carrier has failed to present any evidence of standards or otherwise on the basis of which we can find that it was a "large installation"; we have only Carrier's

assertion that it is large. Similarly we have only Carrier's assertions that the work was beyond its capacity to perform and that it could not have been completed it on time using its own employes. Thus Carrier has failed to sustain the burden of proving the reasons it asserted to justify an exception to the Scope Rule in this case.

THE REMEDY

Carrier argues that the Claim should be denied because "there were no signal employes available to perform the work" and the Claimants were on duty and under pay at the times the involved work was performed.

These arguments are not valid. As we said in Award 13832 (Wolfe)

"The fact is that Claimants were working where Carrier has assigned them, hence were not only available but Carrier was availing itself of them."

We have often held that employes have a right not to be deprived of work belonging to them under an agreement. Without a monetary award, such rights would be empty and of no consequence. Our statement in Award 12374 is pertinent to this case:

"If Carrier's position is sustained it could continue to violate the Scope Rule and Article I of the Agreement with impunity as long as no signal employes were on furlough and all of them were actually at work."

We will sustain the Claim except as to Claimant Yelton; and except that one full share bedivided between Claimant Cox and Claimant T. N. Thompson in proportion to the time each worked during the involved period out of the Greensboro, N. C. headquarters.

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;

That the Carrier violated the Agreement.

AWARD

Claim sustained as modified above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of April 1967.

**CARRIER MEMBERS' DISSENT TO AWARD 15497,
DOCKET SG-14876 (Referee Daniel House)**

Presentation of a claim in letter dated March 30, 1963 on behalf of "other signal employes who may fill vacancies or other positions at Greensboro, N. C." and 69 days thereafter in letter dated June 7, 1963 naming T. N. Thompson as claimant does not meet the requirements of Article V of the agreement of August 21, 1954 that "All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based." The purpose of this rule was to bar such claims and require that all claimants be named when a claim is presented. Contrary to the findings of the majority the Brotherhood did not properly present a claim and handle it in the usual manner on the property (Third Division Award 13235).

The majority found that "On the face of it, the job does not prove itself to be a 'large installation,' and the Carrier has failed to present any evidence of standards or otherwise on the basis of which we can find that it was a 'large installation'; we have only Carrier's assertion it is large." The unrefuted evidence of record reveals that highway crossing protective devices and their appurtenances were installed at the crossing of Carrier's tracks by West Lake Drive, Hill Street and Smith Street in Greensboro. Details of all work performed are revealed in Carrier's submission. This record speaks for itself. Webster's New International Dictionary, Second Edition, Unabridged, describes large as "Exceeding most other things of like kind in bulk, capacity, quantity, superficial dimensions, or number of constituent units; of considerable magnitude; big; great; opposed to small." The unrefuted evidence of record is that installation of the three highway crossing protective devices and their appurtenances and removal of another exceeded most other things of like kind in bulk, capacity and quantity, as well as the number of constituent units. Generally but one device and location is involved. The job was of considerable magnitude. It was big. No one contended otherwise. It was definitely not a small job.

The majority also held that "We have only Carrier's assertion that the work was beyond its capacity to perform and that it could not have completed it on time using its own employes" and that "Carrier has failed to sustain the burden of proving the reasons it asserted to justify an exception to the Scope Rule in this case." The majority in its eagerness to find an excuse for a sustaining award lost sight of the fact that the Brotherhood as the proponent had the burden of establishing the facts and proving that the claim was supported by some specific language in the scope rule of the controlling agreement. The burden of proof was on the Brotherhood—not Carrier. Carrier proved by unrefuted evidence that the claimants could not possibly have performed the claimed work, that they were employed elsewhere filling their regular assignment; also that other signal forces were employed performing signal work elsewhere and could not possibly have been used on the project at Greensboro. The Brotherhood had the burden of proving that claimants could have performed the work. This it did not do. Furthermore the evidence of record is crystal clear that all the work was for the account of and at the cost and expense of the city of Greensboro and on the basis of Award 6499 a denial award was justified. Thus if the majority had seen fit to follow the principles of prior Board awards, there was ample justification for a denial for this reason if for no other.

Finally the majority ignored awards of the Board denying claims of employees on duty and under pay and saw fit to make an award on behalf of three claimants for sums of money which, as clearly evidenced in the record, could not possibly have been earned by them. This was done in the face of Third Division Award 15062 interpreting the very agreement here controlling in which the Board again recognized that it is without authority to impose penalties even when it concluded that the agreement was violated.

For failure of the Division to properly apply the Agreement to the undisputed facts and for failure to confine itself to matters within the scope of the Division's jurisdiction, we dissent.

R. A. DeRossett
W. B. Jones
C. H. Manoogian
J. R. Mathieu
W. M. Roberts



Serial No. 225

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Interpretation No. 1 to Award No. 15497

Docket No. SG-14876

Name of Organization:

BROTHERHOOD OF RAILROAD SIGNALMEN

Name of Carrier:

SOUTHERN RAILWAY COMPANY

Upon application of the Brotherhood involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, the following interpretation is made:

The parties are in dispute as to whether the Claim was sustained for a total of 728 hours, as stated by the Brotherhood, or for 484 hours and 40 minutes, as stated by the Carrier. The portion of the Claim involved reads:

"The Carrier now compensate R. H. Brown, Crossing Signal Maintainer, Greensboro, N. C.; and P. D. Yelton, Signalman, with headquarters at Greensboro, N. C., together with other signal employees who may have filled vacancies or other positions at Greensboro, N. C., during the period of February and March, 1963, at their respective hourly rates of pay on a proportional basis for the total number of man-hours worked by the contractor and his forces, or by persons not covered by the Signalmen's Agreement, as indicated in this claim, and on the basis of days worked by the respective signal employees involved."

The Award reads:

"Claim sustained as modified above."

and the modification in the Opinion reads:

"We will sustain the Claim except as to Claimant Yelton; and except that one full share be divided between Claimant Cox and Claimant T. N. Thompson in proportion to the time each worked during the involved period out of the Greensboro, N. C. headquarters."

The phrase in the Claim: ". . . for the total number of man-hours worked by the contractor and his forces . . ." describes the total number

of hours claimed; the modification did not modify this portion of the Claim. That total number of hours was found in our Award to be 728. Thus, the Brotherhood is correct that the Claim was sustained for a total of 728 hours, and that pay for one-half (364 hours) was awarded to Claimant Brown and pay for the other 364 hours was awarded to be shared between Claimants Cox and Thompson in proportion to the time each had worked out of Greensboro during the involved period.

Referee Daniel House, who sat with the Division as a member when Award 15497 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1968.