Award No. 15874
Docket No. SG-15717

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, 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) On September 30, 1964, Carrier violated the current Signalmen's Agreement, as amended, when it arranged and permitted a person or persons (known to us as a contractor) to perform recognized signal work in digging and back-filling a trench or trenches for signal and/or track circuit wires (underground wires or cables) at Princeton, Indiana, in connection with a new track crossover on its tracks on the St. Louis-Louisville Division at or near MP 161.2 in Princeton, Indiana.

(b) Messrs. P. G. West, Signal Maintainer, Mount Carmel, Illinois, and N. Trimble, Jr., Signal Maintainer–New Albany, Indiana, be compensated at their respective hourly rates of pay, on a proportionate basis, for all time in hours that were worked by the Contractor, or persons, not covered by and who held no seniority or other rights under the Agreement, while performing signal work on September 30, 1964, at Princeton, Indiana, with a minimum of four (4) hours each, in addition to their regular pay on that date.

[Carrier's File: SG-20639]

EMPLOYES' STATEMENT OF FACTS: This dispute, like numerous others from this property which have either been previously decided by this Division or are awaiting adjudication involves signal work which Carrier has contracted out to persons not covered by the Signalmen's Agreement.

On Wednesday, September 30, 1964, between the hours of 9:30 A. M. and 7:30 P. M. a contractor, using machinery, dug and back-filled a ditch in which underground electrical cable for signaling purposes was buried at Princeton, Indiana, near MP 161.2. The work was in connection with a new cross-over switch being installed at a grain elevator, on the territory regularly assigned to Signal Maintainer P. G. West.

Arrangements were made by Signal & Electrical Supervisor M. A. Otterburg, Jr., for the contractor to do the digging and back-filling and for Signal

performed. Claim concedes that claimants were on duty and under pay and that you are requesting double compensation on their behalf. As you know, the agreement does not entitle employes to double pay under circumstances such as here involved.

Claim being unsupported by the agreement and without basis payment is declined."

On April 27, 1965 the claim which the General Chairman had presented was discussed in conference between the General Chairman and the Director of Labor Relations, following which on April 28, 1965 Carrier's Director of Labor Relations wrote the General Chairman as follows:

"Reference is made to the claim described by you as follows which we discussed in conference on April 27:

'(a) Claim of the Brotherhood that the current signalmen's agreement was violated on September 30, 1964 when the carrier arranged and permitted a person or persons (known to us as a contractor) to perform recognized signal work in the digging and backfilling a trench or trenches for signal and/or track circuit wires, (underground wires or cables) at Princeton, Ind., in connection with a new track crossover on the Southern Railway tracks of the St. Louis-Louisville Division at or near MP 161.2 in Princeton, Ind.

(b) That Messrs. P. G. West, Signal Maintainer, Mount Carmel, Ill., and N. Trimble, Jr., Signal Maintainer, New Albany, Ind., be compensated at their respective hourly rates of pay, on a proportionate basis, for all time in hours that was worked by the Contractor, or persons, not covered and who held no seniority or other rights under the agreement, while performing signal work on September 30, 1964 at Princeton, Ind., with a minimum of four (4) hours each, in addition to their regular pay on the date involved.'

As explained in my letter of December 22, both claimants were on duty and under pay when the complained of trenching and backfilling was performed. Furthermore claim concedes that claimants were on duty and under pay. As heretofore pointed out, the agreement does not entitle employes to double pay under circumstances here involved. Furthermore no signal work was performed in violation of any provision of the signalmen's agreement.

Claim being unsupported by the agreement and without basis. basis, I confirm my previous declination of the same."

OPINION OF BOARD: This Claim arose out of the following factual circumstances: On September 30, 1964, Carrier hired a private contractor to dig and back-fill a ditch in which underground electrical cable for signaling purposes was buried at Princeton, Indiana. This Contractor used its own equipment, "a small backhoe" machine, to excavate a trench in the 296 feet in length. After completion of this excavation work, Claimants West and Trimble, both of whom are Signal Maintainers, installed signal and/or track circuit wires (underground wirse or cables). After the excavation work was

completed, the operator of the backhoe, returned to backfill 206 feet of the trench. It should be noted at this point that the Claimants did a part of the excavation work themselves by using picks and shovels; also, Claimants backfilled 116 feet by the same method. On the day in question, Claimants were paid their normal and regular wages; however, the grievance of the Brotherhood is based on the argument that the applicable Agreement of the Parties was violated in that work belonging to Signalmen was assigned and transferred to a private contractor not covered by the Agreement, and that, therefore, punitive pay should be awarded the Claimants — all as set forth in the Claim shown above.

In the handling on the property, Carrier alleged (and the Brotherhood did not deny) that it had no machines in Princeton available for use in digging the trench here involved; that on September 30, 1964, it did own two Davis "66" Trenchers; but that on said date, there machines were several hundred miles from Princeton.

The Brotherhood contends that the Scope Rule of the Agreement was evaded by Carrier. The Scope Rule is lengthy, but especially pertinent parts of it should be cited:

"RULE 1. SCOPE

(Revised — effective October 23, 1953)

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

and

> "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." (Emphasis ours.)

The issue between the Parties is whether Signalmen in cases such as this have the exclusive right by virtue of contract to perform the digging of trenches for underground cables and the necessary backfill work after the installation of the cables — although only pick and shovel hand tools are available.

The Carrier contends that such work when done with hand tools such as a pick and shovel is simple manual labor; that Signalmen may and often do perform such work as an incident of their signal work; but that digging trenches per se is not "work generally recognized as signal work," although such digging is a necessary incident to the installation of signal equipment.

In regard to whether Carrier's action constituted breach of contract, adherence to the rule of stare decisis governs our conclusion that in the instant case the Agreement was violated. Awards 15624, 15062, 14371, and 13236 (among others) have resolved this issue adversely to the argumentation of the Carrier. Since these Awards concerned the same Parties, the same collective bargaining agreement, and substantially similar factual situations, a truly applicable stare decisis situation emerges, and it is the duty of the present neutral referee to preserve the consistency of our prior decisions on this property.

Part (b) of the Claim shown above poses the question of what type of remedial action should be taken for a contractual violation of this type. This referee is of the belief that this knotty issue has not yet been clearly resolved, either by the Federal Courts or the National Railroad Adjustment Board. However, at this time period in the history of the Board, there is an abundance of precedential authority to support allowance of the pro rata time claimed herein.

For reasons stated above, the present Claim is sustained and allowed as presented.

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 Agreement was violated.

AWARD

Claim sustained and allowed as presented.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15874,
DOCKET SG-15717

Award 15874 is erroneous and we dissent.

It is axiomatic that in any proceeding before this Board the burden of proof is upon the party alleging a violation of the agreement. In this docket there was no evidence offered by the Petitioner, much less proof, that the

digging and backfilling of trenches for underground cables is "generally recognized signal work" on this Carrier, which was essential before the Petitioner could assert a violation. In the absence of such proof the claim that the agreement was violated should have been denied. See dissents of Carrier members to Awards 13236 and 15689 which are, by reference, incorporated herein. Awards 15624 and 14371 did not involve similar factual situations, and the conclusion of the Referee that a "truly applicable stare decisis situation emrges" is erroneous.

As concerns the awarding of damages to the extent claimed, the record is clear that the Claimants suffered no monetary loss. The Referee recognized that the problem of penalties or exactions has not been clearly resolved by the Federal Courts or the Adjustment Board, and then proceeds to award penalties or exactions without any provision therefore in the agreement which the Board was required to apply. The observation that there is an abundance of precedential authority to support allowance of the pro rata time claimed would have been just as sound if it had been that there is an abundance of precedential authority to support denial of any monetary payment where no loss was shown. In fact, some of the awards relied upon by the Referee [15624 and 15062], involving disputes between the same parties, would have supported such denial, which was required in the absence of any agreement provision supporting the penalties awarded.

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R. E. Black
G. L. Naylor
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