Award No. 16691
Docket No. SG-16808

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

CENTRAL OF GEORGIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Central of Georgia Railway Company that:

CLAIM NO. 1

(a) Carrier has violated and continues to violate the Scope Rule and other provisions of the Signalmen's Agreement by contracting to persons not covered by the agreement signal work that should be performed by the Carrier's own signal employes under the provisions of their current agreement.

(b) Messrs. T. J. Gassett, Signal Foreman; E. E. Murdock, Leading Signalman; R. L. Johnson, Signalman; A. T. Jones, L. B. Hardison, J. L. Taylor, and T. B. Coker, Assistant Signalmen, be compensated at their respective overtime rates of pay, on a proportionate basis, for all man-hours of signal work performed by the contractor(s) and their forces, beginning on or about September 1, 1965, or sixty (60) days prior to the date of this claim, and to continue thereafter so long as the signal work is performed by persons not covered under the Signalmen's Agreement and who hold no seniority or other rights with the Carrier to perform the signal work.

(c) Carrier make a joint check of its records with the Organization, in the event of a favorable decision, to determine the number of man-hours of signal work, or the amount of money paid to the contractor(s) and their forces, in order to determine the hours and pay that would be due each of the signal employes involved in the claim. (Carrier's File SIG 486.)

CLAIM NO. 2

(d) Mr. D. C. Hunnicutt, Signal Maintainer at Rome, Georgia, beginning November 29, 1965, be compensated at his overtime rate of pay, on a proportionate basis (together with other Claimants named

in paragraph (b) above) for all man-hours of signal work performed by the contractor and his forces on the CTC installation at or near Rome, Georgia. (Carrier's File: SIG 487.)

EMPLOYES' STATEMENT OF FACTS: This claim is the result of Carrier's contracting out work covered by the Scope of the Signalmen's Agreement. The work involved the construction and installation of Centralized Traffic Control (CTC) on approximately eleven (11) or twelve (12) miles of the trackage between Rome, Georgia, and Chattanooga, Tennessee. Work by the contractor's forces was begun on or about September 1, 1965.

Mr. D. Furman, a retired Southern Railway Company Signal Supervisor, contracted for and with others performed the work incident to this CTC installation. As a result, claim on behalf of the members of the Signal Crew — Signal Foreman T. J. Gassett, Leading Signalman E. E. Murdock, Signalman R. L. Johnson, Assistant Signalmen A. T. Jones, L. B. Hardison, J. L. Taylor, and T. B. Coker — was filed by General Chairman E. C. Melton in a letter dated October 28, 1965, to Assistant Signal Superintendent V. L. Cosey.

Mr. Melton referred in the claim letter to a Finance Docket by the Interstate Commerce Commission which authorized certain track changes and abandonments. Finance Docket Nos. 23829 and 23830 are Brotherhood's Exhibit No. 1, and the initial claim letter is Brotherhood's Exhibit No. 2. Other correspondence relating to the claim and appeals has been reproduced and made a part of this ex parte submission as Brotherhood's Exhibit Nos. 3 through 25.

On December 21, 1965, in a letter (Brotherhood's Exhibit No. 16) addressed to Mr. Cosey, Mr. Melton asked that Signal Maintainer D. C. Hunnicutt, Rome, Georgia, be added to the original list of Claimants. Mr. Hunnicutt was assigned to the position on Bulletin No. J-21-65, effective November 29, 1965, and General Chairman Melton asked that his name be included in the claim as of that date. Carrier refused, however, and considerable correspondence was exchanged as a result. That correspondence is identified in this submission as Brotherhood's Exhibit Nos. 16 through 25.

With Carrier letters identified as Brotherhood's Exhibit Nos. 8, 10, and 21 copies of affidavits by certain Carrier officials and retired former employes were furnished to Melton. Inasmuch as Carrier will undoubtedly reproduce those statements and since they are of no consequence they will not be reproduced as a part of Brotherhood's exhibits.

Attention, however, is directed to an affidavit by former General Chairman J. R. Estes, Jr., page 3 of Brotherhood's Exhibit No. 11, which was necessitated by certain erroneous, self-serving statements which Carrier made before, during, and after the conference on February 15, 1966. Typical of those statements are the following from Mr. Tolleson's letter (Brotherhood's Exhibit No. 10) in which he said of and to Mr. Melton that:

> ". . . I realize that you have never worked for the Central of Georgia for even one day, and therefore through no fault of your own have no first-hand information as to historical Interpretation and practices on this property.

* * * * *

Exception is also taken to your attempt to amend another claim by adding, at this late date, the name of D. C. Hunnicutt.

Without prejudice to the foregoing facts and our positive position, the so-called 'merits' of the claim were discussed at length. For the reasons set forth in detail in conference the fatally defective vague and indefinite claim remains declined in its entirety as per my full and final decision of May 6, 1966, inasmuch as you failed to attempt to show any evidence or proof to support your claim."

On April 16, 1965, Carrier entered into a so-called stabilization of employment agreement with employes of the signalmen's class or craft, a copy of which agreement is on file with your Board and is, by reference, made part and parcel of this submission as though reproduced herein word for word.

Under the April 16, 1965 agreement all the claimants except J. L. Taylor and T. B. Coker are "protected employes" and under Article IV of such agreement are not to be placed in a worse position with respect to compensation than the normal rate of compensation of positions to which assigned on October 1, 1964 plus any subsequent general wage increases. J. L. Taylor is a relatively new employe as was T. B. Coker, who resigned March 11, 1966. The "protected employes" are guaranteed the rate of compensation received on October 1, 1964 so long as they protect their rights and until such time as they retire, die or are discharged for cause. Having been guaranteed lifetime pay under the conditions outlined in the referred to agreement, they cannot expect more.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts in this dispute are that Carrier contracted out to a private contractor the installation of a new Traffic Control System (CTC) over approximately 12.6 miles of trackage between Rome, Georgia and Chattanooga, Tennessee. Carrier was allowed by ICC to discontinue 18 miles of trackage in and near Rome, Georgia and was authorized to operate over Southern Railway Company tracks necessitating CTC and signal work to be performed on both Carrier's and Southern Railway Company's rights of way.

The Organization's position is that the Scope Rule of the Agreement was violated when Carrier contracted out this work to a private contractor.

The Scope Rule provides as follows:

"This agreement covers the rates of pay, hours of service and working conditions of all employes, classified herein, engaged in the construction, installation, repairing, inspecting, testing and maintenance of all interlocking systems and devices; signals and signal systems; wayside devices and equipment for train stop and train control; car retarder and car retarder systems; centralized traffic control systems operative gate mechanism; operative highway crossing protective devices; spring switch mechanism; electric switch targets together with wires and cables; iron train order signals; signal cantilevers, power or other lines, with poles, fixtures, conduit systems, transformers, arrestors and wires or cables pertaining to interlocking and signal systems; interlocking and signal lighting; storage battery plants with charging outfits and switch board equipment; sub stations, current generating and compressed air plants, exclusively used by the

Signal Department, pipe lines and connections used for Signal Department purposes; carpenter, concrete and form work in connection with signal and interlocking systems (except that required in buildings, towers and signal bridges); together with all appurtenances pertaining to the above named systems and devices, as well as any other work generally recognized as signal work."

Carrier's position is that (a) the claim is vague and indefinite (b) the Agreement was not violated (c) the Carrier has the right to contract out such work involving considerable undertaking and of great magnitude, which undertaking is beyond the capacity of Carrier's signal forces and further no signal employes were furloughed or available to do the work at the time it was performed (d) this Board does not have the authority to require Carrier to make a joint check of its records with the Organization in event of a favorable decision, to determine the number of man-hours of signal work involved or the amount of money paid to the contractor; and (e) this Board does not have the authority to grant the pay claims involved herein inasmuch as the Claimant's were working and suffered no pecuniary loss as a result of the contracting out of the signal work involved herein.

First, Carrier's argument that the claim is vague and indefinite and thus in violation of Section 3, First (i) of the Railway Labor Act, as well as Article V of the November 5, 1954 Agreement, we feel, is without merit. As was said in Award 12328 (Dolnick): ". . . Carrier is fully aware of the nature of the claim. The record is replete with statements by Carrier showing full well that Carrier knows and understands the issue in this dispute. Similar claims involving the same issue have previously been considered by this Division of the Board."

Second, in regard to the merits of the claim, it is seen that we are dealing with a specific type scope rule rather than a general type scope rule. Examination of the scope rule in question shows that the rule does cover the type of work involved in this dispute. The rule states: ". . . Covers rates of pay, hours of service and working conditions of all employes, classified herein, engaged in the construction, installation . . . of all . . . centralized traffic control systems. . . ." Therefore, the scope rule does by specific terms include the installation of signal systems such as in this dispute and thus reserves such work exclusively to the signalmen. Consequently, we must reject Carrier's contention that the Scope Rule does not apply to the work contracted in this instance.

Third, concerning Carrier's contention that Carrier has the right to contract out work as in the instance case inasmuch it involves considerable undertaking and is of great magnitude and therefore beyond the capacity of Carrier's signal forces, Carrier alleges that Awards of this Division permit work to be contracted out when such work is of great magnitude or beyond the capacity of the Carrier's forces. Carrier thus is raising an affirmative defense and the burden is upon Carrier to prove such defense by competent evidence. Carrier makes the mere assertion that the total cost of the installation work exceeded one-quarter million dollars. No factual evidence was adduced by Carrier to support this allegation. This Board has held on numerous occasions that mere assertions cannot be accepted as proof, and self-serving declarations and general statements are of no real probative value. This principle applies also to Carrier's assertion that inasmuch as the work involved was to be performed over 12.6 miles of trackage, this shows the great magnitude of the project

and thus is beyond the scope of the Carrier's signal forces. Carrier failed to adduce evidence to show what specific work was actually performed by the contractor in installing the Traffic Control System, and at what points along the 12.6 miles of trackage that said work was actually performed. We cannot speculate and assume that the work must have been of great magnitude. Failing to cite evidence of probative value, Carrier has failed to meet its burden of proving said affirmative defense, and therefore this contention must be rejected.

The Carrier's argument that it was justified in contracting out the work in question inasmuch as there were no signal employes furloughed or available to do the work, was rejected in Award 5839 (Yeager), which held:

> "It appears well established that mere lack of qualified employes does not furnish a Carrier with grounds for removal of work covered by a Scope Rule. Awards 5470 and 5471 appear to indicate that the Carrier under such circumstances before contracting must either seek to recruit capable employes for the work or negotiate with the Organization in an effort to work the matter out satisfactorily or both. . . ."

Therefore it is the opinion of this Board that the Carrier violated the Agreement when it contracted out the work in question to a private contractor.

Finally, in regard to damages, Carrier's contention is that inasmuch as Claimants did not lose any time from their work and did not suffer any pecuniary loss as a result of contracting out of the signal work, then this Board is without authority to award penalties or windfalls to these Claimants. The Organization is not contending that Claimants herein lost any time from their work or suffered any pecuniary loss as a result of Carrier's contracting out the work in question.

A large number of Awards of this Board as well as a number of Court decisions have held that where Claimants have not suffered any wage loss as a result of a contract violation, this Board is without authority to make use of penalties, except as limited to nominal damages. See Awards 14920, 14963, 14371, 13236, 15062, Brotherhood of Railroad Trainmen vs. Denver and Rio Grande Western Railroad Company, 338F and 407, cert. den. 85 S. Ct. 1330.

As was said in Award 15062 (Ives): "Although the arguments advanced in support of penalties as a necessary deterrent to further contract violations are persuasive, we are compelled to follow the late Awards of this Board and recent decisions of the Courts until such time as the Supreme Court considers whether or not we have the statutory power to impose penalties for violations of Agreements. Accordingly, we will deny that part of the claim which relate to damages (Award 13958)."

Therefore we will sustain paragraph (a) of Claim (1) and deny paragraph (b) and (c) of Claim 1; and will deny paragraph (d) of Claim (2).

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 Employe 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

AWARD

Claim sustained as to paragraph (a) of Claim 1; and Claim denied as to paragraph (b) and (c) of Claim 1 and Claim denied as to paragraph (d) of Claim 2.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1968.

DISSENT TO AWARD NO. 16691, DOCKET SG-16808

The Majority — Carrier Members and Referee, after correctly interpreting the Scope Rule of the controlling agreement, makes a travesty of their award in their holdings in the matter of the relief prayed for. The majority, citing Award No. 15062, ignors later Award No. 16009 by the same Referee which has the effect of overturning the earlier decision.

While this award, being no better than the logic upon which it is based, can not stand as a precedent, it is tragic that the claimants have been denied justice because of this Board's failure to meet its statutory obligation.

W. W. Altus, Jr
For Labor Members

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