Award No. 1218
Docket No. SG-1193

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

CHICAGO, BURLINGTON & QUINCY R. R. COMPANY

STATEMENT OF CLAIM: "(a) That the carrier violated the signalmen's agreement by using employes not covered by such agreement in the installation of highway-railroad grade crossing signals at Louisiana, Mo., on the Hannibal Division.

"(b) That R. A. McLelland and L. J. Stromer, signal department employes holding seniority rights but laid off because of force reduction, be compensated at the helpers' rate of pay for all wages lost because of failure of the carrier to call them back to service in place of using Maintenance of Way employes in the performance of the work described in paragraph (a). A total of fifty hours at rate of 56¢ per hour is involved for each man."

EMPLOYES' STATEMENT OF FACTS: "On April 13, 1939, the work of installing a flasher light signal at a highway-railroad grade crossing in Louisiana, Mo., was started by direction of Signal Supervisor F. A. Tegeler. The work was progressed intermittently until completed or until September 27, 1939, the date the signal was put into service, there being a total of 168 days including Sundays and Holidays from the date the work was started until completed and the signal placed in service.

"During the installation of this signal, together with the necesary appliances in connection therewith, the work was performed, under the instructions of Supervisor Tegeler, in a piece-meal fashion, the signal maintainers on the district together with track department or maintenance of way employes doing the work. A total of 100 hours work was performed by the maintenance of way employes.

"During the time the maintenance of way employes were used on this work, R. A. McLelland and L. J. Stromer were the oldest helpers, in point of seniority, who were out of service because of force reduction and they were the first employes of their class to be returned to service under the provisions of the seniority rules, Rule 50 governing in this instance. However, they were not recalled to service to perform this work. The maintenance of way employes were used in their place.

"The Scope rule of the agreement between the management of the Chicago, Burlington and Quincy Railroad Company and the Brotherhood of Railroad Signalmen of America, effective February 1, 1938, is as follows:

'Scope

'This agreement governs the rates of pay, hours of service and working conditions of all employes in the Signal Department (except

hereto. He reported for duty at Oreapolis on April 17, 1939. Is it logical to assume that he would have traveled 984 miles to and from Louisiana, Missouri for one day's work, when he would not go to Mendota to work from April 12th to 16th, inclusive?

"We ask the Board to take cognizance of the difficulty the Management would encounter in attempting to secure signal helpers for temporary work of this nature, which in this particular instance involved less than a day. The Management also points out the serious delay and resultant expense which would ensue therefrom.

"On May 15, 16, and 23, 1939, the other dates named in the claim, R. A. McClelland and L. J. Stromer, the complainant employes were employed as assistant signalmen and were paid eight hours at 72¢ per hour on each date, which is 16¢ per hour more than the amount asked for in the instant claim.

"The Management rests its case on the fair premise that:

"(1) The service involved in the instant claim is not signalmen's work within the scope of the schedule agreement cited in evidence by the petitioners;

"(2) However, the Management again signifies its willingness to meet the Committee in an endeavor to compose our differences, which the Committee has heretofore refused to do;

"(3) evidentiary documents submitted by the Management refutes the allegation of the Committee that the employes named in the instant claim desire or would accept service such as that required on April 13, 1939, and

"(4) the employes named were in service on May 15, 16 and 23, 1939 and were paid a greater amount for the service performed than they would have been paid for the service at Louisiana, Missouri.

"Therefore, as there is no rule in the agreement to support the contention of the Organization that manual labor is exclusively the work of signalmen and their helpers, and in view of the fact that the employes named in the claim were in service or had opportunity to be in service on all dates involved, this claim is entirely devoid of merit and should be declined."

There is in existence an agreement between the parties bearing effective date of February 1, 1938.

OPINION OF BOARD: Briefly the facts involved in this dispute are that the carrier was installing flasher light signals at a highway-railroad grade crossing in Louisiana, Mo., under the supervision of Signal Supervisor F. A. Tegeler. During the installation of the flasher light signals no helpers were used, but three track section laborers did perform certain common, or unskilled labor, such as moving material, digging trench, wherein a signal cable was later placed, and back-filling the same under the immediate supervision of the section foreman, assembling foundation, raising cable post and box on foundation.

Numerous awards by this Division and by other Divisions of the Board have held that work covered by an agreement cannot be performed by employes not covered by the same agreement, and that employes embraced in an agreement shall be returned to service in the order of their seniority rights to perform such work as is available; consequently, in the absence of any agreement to the contrary it must continue to be held that all employment of a class covered by an agreement must be deemed to be embraced therein.

Therefore, the question for determination is, "Did the work performed by the section men come within the current agreement of the Brotherhood of Railroad Signalmen of America, and the carrier in question?"

The Board is of the opinion that this question must be answered in the affirmative. This, for the following reasons: The Scope rule reads:

"This agreement governs * * * all employes in the Signal Department * * * performing the work generally recognized as Signal work, **which work shall include the construction,** installation, * * * **(of) highway crossing protection devices and their appurtenances.** * * * and all other work generally recognized as signal work.

"It is understood the following classification shall include all the employes of the signal department performing the work enumerated under the heading of 'Scope'." (Emphasis our.)

Article 1, Rules 1, 2, 3, 4, 5, and 6, apply to all employes in the signal department, and that a reasonable definition of the work to be done by each class is set forth. There is no classification of "laborers."

Rule 6 defines a "Helper" as follows:

"An employe assigned to assist other employes specified herein shall be classified as a Signal Helper. A Signal Helper working alone, or two or more Helpers working together, may perform work recognized as Helper's work. A Helper as such shall not be assigned to do work recognized as that of other classes as named in this article."

This provision does not require that a signal helper shall possess skill; he is to assist other employes specified herein (Rules 1 to 5). Therefore, in the installation of a flasher highway signal if it became necessary to use unskilled labor, such as digging trenches and back-filling the same, or moving material, it was the duty of the helper to do such work.

If it be a fact that this work had been previously done by section men, then this practice is only valuable in cases of doubtful meaning of words used in the agreement. There is no doubt as to the meaning of the words used in the scope rule of the agreement.

The Board is not unmindful of Award No. 1134, but that award was based solely upon unique facts in that case. In this claim we have no disturbance of the road bed. It is easily distinguishable from the claim before us as the following quotation from that Award will show:

"In digging the trench beneath three main line tracks of the railroad, as was done, and its extensions otherwise, in the circumstances appearing, potential disturbance of the roadbed at vital points challenged the carrier's concern to a degree not lightly to be regarded, and the back-filling partook of the same potentialities. Throughout the process, as we are persuaded, responsibility for the finished job in relation to the trench proper—digging and back-filling—rested on the track force."

Moreover, the contract in that claim is dissimilar to the one in the claim before us.

The carrier violated the agreement by assigning section laborers to perform work generally recognized as signal work.

The second point for the Board's decision is as follows: "Is the reparation sought a valid claim for any or all of the dates here involved?"

Rule 65 of the current agreement is as follows:

"* * * A claim or grievance not presented within ninety (90) days of the occurrence will not be recognized by either party."

In construing similar rules, the decisions of the Board are not in harmony as the following awards will show: Award Nos. 417, 444, 595, 604, 863, 951, 1080, 1082, 1083 and 1084. But those awards do hold that if the claim is not presented within the time mentioned in the rule (in this case ninety days) then the claim is barred, unless the complaint is a continuing violation of the agreement; this for the reason that each day's violation of the agreement makes a separate grievance. If reparation is sought where the award is a continuing one, then we find some case holding that the recovery dates go

back to the first day of the violation, while in others, recovery is limited to a period beginning on the date limit named in the rule. (In this case ninety days prior to the date of presenting the claim.)

In this case the claim for reparation was on the following dates: April 13, 1939, May 15, 16 and 23, 1939. There was no violation between the dates of April 13 and May 15, 1939, and, therefore, not a continuing violation of the agreement.

The affirmative showing in this record is that the claim was not presented until August 8, 1939. It, therefore, follows that the claim for pay for the date of April 13, 1939 should be denied.

The last question for the Board's determination is as follows: "If the reparation here claimed is valid under the agreement, are the claimants named entitled to such reparation for all or any dates involved."

The record shows that on May 15, 16 and 23, 1939, the other dates named in the complaint, that R. A. McLelland and L. J. Stromer, the complainant employes were employed by the respondent as Assistant Signalmen and were paid eight hours at 72¢ per hour on each of the three days, but that there were other idle employes junior to McLelland and Stromer who were not in service on these dates.

Under these circumstances the claimant R. A. McLelland and L. J. Stromer were not entitled to pay for the May dates, but as there were other idle employes junior to McLelland and Stromer who were not in service on those dates, they would be entitled to pay for these dates. The only concern of the carrier under these circumstances is to see that the employes entitled thereto are paid. (See Award No. 893.)

As the record does not disclose the name of the employes entitled to pay on May 15, 16 and 23, 1939, the case will be remanded to the parties to determine who were the employes entitled to the pay on these dates.

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 carrier violated the agreement by assigning section laborers to perform the work in question; that the claim be denied in part and sustained in part in conformity with the Opinion, and remanded to the parties to determine the senior furloughed employes on the dates of May 15, 16, 23, 1939.

AWARD

Claim (a) sustained; claim (b) remanded in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 31st day of October, 1940.