

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

TEXAS AND NEW ORLEANS RAILROAD COMPANY

STATEMENT OF CLAIM: (a) Claim of the Brotherhood that the Carrier violated the Signalmen's Agreement when on or about May 1944 and continuing until about March 1945 it farmed out, removed or otherwise arranged or assigned generally recognized signal work to persons not covered and who held no seniority rights under the provisions of the Signalmen's Agreement.

(b) Claim that the regular signal employees affected, by reason of this violation of the Signalmen's Agreement, be compensated at their proper rate of pay on the basis of time and one-half for an amount of time equivalent to that required by the outside workers to perform this signal work. That each employe holding seniority under the Agreement during the period involved shall receive pay for his proportionate share of the total time worked on the seniority district by employees not covered by the Agreement.

EMPLOYEES' STATEMENT OF FACTS: An agreement, effective February 1, 1941, is in effect between the Southern Pacific Lines in Texas and Louisiana (Texas and New Orleans Railroad Company) and the Brotherhood of Railroad Signalmen of America, representing signal department employees, which governs the rates of pay, hours of service and working conditions of all employees in the signal department performing work generally recognized as signal work. There are no exceptions of any nature providing for diversion of signal work to workers not covered by the agreement. The agreement involved in this dispute is on file with your Board and we request that it be considered as a part of the record in this case.

The work in dispute here is the painting of signal apparatus which always has been and still is a part of the work generally recognized as signal work. Painting is a necessary part of the proper maintenance of signals and interlocking apparatus.

On May 10, 1944 the Carrier issued a memorandum over the name of Mr. J. H. Knowles, Division Engineer, which stated that a jobbing contract No. 35264 had been entered into with L. R. Swope of Bryan, Texas to cover painting of signals between West Junction and Glidden. It further stated that Paint Contractor Swope will paint signals between West Junction, M. P. 12 and Glidden, Texas, M. P. 87. The contract also included the painting of other signal apparatus.

The Carrier agreed to pay Contractor Swope six dollars (\$6.00) each for the cleaning and painting of signals and two dollars (\$2.00) each for the cleaning and painting of relay boxes and posts.

have been performed by employes of the company during regularly assigned hours. The record further discloses that there has been a dispute between the company and the employes over the right of the company to require that employes work overtime. The work involved was of such a nature that it required performance during the night, and to have required the regular employes to perform such work after their regular tour of duty, would have, to say the least, afforded complications and required excessive overtime hours. While the job was not an emergency, nevertheless, it was such that its prompt completion was essential. During the time this work was in progress all employes were working full time, and many were working overtime. We are convinced, therefore, that there was no intention by the carrier of depriving employes under the contract of any work. The act of the carrier was a good faith attempt to have essential work performed with reasonable dispatch, under adverse labor conditions. Better practice would undoubtedly have been for the company officials to have consulted the organization, but under the facts presented by this record, we are unable to determine that the failure to so act resulted in loss to the claimants."

This Carrier has not contracted to have anyone do work that could have been done with the Carrier's own forces and facilities without undue delay and damage to signal equipment, nor has it attempted to evade any of its obligations under the Agreement between it and the employees represented by the Brotherhood of Railroad Signalmen of America. It has never agreed that essential work must be unreasonably deferred until such time as there can be Signal Department employees available to do it or that Signalmen, Signal Maintainers, and Signal Helpers regularly employed and paid are entitled to additional or double pay nor can any such obligations be implied under the circumstances surrounding this dispute.

CONCLUSION: The Carrier has shown that the only case properly before this Division of the Board for consideration is the protest of the Organization against contracts entered into by the Carrier to have certain necessary cleaning and painting of signal equipment done which could not be done by its own forces which were insufficient to perform the required work and despite all efforts to augment its forces and that the work done under contract was essential work and had to be done to protect the property from permanent damage; that there was no attempt to evade any of its obligations under the Agreement.

Every effort has been made to set out all known relevant argumentative facts, including documentary evidence in exhibit form.

OPINION OF BOARD: On May 10, 1944, the Carrier contracted with workers outside the scope of the Signalmen's Agreement to repaint signal apparatus and structures consisting of signals, posts, relay cases, train order signals, signal bridges, wig-wags and other crossing signals, mechanism cases and time release cases. The work was completed on March 15, 1945. It is the claim of the Organization that regular signal employes should have been called to perform this work as overtime and claim is made on that basis.

The work in question was clearly within the scope of the Signalmen's Agreement. It was work ordinarily and customarily performed by Signalmen. The general rule is that a carrier may not contract with others for the performance of work embraced within the scope rule of a collective agreement made with its employes. Awards 2701, 2812 and 2819. There are, however, exceptions to this rule which have been recognized by the awards of this Division. Awards 757, 2338 and 2465. However, the work here involved does not fall within any of the exceptions heretofore recognized by this Board. Giving effect to the Scope Rule and the nature of the work performed, it necessarily follows that the work belonged to the Signalmen and that the Agreement was violated when the work was contracted to persons not covered by the Agreement.

This requires consideration of the nature of the claim filed and the penalty that could properly be imposed because of the contract violation. The first sentence in Section (b) of the claim is fairly clear. The second sentence injects much uncertainty and indefiniteness into the claim. It reads: "that each employee holding seniority under the agreement during the period involved shall receive pay for his proportionate share of the total time worked on the seniority district by employees not covered by the agreement."

It is quite evident from an examination of the record that the employees claiming the time lost were Signal Maintainers in the Signal Maintenance Districts where the contracted work was performed. It is also evident from the personal claims filed by three Signal Maintainers shown in the record that each such Signalman was claiming the number of hours at the overtime rate that the Contractor worked in his Signal Maintenance District. We think the choice of words in the second sentence of Section (b) of the claim was unfortunate but we construe this portion of the claim to mean that each employe having the right to the work under the Agreement during the period involved shall receive pay for the equivalent number of hours that the Contractor's forces worked within his district. We will dispose of the claim on this basis. The question for decision is: Are the Signal Maintainers affected entitled to be paid at the time and one-half rate of their positions for a period of time equivalent to that required by the Contractor to perform the work in their respective districts? The fact that the claim is general and fails to name the claimants except as a class is not a bar to the disposition of the claim. Award 137.

In a consideration of the merits of the claim, it will be noted that all Signal Maintainers involved worked their full assignments during the period the work contracted was being performed. The record discloses that in addition thereto, they averaged one hour per day at the overtime rate. No claim is made that any signal maintainer was deprived of a higher classification or of any supervisory position carrying a higher rate of pay. The sole claim is that the work belonged to them as overtime and that they should be compensated at the overtime rate.

The Carrier alleges that it could not augment its forces to get this work done due to a labor shortage. It contends that the work was necessary to be done as soon as possible and that additional delay was fraught with danger to the safety and efficiency of the railroad.

The Carrier failed to discuss the matter with the Signalmen's Organization before contracting the work. A failure to so do indicates an intent on its part to by-pass the Agreement. The assertions of the Carrier that it had no intention or desire to have work covered by the Agreement performed by persons not covered by it, can have no efficacy here where the Carrier, under such circumstances as here shown, fails to discuss the matter with the Organization before assigning the work to persons outside the scope of the applicable collective agreement.

The Organization relies upon the rule announced in Award 1501 to the effect that the employees under the Signalmen's Agreement are to be given not a part, but all, of the work which properly falls within its domain. This rule is, of course, subject to certain exceptions, none of which are here involved, which have been recognized on the theory that the work was of such a nature or the conditions under which it arose were so unusual that it could be said that the parties to the Agreement did not contemplate its inclusion therein. Award 906, 2338 and 2465. The Organization asserts that the contract was violated, that the violation was not technical and that the work contracted was lost insofar as claimants were concerned.

The Carrier, on the other hand, relies upon the rule announced in Award 1453 to the effect that although there was a violation of the Agreement, such violation was technical. It is pointed out in that award that the violation was technical because it was not intended to deprive employees under the Agreement of work by letting the paint job in question under the contract; because it was done in good faith by the Carrier acting in its discretion to

preserve the property and to avoid the reasonable probability of painting during the worst winter weather; because none of claimants were deprived of work during the period of painting and there was no attempt at evasion of the contract to the disadvantage of the employes and that no loss resulted to claimants. This rule is further supported by Award 1610 of this Division and Award 924 of the Second Division.

No attempt has been made to rationalize these two rules. We think it important that a rule be announced that will induce consistency in the decisions of cases involved the contracting of work falling within the scope of a collective agreement.

Where work is within the scope of a collective agreement, and not within any exception contained in that agreement or any exception recognized as inherently existent as hereinbefore discussed, we feel obliged to adhere to the fundamental rule that the work belongs to the employes under the agreement and that it may not be farmed out with impunity. Where unusual conditions intervene, such as a labor shortage, so that the work cannot be performed in the manner contemplated by the agreement, the carrier is required to negotiate the matter with the Organization before it can justifiably assert that a contracting of the work constitutes only a technical violation of the agreement. This is so because the carrier has already solemnly contracted the work to the employes covered by the agreement. If negotiation be attempted, and either party assumes an unreasonable attitude, this Board may give primary consideration to such fact in determining, if the carrier elects to contract the work, whether the violation was technical only. We think it would be unreasonable for the Organization to insist that work of great magnitude be performed on overtime, or to insist that work be performed as overtime where it could bring about serious complications in the efficient performance of the work or require excessive overtime hours. Neither party can be required to do the impossible, nor will they be permitted to assume an unreasonable position in such matters with impunity.

In arriving at this conclusion, we have not overlooked the reasoning contained in Awards 1458 and 1610. We desire to point out that the reasons given for permitting a contracting of work within the Agreement with the impunity do not appear as exceptions to the scope rule of the Agreement. We do not see how they can be asserted as a justification for assigning the work to persons not covered by the Agreement when it results, in effect, in a rewriting of the Agreement. We think the conditions confronting the Carrier, if sustained by proof, amount to an impossibility of performance which requires negotiation between the parties. In the event negotiation fails, and the Carrier is forced to contract the work to avoid serious consequences to its property, all the circumstances including the reasonableness of the parties in attempting to negotiate, will be taken into consideration in determining whether the violation requires the imposition of a penalty to preserve the solemnity of the Agreement.

By ignoring its Agreement with the Signalmen and failing to attempt an adjustment by negotiation to meet the unusual conditions with which it was confronted, the Carrier's violation of the Agreement must be treated as more than technical and an affirmative award is required.

The Organization claims that the employes affected should be compensated at the time and one-half rate. The penalty to be imposed for work lost is the pro rata rate of the position occupied by the employee entitled to the work. Awards 3193, 3049, 2823, 2695, 2346.

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 as alleged.

AWARD

Claim (a) sustained. Claim (b) sustained in accordance with the Opinion and at the pro rata rate only.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1946.