Award No. 3423
Docket No. SG-3424

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: (a) Claim of the Brotherhood that the Carrier violated the Signalmen's Agreement when on or about July 25, 1945, it contracted, farmed out, removed, arranged, or otherwise assigned work to persons who hold no seniority rights and are not covered by that Agreement.

(b) Claim that signal employes on the Western District shall be compensated at their regular rate of pay on basis of time and one-half for an amount of time equal to that required by the contractor's employes to perform signal work assigned to such employes in violation of the agreement; that each employe holding seniority on the Western District during the period signal work was improperly assigned to persons not covered by the Signalmen's agreement shall receive compensation for his proportionate share of the total time worked by contractor's forces on that district.

EMPLOYES' STATEMENT OF FACTS: There is an agreement dated August 1, 1943 between the parties to this dispute, the Scope of which reads as follows:

> "This agreement governs the rates of pay, hours of service, and working conditions of employes in the Signal Department specified herein, engaged in the construction, installation, maintenance and repair of signals, signal power lines, pole line signal circuits and their appurtenances, interlocking plants, spring switch locking devices, highway crossing signals, automatic crossing gates, wayside train stops and train control equipment, slide detector devices connected with signal systems, car retarder systems, centralized traffic control systems, signal shop work and such other work as is generally recognized as signal work."

The Scope rule, above quoted, makes no provision for contracting or farming out work, nor in any manner provides that persons not covered by the Signalmen's agreement will be required or permitted to perform work covered by that agreement.

On, or about, July 25, 1945, the Carrier contracted with the James Construction Company, a concern not a party to the Signalmen's agreement, to perform certain signal work between mile post 36.9, east end of Easton Yard, Washington, and mile post 60.5, west end of Lester, Washington, a total of 23.6 miles of double track railroad where automatic signaling was installed to provide for reverse traffic movement on either track. The contractor completed work assigned on or about November 15, 1945.

it was not intended to deprive employes 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 reasonably probable futility 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, we are of the opinion that no loss resulted to claimants."

And in Award No. 1610, this Division, with Mr. Bruce Black acting as Referee, said:

"It is contended by the Organization, however, that the disbanding of the gang on September 30th would not have occurred if the Carrier had not contracted the job on the elevator at North Kansas City. The answer to that contention is that claimants were working on their jobs during the entire period the elevator was being painted. They lost no time on account of the Carrier's violation of the scope rule as did the claimants in Award 1020. Having lost no time as a result of the Carrier's violation of the scope rule, their claim must be denied under the holding of the Board in Award 1453."

What was said in Awards Nos. 1453 and 1610 insofar as time lost by the claimants in these Awards is concerned is fully applicable in the instant case. Signal Department employes were not laid off or deprived of any work because of having the contractor do certain signal work between Easton and Lester; Signal Department employes lost no time by reason of having the contractor do this work. Therefore, there are no employes in the Signal Department on the Western District entitled to additional compensation because certain work between Easton and Lester was contracted. This proposition is sustained by you in Awards Nos. 1453 and 1610.

This claim is not sustained because:

1. For reasons stated by the Carrier, the Scope Rule of the Signalmen's Agreement does not sustain the claim. This proposition is supported by the language of the rule and also by the cited awards of this Division.

2. World War II created an emergency and schedule rules aside, there would be no basis for this claim because the Carrier used the only means at its command to do the necessary work.

3. Schedule rules were not complied with in presenting this claim. As the claim is presented under schedule rules it logically follows that the employes must comply with those rules in presenting time claims.

4. In any view of the case, the claim is indefinite, uncertain and speculative and an award of this Division sustaining the claim as presented would be impossible of application.

5. No employe has or is in position to definitely show that he lost any time as a result of the performance of the work in question.

For the reasons herein stated this claim should be declined.

OPINION OF BOARD: That the work which was done under contract between Lester and Easton fell within the Scope Rule of the current Agreement and should have been assigned to employes under the Agreement is not open to dispute. It is a fair inference that the Carrier itself recognizes the work was within the Scope Rule. For, in its presentation of the case, it resorts, in defense of the claim, to the contentions of: (1) war emergency, (2) past practice (acquiesced in by the Organization) of contracting for new construction and (3) absence of a showing of wage loss by employes covered by the Agreement.

The first defense is predicated upon the scarcity of labor and the urgency of the improvement in connection with the war effort. The urgency of the work may be conceded. Nevertheless, it does not justify the Carrier's conduct in ignoring the Agreement and the rights of the employes covered by it. The Carrier says it made every effort to obtain more signalmen. It did not, however, ask the Organization's assistance in trying to obtain them. Furthermore, it would seem that there should have been no more difficulty for the Carrier itself to procure signalmen than it was for the Contractor who got the work.

The second defense—past practice, acquiesced in by the Organization—is without substance. The practice was under a prior agreement, the Scope Rule of which was very general in terms and did not cover new construction. The current Agreement in specific terms brings new construction within its scope.

In the light of some of the decisions of this Board the third contention of the Carrier (that no wage loss has been established by reason of the violation of the Agreement) might have offered some difficulty but for the decision of this Board in Award No. 3251. In all essential features the dispute in that case is indistinguishable from the issue in this. The contention there, as here, was that no wage loss had been established in behalf of any particular men covered by the Agreement.

In a comprehensive opinion, distinguishing some of the former Awards of this Board relied upon by the Carrier, we held that proof of wage loss is immaterial when the violation is deliberate and in complete disregard of the rights of the Organization and the employes covered by the Agreement. That the violation of the Agreement in the instant case was deliberate is manifest from the record. Indeed, we think it is fair inference from the record that the Carrier "took a chance" on violating the Agreement rather than disturb the wage structure set up in it by paying wages at the scale the Contractor had to pay. We think that Award No. 3251 is controlling of this dispute; and what was there said with respect to the same contention now under discussion is peculiarly pertinent:

> "It is quite evident from an examination of the record that the employes claiming the time lost were Signal Maintainers in the Signal Maintenance Districts where the contracted work was performed. It is also evidence 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."

Following the holding in that Award the claim will be allowed; but at the pro rata rate only.

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.

AWARD

Claim (a) sustained.

Claim (b) sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 3rd day of February, 1947.