Award No. 5218
Docket No. SG-5078

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim (a) That the Carrier violated and continues to violate the provisions of the Signalmen's Agreement when it diverted or otherwise assigned generally recognized signal work to persons not covered by the agreement. Namely; the installation and maintenance of car retarder and signal apparatus at Lorain, Ohio.

(b) That the Carrier be required to restore this work to the scope and operation of the Signalmen's Agreement; and

(c) That all employes who have been adversely affected by this action of the Carrier be entitled to and receive compensation representing the monetary losses sustained.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement dated August 1, 1939, between the parties to this dispute, the Scope Rule of which reads as follows:

> "The following rules shall apply to employes classified in Article 1, performing the work generally recognized as signal work, superseding all rules, working conditions and practices in conflict herewith."

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

Sometime in April 1948 the General Railway Signal Company, pursuant to contract with the Baltimore and Ohio Railroad Company, completed a car retarder installation at Lorain, Ohio, and at the same time diverted the maintenance work in connection with the said car retarder system to employes of the Toledo, Lorain and Fairport Dock Company.

The work in connection with the installation of the car retarder system by the General Railway Signal Company, at Lorain, Ohio, as well as the maintenance work in connection therewith, diverted by the Carrier to the Dock Company, has always been and still is a part of the work generally recognized as signal work.

The maintenance work referred to in this dispute, since the inception of the use of car retarder systems on this Carrier, has been and still is as-

out of this Carrier's operations. Nowhere in this working agreement, nor in the scope rule cited hereinabove extracted from that working agreement, is to be found any reference whatsoever defining, describing or in any way establishing the rights of the Employes covered by that working agreement to service arising out of the operations of any corporation other than this Carrier, signatory party to that working agreement.

In a realistic and complete sense, the scope of the working agreement involved in this dispute must necessarily be restricted to the performance of such work as is comprehended by that agreement arising on the property of the Carrier out of the Carrier's operations. It is a highly pertinent fact, therefore, that the work involved in this dispute arises on property in the possession of the Stevedore Company, not the Carrier, and emerges from the operations conducted by the Stevedore Company, not the Carrier.

On the basis of the record, the Carrier submits that the scope of the working agreement found here does not extend nor can properly be extended to include service arising out of the operations of the Stevedore Company.

CARRIER'S SUMMARY OF ARGUMENT: The Carrier has shown hereinabove:

1—The so-called car retarder devices and the electrically controlled switches were installed for the use of and possession by the Stevedore Company.

2—The scope of the working agreement does not extend nor can be properly extended to include operations of the Stevedore Company on facilities in the possession of the Stevedore Company.

3—The Employes have failed to submit a bill of particulars describing the identity of the nameless persons who assertedly suffered adverse effects under the Stevedore Company's operations, and likewise the Employes have failed to submit any data capable of use in the measurement of the damages assertedly suffered by such namless employes.

In view of all that is contained hereinabove, the Carrier requests the Division to hold this general protest as being without merit and to deny the wage claims emergent therefrom accordingly.

OPINION OF BOARD: The Brotherhood claims the Carrier violated the provisions of its Agreement with them by having persons not covered by their Agreement install and maintain a car retarder and signal apparatus at Lorain, Ohio. It asks that this work be restored to employes coming within the scope of their Agreement and that all employes coming within the scope thereof, who have been adversely affected by this action of the Carrier, be paid all monetary loss which they have sustained by reason thereof.

The claim arises out of the installation and maintenance of a car retarder system used in connection with Carrier's tracks at its loading and unloading dock at Lorain, Ohio.

The scope rule of the parties' Agreement, effective August 1, 1939, as far as here material, provides as follows: "* * * work generally recognized as signal work, * * *."

That the work of installing a car retarder system, and the subsequent maintenance thereof, is within the scope of the Signalmen's Agreement is clearly evidenced by Award 4712 of this Division and the Carrier's use of Signalmen in installing and maintaining such a system at Willard, Ohio, although Carrier was not penalized for having the system built at Cumberland, Maryland, in 1946 because it was determined that the signalmen did not then have sufficient skill and experience to require Carrier to do so the first time such an installation was made.

As stated in Award 4712: "* * * inasmuch as neither any of its officials nor employes covered by the Signalmen's Agreement had had any previous experience with the installation or the operation of the car retarder system here involved, or any similar system, the Carrier was justified, on the basis of prudence and good judgment, in transferring the risk to an experienced, responsible manufacturer for the first installation of a car retarder system on its property."

It is self apparent that the situation which existed when the car retarder system involved in the foregoing award was installed, on which the award was based, did not exist when the car retarder system was installed in connection with the switching of cars at the Lorrain dock.

It is a well-established rule that generally a Carrier may not let out to others the performance of work embraced within an agreement with its employes. While there are expections to this general principle, such as controlled in Award 4712, none are here existent unless Carrier's Agreement of January 1, 1947, with the Toledo, Lorain and Fairport Dock Company permitted it to do so. We shall herein refer to the Toledo, Lorain and Fairport Dock Company as the Dock Company.

The car retarder system at Lorain was installed and used in connection with the Carrier's track facilities located there on which it handled all freight it transported to and from its unloading dock located there. It was installed by employes of the General Railway Signal Company and maintained by employes of the Dock Company. None of these employes are covered by the Signalmen's Agreement.

Carrier seeks to justify its action on the basis of a contract it entered into with the Dock Company as of January 1, 1947, which, among other things, provided: "The facilities of Railroad to be operated * * * under * * * this agreement comprise * * * such tracks adjacent to said facilities as may be agreed upon by both parties hereto.

* * * *

"STEVEDORE AGREES:

"(a) To take possession of said facilities at Lorain and to operate the same without prejudice or preference to any party or shipper, and by means of said facilities to:

"(1) Move from designated inbound tracks, in the order in which loaded cars are placed thereon by Railroad, all loaded cars of cargo coal and coke including coal for fueling vessels; to place the same at the dumping machines * * *, and to deliver cars so emptied to Railroad in the outbound empty yard.

"(2) To place such empty cars as are made available by Railroad, alongside the ore unloader * * *; and to deliver cars so loaded with ore to Railroad at the outbound ore load yard."

The tracks, together with the appurtenances necessary to operate them, belong to the Carrier. They are being used for Carrier's transportation business or railroad operations insofar as the freight Carrier handles is being moved to and from the unloading dock. Whether the work of installing and maintenance the car retarder system was contracted to be done by others, not under the Signalmen's Agreement, through lease arrangement, or otherwise, is not material as the manner in which the work is let to others is not controlling. It is the result of taking it from the employes who, by their Agreement with Carrier, are entitled to perform it that is controlling no matter by what means.

As stated in Award 323 of this Division: "* * * any work necessary in performing the functions of a common carrier belongs to such classes of employes as are protected by its collective agreements with them."

This is well stated in Award 4783 of this Division, as follows:

> "The common business of the Carrier and Organization is railroad operation, and it is to that business and the property employed in that business alone, that their Agreements apply. When property is so used no lease or other device should exclude the operation of the agreement thereon, * * *."

We find the Carrier violated the Signalmen's Agreement when it permitted others, not covered by such Agreement, to install and maintain the car retarder system at Lorain, Ohio, used in connection with its track facilities in taking all freight it handles to and from its unloading dock locate there.

As to Carrier's objection to the form of the claim, we think what we said in our Award 4471 is applicable here. Therein we stated:

> "* * * As stated in Award 3687:
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> 'Carrier's contention that the claim is not sufficiently definite in that it fails to name the employes who were adversely affected by reason of any violation, the basis of their claim, and the amount claimed, is without merit based on previous awards of this Division. We have said: "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." See Awards 3251 and 3423.'
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> "As to the individual employes of the Signal Department, if any, who have been adversely affected by the acts of the Carrier in its violation of their Agreement on its Eastern lines, when it permitted others not under the Signalmen's Agreement to do signal work, and the extent of their rights because thereof we do not here determine as it has neither been presented nor is it sufficiently brought out in the records. What we do determine is that there has been a violation by the Carrier of the Scope Rule of the Signalmen's effective Agreement on its Eastern lines and that any employes covered by the Signalmen's Agreement, who have been adversely affected by reason thereof, have a right to recover whatever they may be entitled to under the rules of their effective Agreement, up to the extent of the violation. This means the extent of the work under the Agreement which the Carrier assigned to and had performed by others not thereunder."

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, approved June21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute herein; and

That Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. J. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 16th day of February, 1951.

DISSENT TO AWARD NO. 5218—DOCKET NO. SG-5078

The majority give, without justification, to employes represented by the Brotherhood, work which is clearly not within the scope of their agreement and over which the Carrier has no control or jurisdiction. They do so regardless of the fact that all of such work was performed on facilities located on property which was neither operated by, or in possession of, the Carrier.

The Carrier, under date of January 1, 1947, leased certain tracks and facilities at Lorain, Ohio, which were not necessary for its transportation service, to the Toledo, Lorain and Fairport Dock Company, for use in loading and unloading cars delivered to the Dock Company. The Carrier's transportation service ends on inbound cars when they are delivered to the Dock Company on designated tracks and does not begin again until outbound cars are received from the Dock Company on designated tracks. Within the area leased to the Dock Company, all operations of whatever character, including the moving of cars to and from the loading and unloading facilities and the handling of switches and the car retarder system used in connection with handling such cars, are performed by employes of the Dock Company. By their Award the majority, disregarding the fact that the Carrier has no right to perform any service within the leased area, erroneously hold that the installation of a car retarder system within the leased area, more than a year after the execution of the lease, was work which should have been given to employes represented by the Brotherhood. To sustain this erroneous conclusion the majority state:

> "* * * The car retarder system at Lorain was installed and used in connection with the Carrier's track facilities located there on which it handled all freight it transported to and from its unloading dock located there. * * *"
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> * * *
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> "* * * The tracks, together with the appurtenances necessary to operate them, belong to the Carrier. They are being used for Carrier's transportation business or railroad operations insofar as the freight Carrier handles is being moved to and from the unloading dock. * * *"

and by such statements ignore entirely (1) the fact that mere ownership of the leased property is not a sufficient ground for the claim by the Brotherhood of the application their contract to work performed on such property, (2) that such property was leased and used for purposes which are not a part of the Carrier's transportation service, (3) that the Carrier has no right to perform any service within the leased area, and (4) that the record clearly shows the work of installing the car retarder under the facts in this case did not come within the terms of the Brotherhood's contract.

For these reasons we dissent.

(s) R. M. Butler
(s) R. H. Allison
(s) A. H. Jones
(s) J. E. Kemp
(s) C. P. Dugan