Award No. 6782
Docket No. SG-6748

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Spokane, Portland and Seattle Railway that:

(a) The Carrier violated the Signalmen's Agreement commencing on or about May 12, 1951, when it improperly caused or permitted Scope work at the McNary Dam site to be diverted and/or transferred to persons not covered by the Signalmen's Agreement.

(b) The employes of this Carrier in the Signal Department who were affected by this violation be paid at their respective overtime rates of pay for their proportionate share of the time consumed by persons not covered by the agreement in performing the Scope work as referred to in part (a) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Scope work involved in this claim includes the construction and installation of signaling apparatus in equipping a portion of this Carrier's right-of-way which was relocated account the construction of the McNary Dam on the Columbus River, starting in the vicinity of this Carrier's Mile-Post 180 and ending in the vicinity of Mile-Post 225. The McNary Dam is located approximately 200 miles east of Portland, Oregon.

The Carrier in carrying out its obligations with the Federal Government utilized its Signal Department forces to perform some of the signal work involved. The Carrier acted as an agent of the Federal Government for the installation of additional signal facilities on this project and contracted a portion of the signal work involved, such as installing arms on telegraph line poles and installing poles for slide detector fences.

The Carrier failed to properly apply the Scope rule, classification, hours of service, overtime, seniority, promotion, and other provisions of the Signalmen's Agreement by not assigning work covered by the Scope of the agreement as involved in this case to its employes who are covered by the current working agreement. The outside parties or persons who performed the improperly diverted Scope work did not hold seniority rights under the working agreement and could not meet agreement provisions for any of the positions that should have been established and bulletined to perform the signal work involved.

4. The Carrier, having contracted with Parker-Schram Company to perform work as indicated, which was started about March 11, 1951, could not terminate said contract when Carrier was permitted to operate trains over the new line on May 12, 1951 as such cancellation would require Governmental approval and would not have been in conformity with this Board's opinion as stated in Award 3206, quote:

> "We think it would be rather difficult to divide the project into the small component parts; that the contract as a whole being outside the Scope of the Agreement, it would neither be expedient nor wise to place small obstacles in the path of Management and thus limits its discretion and judgment and cause friction and discord and perhaps the failure of the entire project." (Underscoring added by Carrier).

The Brotherhood withdrew all claims for the period March 11, 1951 to May 11, 1951 and the Carrier sees no difference so far as the applicability of the "Scope" of the Signalmen's Agreement is concerned between the work done before and the work done after May 12, 1951. Under Award 3206 the Railway Company would be permitted to carry out work under contract which could not be terminated on May 12, 1951.

5. Claim as presented would require payment at employes' respective overtime rates of proportionate hours worked by Contractors' employes, regardless of lack of availability to perform the work for which such payment was requested. Payment of overtime rates, therefore, would be in direct contravention of Award No. 4233, the opinion of the Board reading in part as follows:

> "Division (c) will be sustained, however, on an individual basis, taking into consideration the physical ability to perform such overtime work with relation to the distances involved and availability to perform such overtime in accordance with proximity to the work being performed on a pro rata basis." (Underscoring added by Carrier).

Many awards of this and other Divisions of the Adjustment Board have consistently held that pro rata rates shall be allowed where a penalty is exacted and no service is actually performed, except where a schedule rule requires such overtime payment.

The Agreement between the United States Government and Spokane, Portland and Seattle Railway Company dated November 1, 1949; also, Supplemental Agreement May 25, 1950; also, subcontract between Parker-Schram Company dated January 17, 1951 are hereby made a part of this submission by reference and will be made available at the hearing of this docket.

The Carrier in conclusion asserts the instant dispute is without merit or schedule support and should for reasons heretofore outlined be dismissed or denied in its entirety.

All data in support of Carrier's position have been submitted to the Organization and made a part of this particular question in dispute.

(Exhibits not reproduced).

OPINION OF BOARD: The right of the Carrier to contract with a private concern for the work hereinabove described is contested by the Organization. Such work comprised but a small part of the total work involved in relocating Carrier's right-of-way necessitated by the construction of McNary Dam.

Title to the new right-of-way was retained by the U. S. Government until construction was completed and accepted in exchange for the old right-of-way by the Carrier. Under the contractual arrangements in evidence the Carrier, acting as an agent of the Government in the eyes of the Carrier, or, as an independent contractor according to the Organization, undertook the responsibility for the construction involved in the relocation of the right-of-way. Further, and of significant import here, the Carrier was given full discretion to undertake the signal system work itself, or, to have it done by contract with others. It was the contracting out of part of this latter work which brought about the instant claim.

The Carrier justifies its actions in stating that threatened high waters made it imperative to rush the work and that its own forces were fully occupied working ten hours a day, six days a week. It asserts, without a showing of proof, that there was a nationwide shortage of the skilled labor required. Its main defense to the claim, however, is based upon the argument that the work was done on land of the Government; that it did not involve an operating line, and, as we previously stated, the Carrier was simply acting as an agent for the Government. A number of Awards have been cited in support of its principal defense. We have carefully re-examined the cited Awards and in none of them find the controlling factor present here, namely, that the Carrier was vested with complete authority in respect to the manner in which the work was to be accomplished, i.e., either by its own forces or by contract. By assuming responsibility for the work it was under duty to consider and respect its Agreements with the Organization.

Recent Award No. 6499 bears certain factual resemblance to the case at hand but nowhere in that submission do we find it contemplated by the municipality that the Carrier's forces were eligible to undertake the work. On the contrary, the Opinion reflects the understanding to be that "the Carrier would invite bids from reliable contractors and before acceptance submit same to the City for its approval." The Carrier there was not in position to honor the claim of its forces to do the work. Not so in the instant case where it had complete discretion and, with Government sanction, could have done any or all of the work as it saw fit, restricted only by its obligations to its employes. In Award No. 5246 it was expressly recognized in the Opinion that the Carrier never controlled the work or had the disposition of it. In Award No. 4945, we pointed out that the right of the employes of the Carrier to perform the work where another is involved is wholly dependent upon the nature of the contract between the Carrier and the other party concerned. In that case, the work had been completed prior to the time that the Carrier had any actual interest in the property and later only as a lessee with duty of maintenance in the lessor.

We attach no importance to the fact that the Government retained legal ownership of the lands until the project was completed and accepted by the Carrier in view of the fact that it had, prior to commencement of the work in question, contracted away its right to control the manner of the project accomplishment. In essence, the work was done by the Carrier for itself.

No showing is made that the Carrier attempted, without success, to augment its own working forces or that additional skilled help was unavailable except for a bare assertion of such fact. See Award No. 5152. Further, no showing is made of any effort to negotiate with the Organization concerning the handling of this work, before farming the same out to others. See Award No. 5470, among others.

The Carrier's contention that the claim as presented to the Board was not submitted to the Carrier or discussed on the property is without merit. The essence of the claim asserted is for violation of the Agreement and in this regard the Organization has been consistent throughout its handling. Minor variance appears only in respect to the method of compensating for

the violation and that detracts nothing from the fact of violation. (See Awards 6016, 5440, 5195, 3256).

It is needless in an Award of this Division to cite authority for the disallowance of the Organization's claim for compensation at overtime rates of pay. We have many times held that the application of the overtime rate is conditioned upon work actually performed, several early Awards to the contrary.

The date May 12, 1951, is of no significance except that it was chosen by the Organization for commencement of the claim asserted and shall be so recognized.

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.

AWARD

Claims sustained but at pro rata rates.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 13th day of October, 1954.