Award No. 8091
Docket No. MW-7680

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) The Carrier violated the effective Agreement when it permitted employes of the Signal Department, who hold no seniority under the effective Agreement, to excavate, install forms, build foundations, pour concrete, etc., at various locations on the Champlain Division, subsequent to April 1, 1951;

(2) Each Bridge and Building employe holding seniority on the Champlain Division be allowed pay at his respective straight-time rates for an equal proportionate share of the total man-hours consumed by the Signal Department employes in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Subsequent to April 1, 1951, the Carrier assigned employes of its Signal Department to excavate, install concrete forms and pour concrete, in connection with the erection of foundations for various signals on the Champlain Division. The work also entailed the dismantling of the old signal foundations. This work was performed at approximately twenty (20) locations, primarily between Mile Posts 79 and 89, and between Mile Posts 139 and 140.

Signal Department Employes hold no seniority rights whatsoever under the effective Agreement covering employes in the Maintenance of Way Department.

Claim was filed in behalf of Bridge and Building employes holding seniority on the Champlain Division who were deprived of the opportunity of performing the aforementioned work.

Subsequent to the date claim was filed in behalf of Bridge and Building employes as above stated, the General Chairman was informed that Signal Department employes were also assigned the work of constructing a foundation for a Bungalow at Plattsburg, and it was the General Chairman's understanding the Signal Department employes would also erect the Bungalow. Accordingly, under date of August 14, 1951, the General Chairman wrote the Division Engineer, amending the claim to include the work in connection with building the Bungalow at Plattsburg.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Initially we must deal with the "due notice" issue raised by Carrier. This was disposed of by this Division with the same referee here sitting in Award 8079, which we now hold applicable here. Carrier's objection is rejected for the reasons see forth in that Award.

We shall proceed to dispose of a question raised by Carrier member of this Board who argued case on behalf of the Carrier here involved, as follows:

> "At page 3 of the record the Organization clearly states:
>
> > '* * * under date of August 14, 1951, the General Chairman wrote the Division Engineer, amending the claim to include work in connection with building the bungalow at Plattsburg.'
>
> "Though the Carrier denies any knowledge that the above amendment to the claim was offered, and vigorously asserts that the only matters discussed on the property in relation thereto concerned the Carrier's right to assign to signalmen work relating to the installation of signal apparatus (other than signal houses and crossing gates) and their support foundations, the fact remains that, somewhere along the line of this claim's progression, it was changed. Carrier's Exhibit 'G' appears to support the Carrier's position in this respect."

Carrier's original ex parte submission to this Board, dated August 5, 1955, quotes Organization's claim in the same language in which it was presented to this Board.

Carrier's oral statement dated May 8, 1956, and presented to this Board June 8, 1956, noted that "the only claim appealed to the highest officer of the Carrier designated to handle grievances involved 'signal foundations' and there is no claim properly before the Board involving the erection of a bungalow."

Organization's original ex parte submission, dated July 8, 1955, spelled out its claim in this detail:

> "Subsequent to April 1, 1951, the Carrier assigned employes of its Signal Department to excavate, install concrete forms and pour concrete, in connection with the erection of foundations for various signals on the Champlain Division. The work also entailed the dismantling of the old signal foundations. This work was performed at approximately twenty (20) locations, primarily between Mile Posts 79 and 89, and between Mile Posts 139 and 140."

That Carrier was cognizant of the detail of Organization's claim is shown in Carrier's original ex parte submission where it stated that "claim is for work performed by signalmen at four locations on the Champlain division."

These "four locations" differ from the "approximately twenty locations" referred to by the Organization, but the locations cited—"between Mile Posts 79 and 89 and between Mile Posts 139 and 140"—are sufficiently clear to permit a joint determination of where and when "Carrier assigned employes of its Signal Department to excavate, install concrete forms and pour concrete in connection with the erection of foundations for various signals on the Champlain Division" between April 1, 1951 and September 17, 1951, which is the date appearing on what appears to be Organization's original written claim against Carrier; the claim for a bungalow at Plattsburg is not properly before us.

For reasons not readily apparent, copies of letters and other documents exchanged by the parties in the handling of this claim on the property are, save for Carrier's Exhibit G, conspicuous by their absence from this docket. We, therefore, conclude this claim is not impossible of ascertainment, and its limits are as we have here spelled them out.

Before proceeding to the merits we must also consider Organization's objection to Carrier's use of affidavits of certain Signal Department employes, presented with its original ex parte submission. These documents, taken on dates between July 5 and 19, 1955, clearly do not meet the requirements of Circular No. 1 of this Board and are held inadmissible as evidence.

With respect to the merits of the claim, it is argued on behalf of Carrier that "historically this work was performed by signal personnel. It was also considered to be signalmen's work at the time the Signalmen's Agreement was entered into on this property, way back in February, 1939. It was considered to be signalmen's work on July, 1939, the date the first Maintenance of Way Agreement was negotiated and made effective on this property. Therefore, prior to and at the time the Agreement between the petitioning Organization and this Carrier was entered into, the work in question was not maintenance of way work, as alleged, but rather signal work. This conclusion is obvious since the Scope Rule of the applicable agreement specifically provides that the provisions of the agreement should apply to and 'govern the hours of service, working conditions and rates of pay for all employes in any and all sub-departments of the Maintenance of Way Department.'

"The parties then very carefully and with reason determine that certain positions and crafts were to be excepted from the Agreement's coverage. Included in this group were signal personnel.

"Practically speaking, the effect of this exclusion was twofold: (1) it reserved to maintenance of way employes the assignment and performance of all work theretofore considered maintenance of way work, and (2) it recognized the right to signalmen to perform work that inherently belonged to their craft. It did not, as implied, confer upon maintenance of way personnel the exclusive right to perform work which was neither inherently within the scope of their agreement nor theirs by traditional assignment on this property."

Organization relies upon Awards 4845 and 4846 of this Division, and Carrier Member presenting argument on behalf of Carrier here involved disagrees "vehemently" with Organization's interpretation of these two awards.

We have read carefully the facts and positions of the parties—the same parties here involved—in Award 4845 (Carter), and because Carrier maintains "Award 4845 can have no bearing on * * * the instant claim (because) there is no claim involving construction of a building properly before the Board in this docket," we must hold otherwise.

Award 4845 held:

> "The work in connection with their (small buildings) construction consists of excavations for foundations, building forms for concrete foundations, pouring concrete into forms, back-filling, erection of the building, painting and the installing of the electrical equipment. It is conceded at the outset that the installation of all electrical equipment is work belonging to the Signal Department. * * *
>
> "The structures involved are buildings within the meaning of the foregoing statement. It will be observed that they require a foundation * * *.
>
> "Certainly the excavations, the building of concrete foundations and the back-filling is work that ordinarily belongs to this group. * * *"

We quote from Employes' Statement of Facts, in its original ex parte submission:

> "* * * the Carrier assigned employes of its Signal Department to excavate, install concrete forms and pour concrete, in connection with the erection of foundations for various signals on the Champlain Division. The work also entailed the dismantling of the old signal foundations."

Award 4845, then, does support Organization's claim in the instant case.

Yet, further argument is made on behalf of Carrier that "the practice on this property does not support the petitioning Organization's claim herein. The record makes it quite clear that the Carrier has always considered the complete installation, maintenance, repair and renewal of signal apparatus to be work generally recognized as signal work. * * * practice explains away any and all uncertainties attributed to a contract that is ambiguous (this refers to Scope Rule) and does not clearly define the rights of the parties thereunder."

There are, however, in evidence copies of correspondence between the Carrier and the Organization here involved with relation to "Case No. 4.50. MW, Susquehanna Division."

Organization's claim there was that Carrier "violated the * * * Agreement when it permitted employes of the Signal Department to construct forms and pour concrete for the erection of a foundation at 'NW' Cabin on April 27, 1949."

Under date of December 11, 1950, Carrier, over signature of F. L. Hanlon, Manager of Personnel, "allowed" Organization's claim.

There is also in evidence copy of a Memorandum of Agreement between these parties, dated February 3, 1954, which was "in disposition and settlement of Awards 4845 and 4846" of this Division and in which the parties mutually agreed on a 5 point program covering work in connection with combination shortarm gates with flashing light signals which would, by that agreement, be performed by maintenance of way employes. The first of these 5 points conceded to employes here involved the right to perform the "installation of foundations for gates and cabins."

That agreement was also signed by "P. O. Ferris, Assistant General Manager and Chief Engineer, and by F. L. Hanlon, Manager of Personnel," both of whom were Carrier's negotiators of and signatories to the applicable wage agreement.

Carrier dismisses Mr. Hanlon's letter agreement of March 29, 1951 as being "paid in error account carrier representative being under the impression that the foundations involved in Case 4.50 M.W. were for automatic shortarm crossing gates, as involved in Award 4845."

It is argued on behalf of Carrier that the 1954 Memorandum of Agreement, in disposition and settlement of Awards 4845 and 4846 "was intended to apply to work in connection with combination shortarm gates."

Yet there is one common denominator in both settlements, Award 4845 and the instant claim: "construct forms and pour concrete for the erection of a foundation" (Carrier's letter of December 11, 1950); "installation of foundations" (Agreement of February 3, 1950); "certainly the excavations, the building of concrete foundations and the backfilling is work that orinarily belongs to this (maintenance of way) group," (Award 4845); and "excavate, to install forms, build foundations, pour concrete" (claim now before us).

We cannot agree with argument made on behalf of Carrier that it fails "to see how this evidence of a single settlement can affect the outcome of this dispute."

We had a similar principle before this Board in Award 7957, where Carrier there involved argued that it had, by a "letter agreement" between the parties, settled certain claims initiated by the Organization there involved on a charge that the "absorbing overtime" rule had been violated; where Carrier there argued the "letter" involved was an "agreement between the parties; that it is a fundamental right of the parties to an agreement to negotiate and arrive at an appropriate penalty for violations of the agreement." Organization had argued, as Carrier does here, that "these settlements dealt solely with the claims there involved."

In that Award (7957) this Board denied Organization's claim to punitive compensation "on the basis of the 'letter agreement' which we have here held to be 'a mutual understanding as to how claims should be handled and compensation paid under Rule 38(b).' "

While Organization relies on this record on Rules covering (Scope), 1(a) and (b), Seniority; 2, Rights to Positions; 3(a) Seniority Rights and 36(a), they are a part of this record and need not be repeated here, except to note that Rule 36(a), covering rates of pay, lists there certain classifications, viz., mason foremen, masons, mason helpers, carpenter foremen, master carpenters, carpenters and carpenter helpers.

We must agree with the Organization that "it is obvious that when the parties to the agreement negotiated the instant rule, it was their intent that certain work would accrue to each position listed therein, otherwise there would be no logical reason for incorporating mason's and carpenter's positions in the rule."

The record also shows this Carrier, in arriving at a joint settlement (it was dated December 11, 1950 and hereinbefore referred to) with the Organization on Case No. 4.50 MW, advised the Organization by letter dated March 29, 1951, it was making wage payments in settlement of that case (which involved: "construct forms and pour concrete for the erection of a foundation") to a group of 7 employes, covering mason foremen, masons, mason helper and carpenter helper.

We must hold, therefore, on the basis of the record here made and for the reasons herein cited that the preponderance of the evidence supports Organization's claim within the limits hereinbefore defined.

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 has been violated.

AWARD

Claim (1) and (2) sustained within the limits set forth in Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1957.

DISSENT TO AWARD NO. 8091, DOCKET NO. MW-7680

In respect of the majority's election to follow Award 8079 in dealing with the "due notice" issue herein, the undersigned make the dissent to that award a part of this dissent on that issue.

The majority correctly hollds "the claim for a bungalow at Plattsburg is not properly before us." This confined the question at issue to work in connection with the dismantling of old foundations and the erection of new foundations for various signals on the Champlain Division. It did not concern any work in connection with the erection of small buildings as was held to be the case in Award 4845, or work in connection with the construction and maintenance of crossing gates as was the case in Award 4846.

Accordingly, the majority is in error in holding that Awards 4845 and 4846 support a sustaining award herein. Furthermore, this Division is without authority to extend the Memorandum of Agreement between the parties, dated February 3, 1954, which the majority herein admit was confined to the "disposition and settlement of Awards 4845 and 4846."

For the foregoing reasons we dissent.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen