

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Sempliner, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
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, subsequent to December 11, 1950, it assigned employees of the Signal Department to construct forms and foundations for the installation of flasher light signals at High Mills crossing, on the Saratoga Division.

(2) Affected employees, covered by the scope of the Maintenance of Way Agreement, be paid at their respective straight time rate, an equal number of hours as were consumed by the employees of the Signal Department in performing the work referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Subsequent to December 11, 1950, employees of the Signal Department, who hold no seniority rights under the effective Maintenance of Way Agreement, were assigned to construct forms and foundations for the installation of flasher light signals at High Mills crossing, on the Carrier's Saratoga Division.

The employees claim that the Carrier violated the Agreement when it assigned this work to the Signal Department employees. The Carrier has denied the claim.

The Agreement in effect between the two parties to this dispute dated November 15, 1943, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Work in connection with construction, maintenance, repairing and dismantling of the Carrier's buildings and structures is Maintenance of Way work. However, as pointed out in the Employees' Statement of Facts, subsequent to December 11, 1950, the Carrier assigned work in connection with constructing forms and foundations for the installation of flasher light signals to employees of the Signal Department, who definitely are excluded from the provisions of the effective Maintenance of Way Agreement.

Any award rendered in this case which affects the rights of signalmen will be invalid unless the Brotherhood of Railroad Signalmen of America is given notice of hearing by the Adjustment Board in accordance with Section 3, first (j) of the Railway Labor Act.

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

OPINION OF BOARD: On September 21, 1955, the Brotherhood of Maintenance of Way Employees filed notice with the Board of intention to submit a dispute with the Delaware and Hudson Railroad Corporation involving the construction of forms and foundations for the installation of flasher light signals at High Mills Crossing on the Saratoga Division. After December 11, 1950, these forms and foundations being installed by the Signal Department, it was claimed on behalf of the Organization the work should have been performed by the Maintenance of Way Employees.

The agreement applicable as between the Carrier and Organization does not define the particular type of work being here considered. We must therefore look to past practice, custom and usage (5416, 6788, 4464, 5404). However, it is to be noted that the agreement specifically exempts "Signal, Telegraph and Telephone employees" from coverage of the scope section of the agreement.

Exhibits A through F of the Carrier's submission indicate this same work had been performed by signalmen for many years. These exhibits are not denied. Indeed there is no claim by the Organization that they have performed this work to any extent in the past. However, the letter of General Chairman Thomas W. McGuire of February 24, 1951, indicates that in the same Division at Burnt Hills Crossing similar installations were constructed by the Maintenance of Way Department. There is no indication if this was the first such installation by the Maintenance of Way Department, or one of many stretching over a number of years. At best, if the Burnt Hills construction (subsequent to the High Mills construction we are concerned with here) was in accord with past practice, it was also (see Exhibits A through F of Carrier's submission) in accord with practice to assign the same work to signalmen, and was therefore not exclusively claimant's work (8083).

On February 3, 1954 the organization and carrier entered into an agreement which reads as follows:

"In disposition and settlement of awards 4845 (Case 12.48 M.W.) and 4846 (Case 11.48 M.W.) of the Third Division, National Railroad Adjustment Board, it is mutually agreed that the following work in connection with combination short arm gates with flashing light signals will be performed by Maintenance of Way Employees:

1. Installation of foundation for gates and cabins.
2. Erection and maintenance of cabins to house signal apparatus.
3. Repair and replace wooden gate arms, except minor and temporary repairs, necessary to protect the traveling public, may be made by any employee provided that permanent repairs are made by Maintenance of Way Employees within twenty-four (24) hours.

4. Construction of wooden gate arms when not purchased.

5. General painting."

This agreement refers specifically to gates and not flasher signals above. In addition, the agreement is subsequent to the High Mills Crossing installation and would thus be prospective, not retrospective. The reference to awards 4845 and 4846 indicates that the issue there involved had been disposed of. Should the agreement be controlling of such issues as were involved at the High Mills crossing, they could only take place subsequent to the date of the agreement. Thus the agreement cannot be controlling here.

While Award 4845, and its companion Award 4846 would appear to be controlling here, they are substantially different from the present facts. Award 4845 had to do with the erection of 6' x 6' x 7½' prefab building in connection with automatic short-arm electric gates and flashers, the notice of intention being filed July 9, 1949. Award 4846 concerns itself with repair of equipment of the type in dispute in Award 4845. However, the files in these awards do not contain evidence which is conclusive that this type of construction was performed by others. In the instant dispute, Exhibits A through F leave no doubt signalmen poured concrete when incidental to signal work and of minimum amount. In the instant case it should also be noted that we are concerned only with a flasher. In essence it is a post supporting electric lights that flash. It could be constructed (and frequently is) by merely sinking the butt of the post in the soil. Here they anchored the base to a concrete foundation for durability. The forms and foundation were meager in comparison to the total installation. In Awards 4845-4846 not only was the size (6' x 6' x 7½') much larger, but a building was involved, work which traditionally was performed by the claimant. These Awards are therefore similar to Award 8091 where there was some confusion as to whether a building was involved. Award 8091, because it was cited by the claimant as controlling, involving an identical situation, was given particular attention. The facts do not seem to be identical. Award 8091 is difficult to follow. Neither the Award or the file is clear just what work was done. However, the Award rests squarely on the proposition that removing and replacing foundations, with the attendant making of forms, pouring of concrete, and backfilling was the claimant's work. This is usually the case, unless, as cited above, the work may be assigned to others. It becomes a matter of degree.

It is curious that the Carrier's presentation in Award 8091 contains Exhibits A through F as in the instant case. The Referee there comments that, the construction of a building appears to be a part of the fact situation, and concludes that it was. This brings Award 8091 within the scope of Award 4845, which also considers the building structure question. These are narrow issues on the borderline of assignment discretion. In the instant case it is felt that the foundation work required is minimum, of the type that flows with the major construction (definitely Signal Department work) and work which by long usage and custom has been performed by the Signal Department as a minimum amount of work needed for full completion of the job.

The Award (8091) cites Section 36 (a), listing various crafts, and says:

"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.'"

We can agree with the wording above quoted, but not its very narrow application. There is nothing to make this work exclusive. Carpenters, Cooks, Blacksmiths, etc. are also included in the agreements of other Brotherhoods as well as outside crafts. The agreement contains no language to make them exclusive except by inference to **Maintenance of Way work**.

The organization argues that Exhibits A thru F of carrier's submission should not be admitted as they were not presented for consideration on the property and thus do not comply with the provisions of circular one. The Exhibits are dated between July 5, 1955, and July 19, 1955. The initial submission to the Board, ex parte by the organization is dated September 21, 1955, two months later. While the dispute must have been processed on the property the record is silent as to the dates of such action. There is therefore no basis on which the Exhibits may be excluded. It is further felt that even without Exhibits A thru F, the results would not be changed due to the nature of the work and claim.

This complaint, having been decided as to the principal issues and on the merits of the claim, the third party of interest issue and other such issues are no longer of consequence.

Thus it appears that the work in question, not being exclusively allocated to the claimant in the scope section of the contract, and of a type performed by others in the past, is work which in the discretion of the Carrier, may be awarded to either class. The discretion to be exercised in the public interest. (See Docket TE-6791, Award 8567.) The agreement was therefore not violated.

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 Employees involved in this dispute are respectively Carrier and Employees 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 in accordance with the Opinion, the agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 6th day of March, 1959.