Award No. 9545

Docket No. SG-9347

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SIGNALMEN OF AMERICA

ATLANTA & WEST POINT RAILROAD—THE WESTERN RAILWAY OF ALABAMA AND GEORGIA RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Atlanta and West Point Railroad Company-The Western Railway of Alabama and Georgia Railroad, in behalf of:

> T. C. Wallace, Signalman, Signal Shop, Atlanta, Georgia, for additional compensation for time required to perform electrical and telephone work, May 11 through 23, 1955.

EMPLOYES' STATEMENT OF FACTS: Claimant T. C. Wallace is regularly assigned as Signalman at this Carrier's Signal Repair Shop, Atlanta, Georgia, with common headquarters at the Repair Shop. Bulletins advertising and assigning employes to positions at the Signal Repair Shop are signed by R. C. Neville, Supervisor of Telephone, Telegraph, and Signals, W.R. of A.-A. & W.P.R.R., and by C. S. Coggins, Supervisor of Telephone, Telegraph, and Signals, Georgia Railroad. The claimant therefore receives instructions from both Supervisors and performs work for each of the railroads. We understand that the claimant is on the payroll of the A. & W.P.R.R. and when he is used on the properties of the W.R. of A. or Georgia Railroad, the A. & W.P.R.R. bills the railroad where he is used for that part of the expenses. We also understand that the General Office Building, 4 Hunter Street, Atlanta, Georgia, is owned by the Georgia Railroad. We understand that the Signal Relay Shop is under the direction of Supervisor Neville, but Supervisor Coggins also gives instructions to the claimant.

Other than the front cover (listing names of railroads) the current Signalmen's Agreements on the W.R. of A.-A. & W.P.R.R. and Georgia Railroad are worded identically, even to the effective date, which is September 1, 1946.

On the morning of May 11, 1955, Supervisor R. C. Neville instructed the claimant to commence cleaning and oiling all electric fans on the third floor of the General Office Building, 4 Hunter Street, Atlanta, Georgia, and to make any and all repairs of the electric fans at the Signal Repair Shop. Heretofore, all electrical work in the General Office Building at 4 Hunter Street, Atlanta, Georgia, had been considered as telephone and telegraph work to be performed

"Signalmen will perform only signal work. Telephone-Telegraph men will perform only communication work. When failures occur to either

system or emergencies occur, if an employe assigned to the class of work is not available, employes of the other craft may be used to put the system in temporary working order. Permanent repairs will be made by employes in the craft of the work."

Regardless of the language of this rule, it is carrier's contention that it was agreed that the practice of performing electrical work in General Office Building would continue in the same manner as it had before agreement was negotiated. Carrier has shown conclusively that such practice did continue without interruption and without protest for a period of nine years. By such a period of time this has become a standard practice, acquiesced in by the employes and the parties have placed their own interpretation on same. Such being so, it is not the province of the Division to reinterpret the rules.

For the reasons outlined above, Carrier requests this claim be denied.

All data contained herein has been made available to Petitioner.

(Exhibits not reproduced).

OPINION OF BOARD: Claimant Wallace is a Signalman. It is agreed that he performed the following amounts and kinds of work:

1. One hour-30 minutes on May 18, 1955 telephone work repairing telephone wires at AJT Yard,

2. Thirty-four hours and 30 minutes on May 11th, 16th, 17th, 18th, 19th, 1955, electrical work cleaning and oiling fans in the General Building.

3. Five hours, electrical work installing outlet for air condition unit in General Building May 23, 1955.

Each such assignment is alleged to be in violation of Rule 59 (a) of the Agreement which provides:

"Signalmen will perform only signal work. Telephone-Telegraph men will perform only communication work. When failures occur to either system or emergencies occur, if an employe assigned to the class of work is not available, employes of the other craft may be used to put the system in temporary working order. Permanent repairs will be made by employes in the craft of the work."

The Carrier's principle argument is that prior to recognition of the Organization in 1946 such assignments were made regularly to Signalmen. Carrier also contends that when the first agreement was entered into by it and the Organization there was agreement to preserve and continue such practices.

The record shows that prior to 1946 such assignments were made. There is some evidence that assignments similar to those here were made after the first Agreement went into effect. However, there is no probative evidence that

the Organization agreed to preserve such practices when the Agreement was made.

The clear language of the contract is to the contrary: "Signalmen will perform only signal work". Nothing could be more clear. Under general principles of contract language and the precedents of this Board evidence of an understanding not reduced to writing and made part of the Agreement cannot be used to vary the unambiguous provisions of the Agreement.

There is no evidence of any such understanding; there are only hearsay assertions by non-negotiators that there was such an understanding. Even these statements, which postdate the notice of intention to submit the claim, are untimely and inadmissible.

It is also well settled that practice cannot justify non-observance of an Agreement nor modify its terms.

Quite clearly, the Agreement was violated by the two sets of assignments to electrical work at the General Office Building.

Carrier implies that in order for the Claimant to prevail as to item 1, above, the telephone repair work, it is incumbent upon him to show that "an employe assigned to the class of work [was] not available" and that he failed to make such a showing.

The first sentence of Rule 59 (e) sustains the claim prima facie. The language of the third sentence which the Carrier refers to is an exception to the general rule for the benefit of the Carrier. Once the Claimant has established the essential elements of his case, it is up to the Carrier to negate the showing by proof that its action came within the exception it asserts is applicable. This it has not done.

We hold that all three kinds of assignment violated Rule 59 (e).

The Remedy

The Carrier contends that no monetary award should be made because the Agreement provides for none. The Agreement contains no specific provision for remedies to be applied in the event of breach.

That there was a breach is clear. It was a substantial one involving an important term of the Agreement. Carrier obtained hours of work from a Signalman to which it was not entitled under the terms to which it had agreed.

We believe that there is ample precedent for a money award in vindication of the Agreement even in the absence of a provision for damages. In Award 6063 (Wenke) it was said:

> "Carrier contends that the claim should be disallowed because none of the claimants lost any time as a result of this company doing the work. This claim is primarily to enforce the scope of the agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which

the carrier is concerned for if the agreement is violated, it must pay the penalty therefor in any event."

Award 6814 (Robertson) involved a violation of a provision giving employes a twenty minute eating period. The eating period was not observed by the Carrier. The Board said: "The mere fact that the rule carries no penalty provision is no bar to sustaining the claim as made" (i.e. for twenty minutes pay for each eating period not observed).

We therefore sustain the Claim as made and detailed earlier in this Opinion.

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 Employe involved in this dispute are respectively Carrier and Employe 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 contract was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August 1960.

Dissent to Award No. 9545, Docket SG-9347

Award No. 9545 is in error because the Majority therein grants additional compensation not provided for in the governing Agreement, as a penalty payment to a Signalman for performing certain duties other than signal work within the hours of his regular assignment in violation of that part of Rule 59(e) providing, "Signalmen will perform only signal work."

This Board has many times held that Carriers are responsible to their employes only to the extent that they have contracted, e.g., **Award 6001**—Daugherty; that it must interpret the Agreement as written and may not add to or subtract therefrom, e.g., **Award 6757**—Parker; and that it is without authority to assess fines or penalties against Carriers for Agreement violations other than such as have been negotiated therefor, e.g., **Awards 9395**—Stone, **8674, 8673**—Vokoun, **7309**—Rader, **5186**—Boyd, and **3651**—Miller, **Second Division Award 1638**—Carter, and **First Division Award 15866**—O'Malley.

Award 9545 involves circumstances entirely dissimilar to those present in **Award 6063** (Wenke), relied upon by the Majority, wherein the claim was not for work performed, as here, but for work which Claimant was deprived of; hence **Award 6063** is without any application to the instant dispute.

Award 6814 (Robertson), also relied upon by the Majority in support of the penalty imposed, likewise has no application to this case, for therein the claim was sustained for pay covering a 20 minute lunch period granted by rule "without deduction in pay" which had not been granted.

/s/ R. A. Carroll
/s/ W. H. Castle
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen