Award No. 10730
Docket No. SG-9805

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Southern Pacific Company:

(a) That the Southern Pacific Company violated the current Signalmen's Agreement dated April 1, 1947 (revised August 1, 1950) when it failed and/or declined to apply the Scope, Classification, Hours of Service, Call, Bulletin, Assignment, Promotion and Seniority rules, or other provisions of the Agreement, by not assigning all generally recognized signal work to employes covered by the agreements since May 16, 1956. Specifically, the signal work is the installation of air compressors and the air line of the car retarder system at Eugene, Oregon; also the repair and maintenance of same.

(b) That the following men in Signal Gang No. 1: S. W. Sargent, John C. Gary, E. D. Hamre, C. R. Jackson, R. D. Hanson, J. A. Mathis, J. C. Kent, and V. G. Sampson, plus the following Signal Department employes who were laid off May 22, 1956, account of force reduction: B. F. Jacobs, D. F. Heinrich, D. L. Bright, G. K. Bushnell, D. L. Smith, E. E. Peyton, D. G. Bright, R. M. Holtorf, F. F. Syres, B. D. Creamer, J. L. Creamer, K. D. Snyder, L. R. Miller, J. H. Cottman, M. H. Schlecht, and J. Evans, and any other Signal Department employes who may work on the construction of the car retarder, be allowed an adjustment in pay for an amount of time at the straight-time rate equal to that required by an employe not covered by the Signalmen's Agreement to perform the work of installing, repairing, and maintaining the air compressors and air line. (Carrier's File: SIG 152-46)

EMPLOYES' STATEMENT OF FACTS: The signal work involved in this dispute constitutes the installation and maintenance of the air compressors and air lines, both of which are integral parts of a car retarder system. The car retarder system referred to in this instant dispute is located at Eugene, Oregon.

On or about May 16, 1956, water service department employes started the work of installing the air compressors and air lines for the new car retarder system at Eugene, Oregon.

Upon learning that the Carrier was permitting the division of signal work

claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: In the latter part of 1955, work was commenced on a car retarder yard at Eugene, Oregon, and the installation was placed in service in August, 1956. Air compressors and the air lines leading from the compressor to the car retarder units and direct acting switch machines were installed by Maintenance of Way Employes for use as a source of power for these units, as well as for other operational requirements. This equipment continues to be maintained by such employes.

Air lines, which are a part of the car retarder units, and direct acting switch machines, required by the system itself, were installed and are maintained by Signal Department Employes.

The claim of the Brotherhood of Railroad Signalmen is that the Southern Pacific Company violated the applicable Signalmen's Agreement when it authorized the Maintenance of Way Employes to install and maintain the air compressor and the associated air lines leading to the car retarders.

The controlling rule is the Scope Rule which provides in pertinent part:

> "This agreement shall apply to work or service performed by the employes specified in the Signal Department, and governs the rates of pay, hours of service and working conditions of all employes covered by Article 1, engaged in the construction, reconstruction, installation, maintenance, testing, inspecting and repair of * * * car retarder systems * * * and all other work that is generally recognized as signal work."

The principal contentions of the Employes are: that the air compressor is an integral, component, functional part of the car retarder system; that the primary purpose of the particular air compressor involved was to provide a source of power for the car retarder system; that, therefore, the work is reserved to the Signalmen under the Scope Rule.

The Carrier contends that the claim is defective because it is vague and indefinite; that; in any event, certain of the claimants were fully employed at the time the work in question was performed and, therefore, suffered no loss in earnings; that the air compressor is not an integral, component, functional part of the car retarder system, but is conversely a source of power which may be used to operate such system, as well as other facilities; and, that the division of work here was the same as at two other yards, thereby constituting practice on this property.

The narrow and vexing question on the merits of this dispute is whether or not the air compressor, which is the source of power for the car retarder system, and the air lines which carry that power to the car retarder are part of that system within the meaning of the Scope Rule.

Because the issue clearly involves the interpretation of an agreement and certain claimants have been specifically identified as having been affected by the alleged violation of the Carrier, there is no reason why this Board should not take jurisdiction of this dispute. The matter of vagueness of certain other claimants and the question of loss of earnings go to the kind and degree of award that should be issued if the claim is sustained in any respect.

We think that, under the facts involved, the air compressor and the air lines leading to the car retarder were part of the car retarder system, within the meaning of the Scope Rule.

A car retarder system is described by the Signal Section of the Association of American Railroads in a technical booklet on the subject as including the following devices:

a) Car retarders
b) Switch machines
c) Skate machines
d) Control machines
e) Power plant
f) Signal system
g) Communicating system
h) Flood lights
i) Hot oil plant

The power plant is described as a device for converting the main source of power into power of the proper type, whether it be air, direct or alternating current. A car retarder is described as a device for controlling the speed of cars from the crest of the hump to the classification track.

In the list of devices included in the car retarder system is a car retarder. From this it is clear that a car retarder system encompasses something more than the car retarder. One of the additional devices in the system is the power plant, as described. Ergo, the power plant, is part of the car retarder system. The conduit, or the air lines by which the power is transferred from the plant to the operating unit, per force, would be included in that system.

There remains the question whether or not the power plant must be considered at all times and under all conditions a part of the car retarder system, for purposes of work under the Signalmen's Scope Rule.

We do not think so. The best general answer we can give to this question is that sometimes it is and sometimes it isn't. The circumstances govern. In the dispute before us, we find that the power plant is such a part of the car retarder system.

The parties have concentrated on the argument that the power plant is or is not an integral, component or functional part of the car retarder system. This presents a question in semantics in a technical area, exploration of which may not prove helpful. Thus, is the power plant a component of the system as H2 is to H2O; or is it functional as the brain is to speech; or integral, as the lead is to the pencil? It is better to turn to actual railroad operations for the answer.

In describing further the role of a power plant in a car retarder system, the Association of American Railroads, in its technical booklet on the subject, states:

> "Many hump yards are located near car or locomotive shops, which use a considerable amount of compressed air and are already provided with compressor plants. In a majority of the electro-pneumatic retarder installations the compressed air is supplied from a central plant. * * * Where a central compressor plant is not available other means must be provided. Usually a small power house

is built housing two or three compressors, storage batteries and rectifiers. * * *

The evidence in the record indicates that the power supply for the car retarder and switch machines came not from an existing central plant, or even from one built to augment available power to serve all facilities requiring power, but rather that the power plant was built, primarily, to serve the car retarder and switch machines in issue.

The Carrier's view on this point is that the "compressors which are installed at Eugene car retarder yard, together with air lines which lead from compressor to both car retarder units and direct acting switches, as well as certain other facilities, were properly installed by maintenance of way employes * * * ."

The record does not indicate what other facilities were intended to be served by the newly installed power plant. On brief to the referee, however, it is stated that this power plant supplies power to other facilities—"none of which fall within the Signalmen's Agreement—such as air for the air lines in the train yard used by carmen to furnish the required amount of air to trains which have been made up (but before the engine is coupled on) so that when the engine is coupled on the proper air tests may be made and the train depart without delay."

The signalmen concede that it is possible to tap off feeder lines from the main air lines and operate some other device not coming within the scope and jurisdiction of their agreement. They insist, however, that the air compressor and air lines involved in this dispute were installed "initially" and "primarily" for the purpose of producing and transmitting the compressor air to the car retarders and switch machines. This is not disputed by the Carrier. Accordingly, the well established authority that the classification of work should be determined by the reason for doing it and its primary purpose seems to apply. See Awards 3638, 4077, 4471, 4553, 4637, 6214 and 9210.

We think that the purpose for which the power plant was built is more determinative of the question whether or not it is part of the car retarder system than the "point of utilization" theory adopted in Award 8070 (Beatty) on which the Carrier leans heavily. Whatever the merit of that theory may be it cannot be controlling here because car retarder systems were not included within the Scope Rule which was under consideration in that dispute.

The Carrier also cites Award 9630 (Begley) as precedent for its position that the power plant is not an integral part of the car retarder system. In that case the finding was that the construction and installation of stand-by-power for centralized traffic control systems is not an integral part of those systems "and do not become an integral part of those systems until the power is connected up with the centralized control system. The power from the stand-by power plants is used only if the commercial power fails."

A fair assumption from that award is that if the power plant were indispensable to the operation of the system it would have been found to be part of that system.

Since the primary purpose for building the power plant in the dispute before us was to operate the car retarder units, and because such power is indispensable to the operation of those units, we find that the power plant was a part of the car retarder system within the meaning of the Scope Rule.

The most persuasive reason given by the Carrier why the claim should be denied is that the division of work in connection with the installation of the car retarder system at the Eugene yards was the same as the division of work when similar installations were made at Los Angeles and Roseville about 1952. The Carrier states that only "token" protests were filed by the signalmen with respect to the installation of these earlier car retarder systems and that by not having appealed from the Carrier's denial of their claims it should be concluded that the Employes were not convinced of the merits of their claim. From this, of course, the Carrier argues that a practice has been established on this property that work on air compressors and associated connecting air lines is not reserved to signalmen under the Scope Rule.

How far practice goes to make or break a rule has long plagued this Board. Each side argues it vigorously when it is to its advantage to do so. The rule itself; history; past practice; the importance, notoriety and length of time of the current practice; and the degree of acceptance or acquiescence of the opposite party are all factors to be weighed in making this judgment.

It is frequently argued by the party seeking to preserve the status quo that practice serves to resolve ambiguities in an agreement, but it cannot prevail over clear language. This is a good guide but it is probably overstated. Even real property rights, which are scrupulously protected under law, can be sabotaged by rights obtained by easement, prescription or adverse possession.

In the last analysis, circumstances govern.

In the dispute before us, we have a rule which, if standing alone, would include the power plant as part of the car retarder system, as we have described. It is not an "inherently ambiguous" rule, as alleged by the Carrier.

There is no "past" practice from which we can draw comfort.

The importance and notoriety of the current practice weigh heavily in the Carrier's favor. But the length of time of the current practice and the degree of acquiescence on the part of the Employes do not weigh nearly so heavily in Carrier's favor as it contends.

The time between the last protest by the signalmen on this property, with respect to the division of work at the Roseville yard, and the first protest with respect to the division of work at the Eugene yard was about three and one-half years. Some prejudice to the Employes' position must follow from this. The Carrier argues, however, that because of the lapse of this time without appeal from the denial of earlier protests, the Employes were convinced that there was no merit to their protest. The Carrier terms these "token" protests.

We do not agree with the Carrier in these views. The fact that a claim has been processed to this Board on the same question as raised in the earlier protests refutes the contention that the Employes are convinced that their work rights have not been violated. As to the token protests, the record indicates that the division of work at both the Los Angeles and Roseville yards was protested in the usual manner and there was no mistaking the Employes' view that their agreement had been violated. In fact, the General Chairman, in his last letter to the Carrier concerning the earlier protests stated that the signalmen intended to submit their claim to this Board.

We do not know why a claim was not filed with the Board but we do not

conclude that it was because the Employes had acquiesced in the practice of dividing the work with the maintenance of way employes. To make such a finding would require that we put a premium on filing claims with this Board to preserve contractual rights. We are unwilling to do this under the circumstances of this dispute. Since the Scope Rule has been construed to weigh heavily in the Employes' favor, their acquiescence with the existing practice would have had to have been shown under circumstances including more time or less protest.

On balance, therefore, we judge that the practice existing on this property concerning the division of work between signalmen and maintenance of way forces was not such as to change the Scope Rule of the Signalmen. We construe this rule to include the power plant as part of the car retarder system. Accordingly, the claim that the agreement has been violated should be sustained.

A final question is the extent of the compensation award and to whom it shall be paid.

In its contention that the claim was vague and indefinite, the Carrier argued that a sustaining decision here "would only result in an award which would be unenforceable under Section 3, First (p) of the Railway Labor Act." Award 7652 (Carey) was cited in support of this contention. In that award the findings of the U. S. District Court in **Brotherhood of Railroad Signalmen of America v. A.T.&S.F.Ry. Co.** (U. S. Dist. Ct. N.D. Illinois, E.D. No. 52 C 320) were reviewed. The court in that case dismissed the Brotherhood's claim, filed under Section 3, First (p) of the Railway Labor Act, to enforce Award 4713 because the Board in Award 4713 had not ordered the Carrier to make any money payments. The Board had found that only through "analysis and negotiation" was it possible for the parties to determine which signal employes, if any, were affected by the violation, or to what extent. In short, the court concluded that there wasn't any order to pay money that it could enforce.

This Board will make an order for the Carrier to pay certain claimants for violation of the agreement so that the precedent of Award 7652 will not apply.

Awards for the payment of money to a group of employes some named, some not named, some suffering loss of compensation immediately, some only losing the opportunity to earn wages, are very difficult to adjudge fairly. This is particularly true for claims involving continuing offenses when the time between the violation and the award is measured in years—as in the present case. The employes should expect compensation for work improperly denied them and an award that will serve to deter the Carrier from repeating the violation. The Carrier should expect to pay compensation only to the extent it can be demonstrated that a particular employe or group of employes has suffered monetary loss by the action of the Carrier. This is especially true when the violation involved is a result of the Carrier contracting with one craft of employes to do certain work but it is later determined that another craft was entitled to do that work.

In this difficult area, some awards hold that the Carrier is not obliged to pay a claim if actual loss has not been demonstrated. Some say that the violation of the agreement is the essence of the dispute and who is to receive the compensation is no business of the Carrier. Some awards turn the question of identification of claimants and amounts owed back to the parties for negotiation. Others, require a joint check of the records—payment to be made in accordance with the opinion and findings. There are other arrangements as well.

Due to the variety of compensation awards ordered by the Board, it should

be acknowledged frankly that with respect to this subject we are in a "no-man's land."

Our judgment is that this Board may make any award within the limits of the claim that it thinks is equitable. This is based on the view that Congress did not intend to, and did not, limit the powers of the Board to "adjust" the differences of the parties with respect to the subjects over which it has jurisdiction.

In this perspective, we hold specifically:

1. That the Southern Pacific Company violated the Signalmen's Agreement dated April 1, 1947 (revised August 1, 1950) when it failed and/or declined since May 16, 1956 to apply the Scope Rule by not assigning to employes covered by the agreement the work of installation, and subsequent repair and maintenance, of the air compressors and the air line of the car retarder system at Eugene, Oregon.

2. That each employe in Signal Gang No. 1, listed in the employes' claim, shall be paid by the Carrier the sum of one dollar for the violation found above.

We are unimpressed with Employes' buckshot pleading that eight specific rules, plus "other provisions of the Agreement" were violated by the Carrier. If the Employes were serious about the applicability of these rules they would have made more than passing reference to them to show how they were pertinent.

Compnsation has not been awarded to those employes, listed in item (b) of the claim, "who were laid off May 22, 1956 account of force reduction" because, from the record, it is highly speculative that the loss of work on the air compressors and connecting air lines was the cause of these men having been furloughed.

The same is true for "any other Signal Department employes who may work on the construction of the car retarder." We agree with the Employes that technical legal pleading is not required in proceedings before this Board—but there is a limit.

As to the nominal assessment of one dollar to each employe in Signal Gang No. 1, we recognize that in all probability this does not reflect actual loss of earnings, or potential earnings. But within what we consider to be our broad powers to "adjust" the dispute, we thing it is equitable. The Employes emphasized that a denial of their claim in this dispute "would form the groundwork for future evasions and violations of the agreement by the Carrier and eventually would render the agreement worthless." This award should relieve them of such fears—whether they were real or fancied. There has been no allegation that the Carrier was arbitrary or was deliberately seeking to "break" the Signalmen's Agreement when it contracted with the maintenance-of-way employes to do part of the work involved. From the record, it appears that the Carrier was in a dilemma, which from its standpoint is one of the most difficult to resolve—that of the claim of two or more organizations to the same work. In this connection, two comments are pertinent. First, the Carrier is entitled to some credit, or equity, because the division of work authorized by the Carrier at the yard at Eugene was the same as at the yards at Los Angeles and Roseville and the Employes should have acted more promptly to settle the dispute. Second, it is noted that the Brotherhood of Maintenance of Way Employes was advised of the pendency of this dispute before this Board, but did not participate in this proceeding. In view of this award it is possible that the

Carrier has not heard the last of this matter from its employes.

It is our final thought that if our nominal compensatory award does not have the intended deterrent effect to new violations, subsequent awards which depend on this and earlier authority may adjust the dispute differently.

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

Claim sustained in accordance with the opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1962.

Special Concurrence to Award No. 10730, Docket SG-9805

The Award, so far as the issue presented is concerned, places things in proper perspective and properly finds that the agreement has been and is being violated. However, the manner in which the Award disposes of the monetary feature not only adds another arrangement in the area which is described as "no-man's land" but also offers little or no assurance that the "equitable" allowance granted will have any appreciable effect as a deterrent to further violation. Based on the Board's experience in the past, the better approach would have been to allow Claim (b) as presented.

/s/ **G. Orndorff**

G. Orndorff
Labor Member