Award No. 10804
Docket No. SG-10477

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Kansas City Terminal Railway Company that:

(a) The Carrier violated the Signalmen's Agreement effective May 1, 1947, as amended, when on December 6, 1956, it transferred or otherwise assigned generally recognized signal work covered by the Signalmen's Agreement, which was heretofore assigned to and performed by the Carrier's signal employes, to the Bridge and Builders employes of the Kansas City Terminal Railway Company, who are not covered by the Kansas City Terminal Railway Company signal employes' working agreement. (Specifically the generally recognized signal work cited above consisted of the building of foundation forms and the pouring of the concrete for the foundations supporting the steel towers for the lighting of the Mill Street Yard at Kansas City, Mo.)

The Carrier violated the above-cited Signalmen's Agreement when on February 5, 1957, it contracted or farmed out generally recognized signal work, which was heretofore assigned to and performed by the Carrier's signal employes, to outside contract electricians, who are not covered by the Kansas City Terminal Railway Company signal employes' working agreement. (Specifically, this generally recognized signal work cited above consisted of the assembling and installing of the steel towers for the lighting of the Mill St. Yard at Kansas City, Mo.)

(b) The signal employes of the Signal Line Crew (a Foreman, one Leading Signalman, two Signalmen, one Assistant Signalman, and one Signal Helper) namely, Messrs. Piburn, Maloney, Matthews, Anderson, Baum, and Woton, who were entitled to be considered and assigned to this work, be compensated at their respective pro rata rates of pay for the exact amount of hours that the persons not covered by the Signalmen's Agreement were used to perform the above-cited generally recognized signal work. It is our understanding that

the amount of time used by the employes not covered by the Signalmen's Agreement in performing the above-listed generally recognized signal work amounted to the equivalent of two hundred and forty (240) hours for each signal employe listed above. [Carrier's File No. SG-16]

EMPLOYES' STATEMENT OF FACTS: Commencing on or about December 6, 1956, the Carrier installed a new yard lighting system in its Mill Street Yard at Kansas City, Mo. On December 6, 1956, the Bridge and Builders employes of the Kansas City Terminal Railway Company built the forms and poured the concrete for the foundations supporting the steel towers for the lighting system. On February 5, 1957, an outside electrical contractor who had been engaged by the Carrier started to assemble and installed the steel towers for the lighting system.

For the past thirty-eight years and up until the time of this dispute the installation and maintenance of yard lights on this property has been performed by employes of the Signal Department, who are covered by and are classified under the current Signalmen's Agreement.

Inasmuch as the Carrier assigned and/or permitted employes who are not covered by the current Signalmen's working agreement to perform the above-cited work that has heretofore been assigned to and performed by the Signal Employes, a claim was filed by certain Signal Employes with Mr. M. H. Napper, Signal Supervisor, under date of February 13, 1957, reading as follows:

"Re: Lighting of Steel Towers.

As of December 6, 1956, the Bridge and Builders of The Kansas City Terminal Ry Co. built the forms and poured the concrete for the foundations supporting the steel towers for the lighting of the Mill St. Yard.

On February 5, 1957, contract electricians started assembling the towers.

We would like to be reimbursed for the time that was consumed by the Bridge and Builders of The Kansas City Terminal Ry. Co. and the Contractors.

Yours truly,

/s/ R. E. Maloney

/s/ E. L. Anderson

/s/ A. A. Baum

/s/ D. R. Woten

/s/ G. E. Matthews"

The claim was denied Mr. Napper in a letter to the employes dated February 15, 1957, reading as follows:

"(e) Carpenter, painting, concrete and form work of all classses in connection with installing, repairing, or maintaining any signal or interlocking systems, apparatus or device.

"(f) All detector devices connected to or through signal or train control apparatus.

"(g) All other work generally recognized as signal work."

Your Board will note there are no provisions in the scope rule assigning work in connection with the installation or maintenance of electric lighting to signalmen employes on this property. In view of that fact it is evident the organization is relying solely upon practice on the property. It is true that signalmen employes have done simple maintenance and routine installation of minor electrical lighting equipment for a number of years, however, that practice cannot be unilaterly expanded to the extent that the Carrier must give all such work to signalmen employes. Especially is that true of an installation such as that in question which is entirely different from any other on the property. We do not believe that the theory of past practice on the property can be expanded to contemplate that the Carrier must gamble the success or failure of an unique installation.

The Organization in paragraph "A" of Statement of Claim alleges that the signalmen's agreement was violated because the Carrier used maintenance of way employes for the construction of the foundations for the steel towers. Certainly, if Carrier's signalmen employes do not have the right to the assembly and installation of the steel towers they have no right to the building of the concrete foundations.

Paragraph "B" of the Statement of Claim alleges in part "it is our understanding that the amount of time used by the employes not covered by the Signalmen's Agreement in performing the above listed generally recognized signal work amounted to the equivalent of 240 hours for each signal employe listed above . . .". We dispute the authenticity of that statement and insist that the Organization produce factual information for its support.

Since the completion of the installation of the newly devised lighting system at Mill Street Yards the Carrier has permitted its signalmen employes to maintain the equipment. The Carrier's officers have no desire to "farm out" work that can be performed by its signalmen employes. These responsible officers do, however, recognize there are certain projects that require the services of specialists in their field. It is the Carrier's position that your Board should not substitute its judgement for these responsible officers who are charged with the success or failure of such undertakings.

We respectfully request that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute between the Brotherhood of Railroad Signalmen of America and the Kansas City Terminal Railway Company.

The Carrier installed a new yard lighting system in its Mill Street Yard at Kansas City, Mo. The Bridge and Builder's Employes of Carrier built the

forms and poured the concrete for the foundations supporting the steel towers for the lighting system. An electrical contractor was engaged to assemble and install the steel towers.

Petitioner contends that Carrier violated the Scope Rule.

> "This agreement governs the rates of pay, hours of service and working conditions of all employes in the Signal Department below the rank of Foreman engaged in the construction, repair, installation and maintenance of the following:
>
> > "(a) Electric, electro-pneumatic, electro-mechanical, or mechanical interlocking systems, semaphore, color light, position light or color position light signals and signaling systems; electric, electro-pneumatic, mechanically operated signals and signaling systems; car retarder systems; centralized traffic control systems; automatic train controlling or stopping device; electric switch locks; highway crossing protective devices.
> >
> > "(b) High tension and other lines overhead or underground, poles and fixtures, wood, fibre, iron or clay conduit systems, transformers, arresters and distributing blocks, track bonding, wires or cables, pertaining to such railroad signaling and interlocking systems."
> >
> > "(g) All other work generally recognized as signal work."

Petitioner contends that (g) is controlling in this case.

Petitioner contends that past practice proves that this type of work has always been done by their craft on the property.

The Carrier contends that since the Scope Rule is specific, that the past practice of the industry as a whole determines whether this work belongs exclusively to Petitioner.

The Petitioner offers no proof as to what the practice industry-wide might be. Therefore since the burden of proof is upon the Petitioner, the claim must fail. Award 4356 (Robertson) stated: "Evidentiary matter leading to the determination of the factual question left open in the doubly scored language of the Scope Rule cannot be restricted to the practice which prevailed on this Carrier. We are charged with notice, and the Carrier knew at the time of signing this Agreement, that the Brotherhood here involved is a large Organization and has Agreements with many Class I Railroads in this country and this general language in the Scope Rule was not intended to be normally confined to what the custom and practice was on this particular Carrier."

Award 8001 (Bailer) overrules Award 4356. We must concur with the opinion expressed in Award 4356. Apparently Award 8001 did not have Award 4356 under consideration.

We are of the opinion that "all other work generally recognized as signal work," means generally recognized by the industry as a whole.

For the foregoing reasons, we believe there was no violations of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1962.

LABOR MEMBER'S DISSENT TO AWARD 10804, DOCKET SG-10477

The majority completely ignored well established rule of contract interpretation which has long been followed by this Board. That rule is clearly expressed in Award 5028 and many others:

> "This Board is committed to the rule of long standing that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. See Awards 507, 1257, 1397."

A practice had existed for at least thirty eight years. The effective Agreement is dated May 1, 1947; since that date is nine years prior to the date of this claim, it is evident that the practice existed for approximately twenty-nine years prior to the date of the effective Agreement.

The Award alleges concurrence with Award 4356, but its findings are not consistent with Award 4356. In that case there was no practice on the property upon which to base an Award, and the Referee concluded that in the absence of such evidence, industry-wide recognition would be relevant to a resolution of the dispute.

From the foregoing it is not only evident that Award 10804 is contrary to Award 4356, but also clearly in error.

The Award states:

> "The Carrier contends that since the Scope Rule is specific, that the practice of the industry as a whole determines whether this work belongs exclusively to Petitioner."

This statement is demonstrative of the extent to which the majority found it necessary to go afield in order to make a case for the Carrier. The plain facts are that the Carrier did not contend as the majority states; the majority's statement is, in fact, an argument urged first and only by the Carrier Member of the Division in panel discussion before the Referee.

Award 10804 is in error; therefore, I dissent.

/s/ W. W. Altus

W. W. Altus

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 10804, DOCKET SG-10477

Contrary to the Dissenter's charges, **Award 10804** correctly applies the applicable rules for the interpretation of contracts and is entirely consistent with the prior well-reasoned Awards of this Board.

In submitting its position to the Board, Respondent Carrier stated that:

> "In progression of the dispute before your Board the Organization cites the scope rule of the Agreement. Review of the scope rule discloses it says nothing about the electrical work here in question. The Organization's sole reliance is placed upon the words of the rule stating, 'all other work generally recognized as signal work'. Certainly, it could never be held that this electrical work was 'signal work'. It has not the remotest connection to the railroad's signal system. . . ."

Petitioner did not disprove Carrier's assertion that the electrical work involved was not "generally recognized signal work" or in any way related to "signal work". To the contrary, Petitioner relied on a local practice whereby Carrier assigned to Signalmen certain electrical work that was clearly not signal work.

The Scope Rule in the controlling Agreement enumerates the work covered by the Agreement, and this Board has repeatedly recognized that work which is not enumerated in such a Scope Rule is not reserved to employes covered by the Agreement, even though Carrier may have had a local practice of assigning such work to them.

Award 5276 BRSofA v. READING CO. (Wyckoff):

> "Since the construction was clearly not within the Scope Rule of the Agreement, the prior practices are not controlling."

Award 10860 (Kramer):

> "The Scope Rules under the binding Agreement in this dispute are in the opinion of this Board specific in that it lists the work covered.

It guarantees to the Employes no rights to perform work other than specifically covered in the Agreement, regardless of local practice. . . ."

The broad statements regarding the binding force of past practice which the Dissenting Member has quoted from **Award 5028** must obviously be read in context, for as we said in **Award 6142** (Wenks):

". . . Practices under an Agreement are not controlling in the absence of a rule or rules relating to the subject matter thereof that are uncertain or ambiguous. . . ."

The Dissenter also argues that:

"The Award alleges concurrence with Award 4356, but its findings are not consistent with Award 4356. In that case there was no practice on the property upon which to base an Award, and the Referee concluded that in the absence of such evidence, industry-wide recognition would be relevant to a resolution of the dispute."

But the Dissenter significantly fails to direct our attention to any statement in **Award 4356** that supports him in this argument. The error in the argument is obvious when one reads **Award 4356**, particularly the extract therefrom quoted in the seventh paragraph of **Award 10804**.

There is no error in **Award 10804**.

/s/ R. E. Black
R. E. Black

/s/ R. A. DeRossett
R. A. DeRossett

/s/ G. L. Naylor
G. L. Naylor

/s/ O. B. Sayers
O. B. Sayers

/s/ W. F. Euker
W. F. Euker