Award No. 11100
Docket No. SG-10369

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
THE NEW YORK AND LONG BRANCH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Central Railroad Company of New Jersey, the New York and Long Branch Railroad, that:

(a) The Carrier violated the current Signalmen's Agreement when on January 14, 1957, it assigned and/or permitted Maintenance of Way employes who are not covered by the Signalmen's Agreement to perform generally recognized signal work in the Allentown Yard on the Pennsylvania Division, specifically the generally recognized signal work of installing and maintaining electric lighted switch lamps.

(b) The signal employes of the Signal Gang at Bethlehem, Pa.—namely, Messrs. J. E. Jones, Foreman; Eugene Gallagher, Leading Signalman; Titus Siefert, Signalman; Charles Roth, Signalman; Richard Pittinger, Signalman; John F. McGinley, Signalman; Albert Rock, Signalman; Herbert Kulp, Assistant Signalman; Phillip O'Connor, Assistant Signalman; and Clarence Angsteadt, Assistant Signalman—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.

[Carrier's File No. SIG #11]

EMPLOYES' STATEMENT OF FACTS: On January 14, 1957, Maintenance of Way laborers installed six electric switch lamps, complete with wiring and primary batteries, on hand throw switches in the Allentown Yard on the Pennsylvania Division. Three of these switches are located adjacent to the main line between "R" Tower and #89 mile post, and three are located on the receiving tracks for the eastbound hump.

In the past, Signal Department employes have installed and maintained the electric switch lights on hand switches on this property. Inas-

OPINION OF BOARD: The jurisdictional question raised by Carrier, is given no further consideration, since the record shows clearly that the Maintenance of Way Organization, was notified by this Division, by Registered Mail, of the pendency of this action, and opportunity to appear before the Board at a hearing of this cause on May 28, 1962. That said third party organization acknowledged the notice of hearing to this Division, as evidenced by letter of April 16, 1962, signed by its President and General Chairman. Such parties did not appear before the Division at the hearing. Therefore we conclude that such jurisdictional question as raised by Carrier is moot.

The claims here are predicated on the theory that Carrier used employes of another craft to perform work recognized generally as signal work of installing electric lighted switch lamps, on January 14, 1957.

The Scope Rule here before us is in general terms and character, and does not set out in express detail the intent of the parties, in reference to the work involved here.

The parties agree that Maintenance of Way employes were traditionally used on this property to install and maintain oil burning switch lamps, and the Organization here has presented no claims for the performance of such work by other employes.

There is evidence here that in 1928, Signalmen at Elizabeth, New Jersey installed an electric light on a hand switch and that the battery power supplied, was maintained by employes of the Signalmen's craft. Also that prior to 1943, an electric light was installed on a hand switch and was supplied with battery power, and maintained by Signalmen, until such installation was removed by Carrier. In 1953 six electric lights were installed on hand switches, powered by alternating current. Carrier has not denied such allegations, but does argue that "there has been no practice and authority on this property that would **indicate** that the work in dispute is generally recognized as signal work. Inasmuch as these were the first installations made of storage battery operated switch lamps, it is certain there have been no past practices controlling on this property." Such position is not correct, as it has been shown, by the record, that similar installations were made and maintained by signalmen.

This Division in Award No. 9984, held that, while in sustaining the claim, that electric wiring work comes within the signalmen's craft, and was noted in the Award, as an exception.

In the record here, the Organization has introduced proof that work as claimed here, has by tradition and practice been performed by signalmen, until the present claims arose.

For reasons stated this claim should be sustained.

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 Carrier did violate the Agreement as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11100, DOCKET SG-10369

This award is rift with error. It commences in the first paragraph where the Majority decides the "jurisdictional question as raised by Carrier is moot". An examination of the record does not support this contention. The file contains a letter dated January 31, 1957, from the General Chairman, Maintenance of Way, reading: (R., p. 24)

> "I understand that the Brotherhood of Railroad Signalmen of America having entered claims on account of employes under our agreement have been assigned to replace Kerosene lighted switch lamps with battery operated switch lamps on the Penna. Division at Allentown.
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> "The work of installing, repairing and maintaining switch lamps has traditionally and historically been performed by trackmen under our agreement. Therefore, it is our contention that the work of installing, repairing and maintaining the battery operated switch lamps is also work that properly comes under our agreement and should be performed by our trackmen.
>
> "Therefore, if any other organization is permitted to perform this work will be considered as an encroachment on our agreement and will result in claims being presented for the employes under our agreement."

The attitude of the Maintenance of Way Organization was unmistakably clear. If there was any doubt about it, their letter to the Carrier, dated June 3, 1957, found in the record and read for the benefit of the Majority, establishes beyond question that they were claiming the right to this work. The letter contains a promise from the Maintenance of Way General Chairman to the Carrier that if the case is presented to the National Board, the Maintenance of Way Organization would support the Carrier's position. The letter in question reads:

> "Referring to your letter of May 31, 1957, your File No. SIG 11 in regards to signalmen claiming the work of installing six battery switch lamps in Allentown Yard, Pennsylvania Division.

"It is our position that the work of installing and maintaining of battery operated switch lamps is work that belongs to Trackmen under our agreement and we will support your position in this matter in the event that this case should be forwarded to the Adjustment Board.

"However, it is also our position that power operated switch lamps is also work under our agreement as switch lamps have traditionally been installed and maintained by Trackmen and the mere fact that the illumination is furnished by electric power does not serve to remove the work from our agreement."

Needless to say this promise was not fulfilled. However, the threat that "if any other organization is permitted to perform this work will be considered as an encroachment on our agreement and will result in claims being presented", still hangs over the Carrier. The jurisdictional question therefore, is not moot as alleged. A proper disposition of this claim would have been to dismiss it because it involves a jurisdictional dispute which this Board is not empowered to resolve. This same Referee so held in **Award 6224**, as follows:

"* * * We therefore must remand the claim before us for further negotiation between the Carrier, the Order of Railroad Telegraphers and the American Train Dispatchers Association, since the matter is resolved into a jurisdictional dispute, on which this Board has no authority to determine. In case of disagreement, this matter should then be referred to the National Mediation Board for final disposition, as suggested by Award 4452."

Aside from the Majority's inexcusable error on jurisdictional grounds, they also disregarded a clear precedent award on this identical question where the claim was sustained in favor of the Maintenance of Way Organization. That Award is **9984.** The Majority ambiguously refers to that Award in this fashion:

"This Division in Award No. 9984, held that, while in sustaining the claim, that electric wiring work comes within the signalmen's craft, and was noted in the Award, as an exception."

What the Majority is apparently trying to say is that "electrical wiring work" in connection with the installation and maintenance of electric storage battery switch lamps was reserved to Signalmen in **Award 9984,** although the installation and maintenance of those switch lamps was given to the Maintenance of Way employes. The Majority again by failing to give the complete story, distorts the facts. The Maintenance of Way Organization, the Petitioner involved in **Award 9984,** conceded that the electrical wiring work belonged to the Signalmen. In that case, the Maintenance of Way said:

"In the instant dispute, the Employes are contending that all work necessary on these switch lamps, with the exception of the electrical wiring, should be performed by Maintenance of Way Employes, just the same as in the past."

Thus, the exception was made by virtue of an admission that such "electrical wiring work" did not accrue to the Maintenance of Way

Organization in that case. Contrast that with the facts presented here where we find no such concession by the Maintenance of Way, but in fact, a claimed right not only to storage battery switch lamp installation and maintenance but "power operated switch lamps" as well.

However, the Majority avoids any discussion of that award either to say it is palpably wrong or that it is distinguishable from this case. The truth of the matter is that had they followed the interpretation established in **Award 9984,** which as a matter of consistency they should have, since it was they who established it, then they would have been compelled to deny this claim. This award fosters the notion that we need not search for consistency in interpretation where there are time claims involved.

The Majority holds that Carrier's argument relating to the absence of any practice should be rejected as incorrect. The Referee refers to the record and asserts that it discloses "similar installations were made and maintained by signalmen". Unfortunately, the Majority again dilutes the facts by failing to acknowledge and credit the sharp distinction drawn between the three instances referred to by Petitioner and the work involved here in this dispute.

The Referee was informed and pictures were introduced to prove that in our case the installation and maintenance was actually no more complicated than putting a battery in an automobile and connecting the two terminals. On the other hand, the so-called "similar installations" alluded to, involved a complicated and intricate wiring arrangement whereby the lamp was connected to and controlled by relays which lighted the switch while the block was occupied or it was connected to a signal power line which was reduced by a transformer. In short, there was no basis on which to equate the work here with that previously performed by Signalmen. The best proof of this fact is that Maintenance of Way employes did the work here in dispute. If it had been the complicated electrical work which was involved in the three recited occurrences, Trackmen would not have the qualifications to do the job.

In regard to the monetary portion of the claim, the Majority again ignored **Award 9984,** which dealt with the same type of requested compensation. Our decision in that case was:

> "The further point has been raised by Carrier, and disputed by Petitioner, that the monetary claim must in any event be denied since it is 'for nothing more than a penalty' and this Board lacks authority to assess penalty payments in the absence of an appropriate contract provision. The positions of both parties on this point are reinforced by lengthy briefs containing numerous citations of awards and other authorities.
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> "In this Referee's opinion, 'penalty' is one of those words ('jurisdiction' is another) that are loosely and inaccurately used in awards under our informal procedures. In some of the cases that came before this Board, a collective right may be involved that under suitable circumstances may warrant the sustaining of a monetary claim that goes beyond the actual and direct financial loss suffered by the individual employes affected by the violation. However, we do not consider such payments to be reasonable or desirable under the circumstances of the present case,

particularly since the violation involved a difficult personnel problem and does not appear to have been of a wilful or flagrant nature. See Awards 9415 and 5186.

"In view of the foregoing considerations, we will sustain the first part of the claim in its entirety and the second to the extent that the Claimants shall be made whole for any loss they may have suffered as a result of the violation we have found to exist."

The Majority offered no explanation for refusing to follow the well-established principle that damages should be limited to the loss sustained. **Award 10730** (Ables), **10963** (Dorsey) and **Second Division Award 4083** (Johnson).

For the reasons stated above, as well as others which we will not labor, the Majority's decision and reasons in support thereof, are in error and the award should be so treated.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts

REPLY TO CARRIER MEMBERS' DISSENT TO AWARD 11100, DOCKET SG-10369

The Dissenters' comments amount to nothing more than a rehashing of "issues" which have been thoroughly handled and found to be without merit. Such rehashing can only be designed to add confusion and cloud the true issues of a claim.

Award 11100 is clearly correct.

W. W. Altus
Labor Member