Award No. 11732
Docket No. SG-11330

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jim A. Rinehart, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Chicago, Rock Island and Pacific Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when it assigned and/or permitted an outside contractor to install conduits for underground signal cables in connection with the installation of crossing signals at East Frontage and West Frontage Streets at Dallas, Texas.

(b) The Carrier further violated the provisions of Article V of the August 21, 1954 Agreement when it failed to disallow the claim within 60 days of the date that it was appealed to the highest officer of the Carrier designated to handle claims.

(c) The Carrier now be required to compensate the following employes of Signal Gang No. 8 for three (3) days' pay each at their respective rates of pay as a result of the above violations: Foreman L. C. Zinsmeister; Signalmen R. G. Fuller and L. M. Taylor; Assistant Signalman J. D. McKeever; and Signal Helpers D. E. Sabin and D. V. Farrier. [Carrier's File: L-130-129]

EMPLOYES' STATEMENT OF FACTS: On or about April 1, 1958, Signal Gang No. 8 installed flashing light highway crossing signals at East and West Frontage Streets at Dallas, Texas. In connection with this flashing light crossing signal installation the Carrier assigned and/or permitted an outside contractor to install two 3 inch conduits under the road crossing at East Frontage Street and two 3 inch conduits under the road crossing at West Frontage Street.

The 3 inch conduits were a necessary part of the signal project and were used for the purpose of housing the underground signal cables and wires which run from the flashing light signals to the relay case. The installation of the

Dear Sir:

Your letter November 1, 1958, file SV-124, relative claim at Dalhart. (Should be 'Dallas')

A reading of your letter indicates, apparently, you are unable to properly interpret Article V — Carrier's Proposal No. 7, Section (a), particularly the phrase:

> 'Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify . . .'

The first day from July 28, 1958, would be July 29. In July, therefore, there would be 3 days. In August 31 days and in September (September 26, 1958, date of our declination) 26 days, all of which equal 60 days from July 28, 1958.

We stand on our declination of September 26, 1958.

Yours truly,

/s/ G. E. Mallery"

The employes' claim in (b) of their Statement of Claim, therefore, has no merit.

As to the merits of the claim itself, this carrier did not engage a contractor to install the conduits at Dallas. This expressway was a State project and it was the obligation and right of the State to install the conduits themselves so as not to interfere with the building of the expressway on State property. The conduits did not become the property of the carrier, but ownership remained with the State with permission for our use and the railroad did not pay the State for the installation. Our own employes inserted the signal cables. The claimants named were fully employed and lost no earnings in this instance.

We submit on basis of the facts in this case, there was no violation of the agreement nor have the employes produced any evidence of loss by the claimants, nor basis, under the rules, and we respectfully request denial of the claim.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives.

OPINION OF BOARD: The Employes contend that Carrier did not comply with provisions of Article V, 1954 National Agreement in that their letter of September 26, 1958, declining the appeal dated July 28 was not within 60 days. We hold that the declination was in time under the often cited rule of omitting the first day and counting the last.

The question here is whether the Carrier violated the agreement when it contracted or permitted an outside contractor to install two 3 inch in diameter conduits of pipe under the road crossings at East Frontage Street and West Frontage Street, Dallas, Texas. The conduits were underground and were used for housing the underground signal cables and wires which run from the light signals to the relay case.

The Scope Rule involved is as follows:

"This agreement covers the rates of pay, hours of service, and working conditions of all Signal Department employes classified herein engaged in the construction, repair, installation, inspection, testing or maintenance, including such work performed in the railroad's Signal Department Shops, of the following:

". . . highway crossing protective devices, other than mechanically connected or pneumatic highway crossing gates.

". . . iron or clay conduit systems, transformers, arresters, distributing blocks, track bonding, wires or cables, including cables, lines and fixtures which are a part of and used for operation of signal or interlocking systems installed on poles or in ducts which are not a part of such systems."

It would appear from the record that the signals and conduit were on the right of way of both Carrier and State of Texas Highway Department. The signals were the property of the Carrier and constructed by its employes and the wires that connected the signals were also the property of the Carrier and were installed by its employes through the conduit.

There is no question but that the disputed work is within the scope of the effective agreement and that as a general rule the Carrier may not contract out work embraced within collective bargaining agreements unless that work comes within certain definite exceptions.

Such exceptions are special skills, equipment or material — Awards 7805, 6492. Or where the work is beyond the capacity of the Carrier's employes or is of such complexity and magnitude they could not perform it. Award 7805 — Carey and awards therein cited. Award 6492 — Whiting. The burden of proving such exceptions is on the Carrier. Award 4671 — Stone, 6109 — Messmore.

Carrier makes no claim to any of these exceptions and offers no proof to establish such right to farm out the work. Carrier simply contends that it had nothing to do with constructing the conduits and that the sovereign State of Texas did that part of the work. It is admitted, however, that the plans or blue prints for its construction were prepared by Carrier and complied with, which certainly indicates some understanding between the Carrier and State of Texas. The Award 6499 (Whiting) cited by Carrier is not in point on facts. In that case the City of Greenwood, South Carolina, found the switching operations of the Carrier in its Civic Center to be unbearable. The City prevailed upon the Carrier to move terminals and depots out of the city square. The Carrier resisted all efforts of the city until the city entered into a contract to pay all costs of the removal and building of new facilities after which title thereto would be conveyed by the city to the Carrier. The city initiated the matter, paid for new location and all construction. It was new construction of great magnitude. Here Carrier initiated and carried out the construction of the signal by its employes on its right of way, paid for it, did everything with the exception of putting the pipe under the road. The Carrier had employes, tools, time and material for that part of the work and those facts stand unrefuted.

The employes who did all the work of constructing the signal were entitled to do the work of laying the conduit, also; such was the purpose of the agreement. The Carrier is not entitled to whittle away work covered by the

agreement, and which, as here, was usually performed by signalmen. If the construction of the signals and putting the wires through the conduits is covered by the agreement, it is difficult to see how construction of the conduit would be different. Award 7051 (Wyckoff), 5090 (Coffey), 5136 (Coffey).

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 violated.

AWARD

Claims A and C sustained.

Claim B denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11732, DOCKET SG-11330

Carrier contracted with the signalmen only in terms of work it had to offer on railroad property. Obviously, before the work comes within the scope rule of the agreement, one of the essential elements the employes must show is that the disputed work occurred on carrier's property.

The employes failed to introduce any evidence to that effect or that carrier owned, paid for, or contracted the installation, but relied altogether upon assertions disputed by the carrier.

The record will not support the Referee's finding in this case.

For these reasons, among others, we dissent to Item 1, sustaining paragraphs (a) and (c) of the claim.

W. M. Roberts
G. L. Naylor
R. E. Black
W. F. Euker
R. A. DeRossett