# Award No. 13041
# Docket No. SG-12574

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

## (Supplemental)

**Lee R. West, Referee**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF RAILROAD SIGNALMEN

## HUDSON AND MANHATTAN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Hudson and Manhattan Railroad Company:

(a) The Carrier violated the current Signalmen's Agreement, as amended, particularly the Scope, when, during October, 1959, it directed and permitted employes not covered by that Agreement to paint the signal cases, signal high tension boxes, signal head, signal instrument cases, stop magnet case and quarter inch air line, at signal locations L6XGG, 308 B Track Cut Section and 308 A Track Cut Section in Tunnel G, at the Grove Street Station owned and operated by this Carrier.

(b) The Carrier should now be required to compensate Signal Repairman L. J. Breasett for twenty-four (24) hours at the pro rata rate of pay for October, 1959. [Time Claim No. 141]

(c) The Carrier further violated the current Signalmen's Agreement, as amended, particularly the Scope, when, during October, 1959, it directed and permitted employes not covered by that Agreement to paint the signal instrument cases at Signal location No. 389 Track Cut Section in Tunnel H at the Grove Street Station owned and operated by this Carrier.

(d) The Carrier should now be required to compensate Signal Repairman K. F. Rennig for eight (8) hours at the pro rata rate of pay for October, 1959. [Time Claim No. 142]

EMPLOYES' STATEMENT OF FACTS: During October, 1959, the Carrier directed and permitted employes who hold no seniority or other rights under the Signalmen's Agreement to paint signals and signal apparatus on the territory covered by the Claimants' respective assignments. Under date of November 14, 1959, Mr. James J. Reese, General Chairman, presented the following claims to Mr. A. D. Moore, Superintendent, Signal System & Way:

Subsequent to the event described, the Organization, by letters dated November 14, 1959, submitted time claims on behalf of the employes mentioned above. Carrier, by letter dated November 23, 1959 rejected the claims. The issue was appealed to Carrier's General Superintendent by letter dated December 16, 1959, and the initial determination was sustained by him in a letter dated March 15, 1960.

**POSITION OF CARRIER:** The Organization has argued that the Scope Rule of the applicable agreement has been violated as a result of TWU men incidentally painting signal equipment as a part of a general paint job. While the Scope Rule in the BRS agreement includes reference to the "maintenance of signals," it is nowhere expressly agreed that only BRS men shall have the exclusive right to paint such equipment. However, the Carrier has given this work to BRS employes when it was undertaken as a part of, and for the purpose of, signal maintenance. This was not involved in the case at issue. Here, signal equipment was admittedly painted as an incident to a general paint job. The job was not undertaken as a signal job, but was part of a program to improve the appearance of Carrier's property. In no such instance has Carrier's action been held to be a violation of BRS Scope Rules.

In this instance the Carrier did not consciously attempt to reduce the work available to BRS employes. No such employes were deprived of work as a result of the paint job. In fact, the claimants could have performed the work involved during their normal duty hours. Under these circumstances the claim should not be sustained even if there was a technical violation of the agreement. See Award 6887. No employe of the Carrier was deprived of any compensation or overtime by reason of the challenged activity. The work could have been performed by the claimants during their normal tour of duty, for which they have already been compensated. They are not entitled to double pay.

In Award 6288, this Division recognized that there had been a technical violation of the Scope Rule, in that work which should have been assigned to a Telegrapher was assigned to an employe outside of the craft. Nevertheless, this Division did not allow the claim, but indicated that in spite of the technical violation involved the claim should be denied on the ground that the Organization had not shown that as a result of the violation any of its members had actually been deprived of compensation or suffered any loss. In similar circumstances (Award 6417) this Division ruled as follows:

> "Under these circumstances we are of the opinion that there has been a technical violation of the rules resulting in no loss to the claimant and he is therefore entitled to no penalty. . . ."

Certainly in an instance when it is not even clear that the work involved violated the scope rule of the applicable agreement, there should be no recovery in the absence of proof of loss.

In an instance similar to the one involved herein, this Division acknowledged that a technical violation did exist, but characterized it as "so small and trivial that no award should be made thereon." See Award 3864.

**CONCLUSION**

Carrier submits that the claim is without merit, and should be denied.

**OPINION OF BOARD:** This claim arose when employes not covered by the Signalmen's Agreement painted the signal cases, signal high tension

boxes, signal head, signal instrument cases, stop magnet case and quarter inch air line at Grove Street Station. The Brotherhood contends that such work belongs to Signalmen by reason of a provision in the Scope Rule which provides that the Agreement relates to "maintenance of signals and their functional appurtenances."

We recently dealt with a similar claim in Docket SG-12573. Therein we found that the painting was not shown to be for "maintenance purposes" and denied the claim. We believe that award to also be controlling in this case.

Claimants attempt to distinguish this case from the one in SG-12573. They contend that here they have met the burden of proving that the painting was for "maintenance purposes." They argue that the burden is met by the inference arising from the fact that the equipment painted in the present case was outside whereas the equipment involved in Docket SG-12573 was all located within a tower.

We are of the opinion that such circumstantial evidence, standing alone, is insufficient proof that the painting was for "maintenance purposes." Carrier further rebuts such inference by pointing out that such equipment was scheduled for removal and that the painting was only for decorative, rather than maintenance purposes. For these reasons, the award must be denied.

**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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1964.

**DISSENT TO AWARD NO. 13041**
**DOCKET SG-12574**

Award No. 13041 is in error and should be so recognized.

The majority, the Referee and Carrier Members, cite their award in Docket SG-12573, contending that it is controlling here, and state that "Claim-

ants attempt to distinguish this case * * *." While we did not exercise our right to file a dissent to Award No. 13010 (Docket SG-12573), we have in no manner concurred with the majority's findings. Without prejudice to our position that that award is in error, we hold, as the majority erroneously credits the Claimants, that the cases are distinguishable for the very reason rejected in the Award No. 13041.

The Majority credits the Carrier with the rebuttal that the equipment in question was scheduled for removal; this ridiculous excuse for a denial award is worthless for several reasons. It was offered nowhere in the record except in a letter of a subordinate carrier officer (reproduced by the petitioner); it was then abandoned in subsequent handling on the property and was not mentioned in the Carrier's submissions to this Board, and it is not shown that such removal has been executed.

The Majority's concurrence with the Carrier's argument that the painting was only for decorative purposes and "was not undertaken as a signal job" (Carrier's position) is a completely strained application of the agreement.

Award 13041 is in error; therefore, I dissent.

W. W. Altus
For Labor Members
12/7/64