Award No. 13051
Docket No. SG-12969

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim on behalf of Signal Foreman K. Elliott, Leading Signalman G. Kaiser, Signalman J. Alger, Assistant Signalmen R. Grant and J. Lunsford, members of Signal Gang No. 5, for two (2) hours' pay each at their respective overtime rates of pay account work generally recognized as signal work being performed on or about October 13, 1960, at the Griffith Interlocking by workers not covered by the Signalmen's Agreement. (BofRS File No. NRAB-1127 — EJ&E)

JOINT STATEMENT OF FACTS: On October 13, 1960, Signal Gang No. 5, operating out of Gary, Indiana, and comprised of the men designated in the Statement of Claim, were assigned to construct a train order signal and its accompanying instrument case at Griffith, Indiana. The employes of Signal Gang No. 5 dug and prepared holes for the foundations for the signal and the accompanying instrument case. They then assembled the steel forms into which the concrete was to be poured. The one and one-half yards of concrete which was used in the construction of these foundations was purchased by the Carrier from the Griffith Ready-Mix Company.

When the forms were prepared, the Griffith Ready-Mix Company truck backed up to the forms and, through the use of a chute, poured the concrete into the forms. The employes in Gang No. 5 then leveled the concrete and after it had settled, smoothed or finished off the tops of the foundations and set the hook bolts which anchored the signal and the instrument case.

After the concrete foundations had hardened, the employes of Gang No. 5 performed all other work pertinent to the completion of this construction project. As a result of the Carrier's purchase of the ready-mix concrete used for the construction of these foundations, the Organization filed claims on behalf of the employes named above for two hours each at their respective overtime rates, on the basis that the work of mixing concrete for these foundations was and is still exclusively Signalmen's work covered by their collective bargaining agreement.

In the past, signalmen have always mixed their own concrete in assigned signal construction projects. (Except the foundations of the walk-in buildings involved in Third Division Award 9036.) When a concrete mixer was not available, or in the absence of one, the concrete was mixed by hand by signal forces.

"It is not disputed, and the record establishes, that for many years the signalmen have constructed concrete foundations necessary to support signal relay houses. These circumstances considered with the Scope Rule lead to the view, on the basis of numerous awards of this Division, that the burden is upon the Carrier to show justification for the diversion of the work to a contractor. See Awards 5485, 5470, 5304, 5152, 5151, 4888, 4833, 4701."

The instant claim is fully supported by the specific provisions of the current Signalmen's Agreement, as well as by numerous prior decisions of this tribunal. We respectfully request your Honorable Board to preserve the integrity of that agreement and sustain the claim of the Brotherhood in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: This case comes before us on a Joint Submission.

JOINT STATEMENT OF FACTS

"On October 13, 1960, Signal Gang No. 5, operating out of Gary, Indiana, and comprised of the men designated in the Statement of Claim, were assigned to construct a train order signal and its accompanying instrument case at Griffith, Indiana. The employes of Signal Gang No. 5 dug and prepared holes for the foundations for the signal and the accompanying instrument case. They then assembled the steel forms into which the concrete was to be poured. The one and one-half yards of concrete which was used in the construction of these foundations was purchased by the Carrier from the Griffith Ready-Mix Company.

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PERTINENT RULES

The Organization contends that Carrier violated the following rules of the Agreement:

"RULE 74.

Establishing or Abolishing Positions

Nothing herein shall be so construed as to prohibit the management from establishing or abolishing positions covered by this agreement. Work covered by this agreement shall not be removed therefrom except by mutual consent of the parties hereto."

"RULE 75.

Working Conditions Now in Force.

Any working conditions now in effect and not covered in this agreement will not be discontinued unless mutually agreed to by the duly accredited representative of the parties to this agreement."

CONTENTIONS OF PARTIES

The Organization contends that the purchase of ready-mix concrete is in effect the contracting out of the work of mixing the concrete.

Carrier contends that the ready-mixed concrete was a purchase of a product — a substance produced from one or more other substances. Further, the fact that the substances had been, in the past, mixed on the property is no bar to the purchase of the finished product. It says there is no analogy between the purchase of a finished product and the contracting out of work.

RESOLUTION

Courts and quasi-judicial experts in the fields of labor law and labor relations have been unable to prescribe a uniform rule which by application would be determinative of whether the contracting out of work is in violation of a collective bargaining agreement. Indeed, no one has been able to define, precisely, what constitutes contracting out. Consequently, when a dispute arises, decision has been reached on a case-by-case basis confined to the facts of the particular case. Unless cases have identical facts, earlier decisions are inapposite. But, they are guides to an evolving legal philosophy of interpretation and application of collective bargaining agreements. Our Awards, cited by the parties, are within this category.

The record leaves no doubt that if the concrete needed for the job here involved was mixed on the property, the mixing would be work covered by the Agreement. The problem confronting us is whether the Agreement requires the Carrier to have the concrete mixed on the property; or, could it purchase the finished product for delivery to the property without violating the Agreement.

We take note that the work on the product, upon its delivery to the job site, was performed by employes covered by the Agreement. We take notice that the purchase of ready-mixed concrete is the modern way in which the product is acquired. We are not prepared to say, as Carrier would have us, that Carrier can purchase any product without violating the Agreement. Upon the basis of the facts in this case, we hold that the purchase of the ready-mixed concrete did not violate 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November 1964.