

Award No. 13135

Docket No. MW-12229

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dan Hamilton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE DELAWARE AND HUDSON RAILROAD CORPORATION**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when, on and subsequent to April 22, 1959, it permitted employees from the Signal Department to assemble, set foundations for and to erect two pre-fabricated metal bungalows.

(2) Carpenters Claude Dexter and George Rumenapp, who hold seniority on the Susquehanna Division, each be allowed sixteen (16) hours' pay at his respective straight time rate by reason of being denied the opportunity of performing the work of assembling the two bungalows at Oneonta, New York on April 22 and 23, 1959.

(3) Carpenter Foreman Francis Reilly and Carpenters Bert Bordinger, Clayton Utter, George Rumenapp and Claude Dexter, who holds seniority on the Susquehanna Division, each be allowed sixteen (16) hours' pay at his respective straight time rate by reason of being denied the opportunity of performing the work of erecting the bungalows at Bainbridge, New York and at Colliers, New York on May 4 and 6, 1959.

(4) Mason Foreman Roy Marks and Masons Leo Sawyer, Paul Lockwood and Robert Dibble, who hold seniority on the Susquehanna Division, each be allowed sixteen (16) hours' pay at his respective straight time rate by reason of being denied the opportunity of performing the work of installing the concrete foundations for the bungalows at Bainbridge, New York and at Colliers, New York.

EMPLOYEES' STATEMENT OF FACTS: On April 22 and 23, 1959, the Carrier assigned its Signal Department employees, who hold no seniority rights under the provisions of this agreement, to perform the work of assembling two pre-fabricated metal bungalows (buildings), each being 6 feet 6 inches wide, 6 feet 6 inches long and 7 feet 6 inches high. This assembling work took place at Oneonta, New York.

Subsequently, one of the aforementioned buildings was transported to Bainbridge, New York and the other to Colliers, New York.

On May 4 and 6, 1959, the Carrier assigned its Signal Department em-

their work by custom and practice. Conversely, records of the carrier effectively prove that the work of setting foundations for and installing buildings of this type to be used to house signalling and associated mechanisms has historically been performed on this property by employes of other than the claimant craft. At the present time traffic on approximately 50% of the main line trackage of this railroad is controlled by Centralized Traffic Control installations. Carrier records indicate that in the five year period beginning January 1, 1955, a total of over twenty-five (25) bungalows to house "CTC" equipment have been installed on our property in the extension of "CTC" control over various segments of our main line trackage. In addition to these twenty-five (25) bungalows placed in service since January 1, 1955, carrier has forty-six (46) CTC bungalows which were placed in service prior to that time. The minimum size of these bungalows is 6' x 6' x 7', with several bungalows as large as 8' x 8' x 7', 8' x 10' x 7', 8' x 14' x 7'. Each of these 71 bungalows required a concrete foundation, and each obviously had to be erected thereon. Carrier records indicate that these 71 installations, 46 prior to 1955 and 25 subsequent to that time, were made in their entirety by Signal Department employes, WITHOUT A SINGLE SOLITARY CLAIM OR PROTEST BEING LODGED BY THE MAINTENANCE OF WAY EMPLOYES THAT THIS WORK BELONGED TO THEM. It is the position of the carrier that these facts, which cannot be denied by the claimant organization, must prevail against the unsupported claim as made herein.

Since the facts and practice on this property provide irrefutable evidence that the disputed work is not the "exclusive" work of the claimant organization, it must necessarily follow that the agreement was not violated when the employes of another class were used to perform it. It is the position of the Carrier that in this instance. Carrier was free to exercise its discretion in the allocation of this work. Inasmuch as the work concerned the installation of a device utilizing intricate and inter-related principles of electrical and sonic transmission of impulses, it was the type of work which has always been performed by Signalmen on this property and it is the carrier's position that the assignment of the work to Signalmen in this instance was proper.

It is the position of the Carrier that this claim must be denied for the reason that the claimant organization cannot prove their "exclusive" right to this work and furthermore based upon the practice of a number of years for employes of our Signal Department to make similar installations without claim or protest being lodged by the Maintenance of Way organization.

OPINION OF BOARD: The problem presented in this claim has been the subject of continuing controversy between these parties for several years. Awards of this Board have supported both the Organization and the Carrier. However, when we examine these awards in the sequence of their settlement, there appears to be a fairly clear indication of the prevailing view.

In order that our awards will be of benefit to the parties, we feel that we should follow precedent cases, wherever and whenever it is possible. The utility of our decisions is lost if we bounce back and forth between various theories on the same general subject.

Therefore, a brief review of the recent awards will be of benefit to us in understanding the present position of the parties.

Awards 4845 and 4846 nunciated the theory that work of the nature involved in this claim belonged to the Maintenance of Way Employees.

As a settlement of these awards, the parties entered into a Memorandum of Agreement as follows:

"In disposition and settlement of Awards 4845 (Case 12.48 M.W.) and 4846 (Case 11.48 M.W.) of the Third Division, National Railroad Adjustment Board, it is mutually agreed that the following work in connection with combination short-arm gates with flashing light signals will be performed by Maintenance of Way Employees:

1. Installation of foundations for gates and cabins.
2. Erection and maintenance of cabins to house signal apparatus.
3. Repair and replace wooden gate arms; except minor and temporary emergency repairs, necessary to protect the traveling public, may be made by any employe provided that permanent repairs are made by Maintenance of Way Employees within twenty-four (24) hours.
4. Construction of wooden gate arms when not purchased.
5. General painting.

* * *

Several years after this memorandum disposed of the claims mentioned, Award 8091, relying on Awards 4845 and 4846, was adopted.

This award was followed by a Memorandum Agreement signed October 9, 1959, which contained the following statement:

"In consideration of the payments hereinabove set forth, it is agreed by and between the parties hereto that the employees covered by the Maintenance of Way agreement effective November 15, 1943, as amended, and represented by the Brotherhood of Maintenance of Way Employees on the Delaware and Hudson Railroad, do not have any exclusive right to perform the work described, or referred to, in the Opinion of the Board in Award 8091."

Referee Larkin in Award 9970, found that in view of this Memorandum Agreement, there was no basis for concluding that the Scope Rule of the parties' agreement had been violated.

In the interest of keeping this matter from becoming more confused, and in recognition of the precedent value of Award 9970, and in view of the October 9, 1959 Memorandum, we hold that the Scope Rule has not been violated.

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 Employees involved in this dispute are respectively Carrier and Employees 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 11th day of December 1964.