

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Missouri Pacific Railroad Company that:

(a) The Carrier violated the Signalmen's Agreement, particularly Rules 1 and 21, when it allowed persons not covered by the Signalmen's Agreement to perform signal work covered by the Agreement on the Dwyer Track location at Clayton Road (U. S. 40) on the Carrier's Creve Coeur Subdivision.

(b) The Carrier now be required to pay Signal Foreman R. R. Corneau, Signalmen E. R. Boker and O. F. Zaleuke, Assistant Signalman C. H. Vincent, and Signal Helper E. Hill, all members of Carrier's Signal Gang No. 3, at their respective time and one-half rates for an equivalent number of hours (to be determined by mutual agreement based on engineering estimates) that were worked by persons not covered by the Agreement in the performance of signal work.

EMPLOYEES' STATEMENT OF FACTS: The Scope Rule involved in this claim includes the construction and installation of signaling apparatus in the equipping of a portion of this Carrier's right-of-way which was relocated because of a highway construction project by the State of Missouri, at Clayton Road (U. S. 40) on the Carrier's Creve Coeur Subdivision. The work involved here consisted of the installation of circuits and apparatus for a highway crossing protection device and was performed by the R. Dron Electrical Company, Inc., of Granite City, Illinois.

The work which was performed by the R. Dron Electrical Company was done from circuit plans furnished by the Carrier's Signal Engineer's office for this specific location, and the signal material used was furnished by the Carrier from its signal department store in Sedalia, Mo. The material was shipped to Kirkwood, Mo., and was checked to correspond with the shipping notice by the Signalman at Kirkwood. Insulated rail joints for this project were trucked by

have it done by contract with others. It was the contracting out of part of this latter work which brought about the instant claim." (Emphasis ours.)

Note your Board considered it of significant import that the carrier in that dispute had full discretion to perform the work with its own employees or have the work done by a contractor. Here the Carrier did not have such discretion under the contract. The Commission retained control over how the work was to be performed and had a contractor perform the work. Your Board cited Awards 6499, 5246 and 4945 with approval, the awards we have discussed above, indicating that your Board would have come to a different conclusion under different facts. Award 6782 requires a denial of this award.

Award 6782 is also helpful in pointing out that the claim can be for no more than the straight time rate for the actual time spent by the contractor performing signal work. Even though the Employees rely on Award 6782, which sustained the claim at the straight time rate, the Employees have claimed the time and one-half rate. The Claimants worked full time during the period the work was performed. The Claimants lost no time and are not entitled to a monetary award in any event. Where a monetary award is made, your Board had to say again in Award 6782:

"It is needless in an Award of this Division to cite authority for the disallowance of the Organization's claim for compensation at overtime rates of pay. We have many times held that the application of the overtime rate is conditioned upon work actually performed, several early Awards to the contrary."

We also draw your attention to the fact that the signal work included not only installing signals to control the trains and to stop vehicular traffic when a train approached but also included signaling to control vehicular traffic between train movement. Any claim must be limited to the work which signalment may be required to perform at the direction of the Carrier.

This claim is entirely lacking in merit and is not supported by the Agreement because the work is entirely outside the scope of the Agreement. Therefore, the claim must be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The State of Missouri, acting by and through the State Highway Commission, and the Carrier, entered into a contract dated January 12, 1960;

"... covering the relocation of railroad track in order to eliminate an existing grade crossing on Route 40TR, St. Louis County, and the Railroad's Creve Coeur Subdivision under Project UG-623(11)..."

Upon completion, the new right of way and the railroad constructed thereon would be conveyed to the Carrier in exchange for the old right of way, after the Carrier inspected and accepted the new right of way.

From the terms of the contract, Carrier was to supply the State, certain track materials, which were to be made available to the contractor, selected by the State (including railroad track circuits and signals) and the Commission, in addition to track work, agreed to:

- "6. Install traffic signals at the intersection of Clayton Road and outer roadway, and install track circuit and signals."

It is the position of the Employees that the Carrier was a party to the contract awarded by the Commission to the R. Dron Electrical Co., Inc. of Granite City, Illinois, by the very fact Carrier did furnish the signal material and designed the signal circuits for the Clayton Road crossing; that Engineer of Maintenance of Signals, Paul Pough and a Maintenance Foreman of Signals, did check and rewire a good portion of the wiring at the crossing installation; that Claimants did unreel and deliver material to the installation; that signalmen tools were loaned and used by the R. Dron Electrical Company; that Carrier was vested with and exercised control over the materials, construction, and work enumerated herein, in violation of the Agreement by diverting said work to persons not covered by the Signalmen's Agreement.

It is the position of the Carrier that the work in dispute was not under the control of the Carrier and was outside the Scope of the Agreement.

The record makes clear the track construction and the installation of traffic signals, track circuits and signals was work to be performed within the control of the Commission. Carrier complied with the terms of the contract between it and the State and was not in privity with the R. Dron Electrical Company.

Carrier certainly would vest with no interest or control of the relocated line until such time, as provided in the contract, the work was complete "subject to the approval of the respective Chief Engineers of the parties hereto." Engineer Pough's inspection and asserted correction of the wiring was done pursuant to the contract terms, subject to the approval of the "parties hereto," therefore, from the facts of the record, we conclude that the work in question did not belong to the Carrier and was work not covered by the Scope Rule of the Agreement.

Carrier never contracted the work or the manner in which the work was to be performed, only the right to inspect said work before final acceptance of the new right of way in exchange for the old. From the beginning, this was a State controlled project to improve the highway, not the Carrier's.

Award No. 6782, relied upon by Petitioner, is distinguished from the instant case. Carrier, in that case, was given full discretion and control to do the work itself or have it done by contract with others.

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 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 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 29th day of September 1965.

DISSENT TO AWARD NO. 13857, DOCKET SG-13655

Award No. 13857 is in error; it serves only to deny the carrier's employees that for which they had contracted and to add confusion to this Board's awards. It, in effect, holds that a party can modify its agreement with a second party by entering into a second agreement with a third party. The Majority's attempt to distinguish Award No. 6782 ignores the clear facts of record.

Award No. 13857 is in error; therefore, I dissent.

**W. W. Altus
For Labor Members
10/26/65**