Award No. 14371
Docket No. SG-14481

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Railway Company et al., that:

(a) Carrier violated the current Signalmen's Agreement, as amended, particularly the Scope, when, on May 1, 2, 3, and 4, 1962, it required and/or permitted employes of a Contractor to install signal and/or CTC code cable between Greenville, S. C., and Atlanta, Georgia, near M. P. 549.8 to M. P. 550.1.

(b) Carrier be required to compensate Messrs. L. A. Meeks, W. C. Meeks, F. P. McCrackin, L. E. Pittman, R. C. Capps and M. L. Grant for a total of one hundred and forty-eight (148) man-hours, on a proportionate basis, at their respective hourly rates of pay, to compensate each of them for the signal work that they should have been permitted to do, or were entitled to do, and which was required or permitted to be done by a Contractor and his forces, or persons not covered by the agreement and who held no seniority or other rights under the agreement. [Carrier's File: SG-17891.]

EMPLOYES' STATEMENT OF FACTS: As indicated by our Statement of Claim, this dispute is a result of the Carrier's action of contracting out signal work, and is based on our contentions (1) that such farming out of signal work constitutes a violation of the Scope of the Signalmen's Agreement, and (2) that signal employes should be paid for the amount of time spent by the Contractor and his forces in performing this signal work.

The disputed work was the installation of signal and/or CTC (centralized traffic control) code cable between Greenville, South Carolina and Atlanta, Georgia. The number of men and the amounts of time involved are as follows:

May 1, 1962 — A Foreman and three men worked from 11:30 A. M. to 4:30 P. M.
May 2, 1962 — A Foreman and four men worked from 7:30 A. M. to 4:30 P. M.
May 3, 1962 — A Foreman and four men worked from 7:30 A. M. to 4:30 P. M.
May 4, 1962 — A Foreman and five men worked from 7:30 A. M. to 4:30 P. M.

property. Copies of letters exchanged between the parties, identified as Carrier's Exhibits A through G, are attached hereto and made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts giving rise to this claim are not in dispute. When Carrier constructed its CTC system (centralized traffic control) at the south end of its Charlotte Division, the code cable was installed underground throughout most of the territory. At approximately mile post 550, however, the CTC code cable was run past what is known as the Wells Viaduct on an open pole line. Wells Viaduct is estimated to be 190 feet high and 1,353 feet in length. Because of tree and bush interference and resulting high cost of maintenance, Carrier decided to install underground CTC code cable in this area.

Because of the hazardous nature of installing the code cable across the Wells Viaduct, Carrier contracted with the Buchanan Contracting Company to assist Carrier's Signal and Electrical Department to do the work. Carrier also arranged for the Buchanan Contracting to assist in digging a trench along the north side of the viaduct and back filling after the code cable was laid.

During the four days in question, Claimants L. A. Meeks and W. C. Meeks, Signal Maintainers, were on duty and under pay on the viaduct project performing signal work as well as working with the contractor.

Within the required time, the Organization presented a claim on behalf of the two employes referred to above, as well as claim on behalf of four other Signal Maintainers who were assigned to "adjoining territories" and were "available for the signal work here involved." The claim is for 148 man hours of straight-time compensation, including 30 hours for a Foreman.

This dispute presents three questions:

1. Was the Agreement violated for contracting out signal work of an allegedly hazardous nature?

2. Was the Agreement violated by allowing crews of an outside contractor to dig code cable trenches and to back fill after the code cable had been laid?

3. If the Agreement was violated in one or both of the instances above, what is the proper measure of damages?

The relevant portions of the Agreement are set forth as follows:

"RULE 1. SCOPE

(Revised, effective January 16, 1948.)

This agreement covers the rules, rates of pay, hours of service and working conditions of employes hereinafter enumerated in Article II, Classification.

Signal work shall include the construction, installation, maintenance and repair of signals, either in signal shops, signal storerooms or in the field; signal work on generally recognized signal systems, wayside train stop and wayside train control equipment; generally recognized signal work on interlocking plants, automatic or manual electrically operated highway crossing protective devices and their appurtenances, car retarder systems, buffer type spring switch operating mechanisms, as well as all other work generally recognized as signal work.

It having been the past practice, this Scope Rule shall not prohibit the contracting of larger installations in connection with new work nor the contracting of smaller installations if required under provisions of State or Federal law or regulations, and in the event of such contract this Scope Rule 1 is not applicable. It is not the intent by this provision to permit the contracting of small jobs of construction done by the Carrier for its own account."

"RULE 2. CLASSIFICATION

(a) Signal Foreman. (Effective September 16, 1946.) An employe assigned to supervise a group of employes (other than foremen) included in this Rule 2, and who is not required to regularly perform any of the work which he supervises.

A foreman may, as a part of his duties, make inspections and tests in connection with his work, but shall not take the place of another employe covered by this agreement.

(b) Leading Signalman. (Revised, effective January 16, 1948.) A signalman under the direction of a foreman, working with, and supervising the work of a group of employes in a gang, shall be classified as a leading signalman. As a matter of general policy the management will, in forming its organization, create the position of leading signalman in signal gangs, the personnel of which consists of eight (8) or more men exclusive of foreman and cook.

(c) Leading Signal Maintainer. (Revised, April 1, 1942.) A signal maintainer assigned to work with and supervise the work of one or more signal maintainers shall be classified as a leading signal maintainer; the number of employes that may be supervised by a leading signal maintainer shall not exceed, exclusive of the leading maintainer, a total of four (4) men covered by the scope of this agreement. This paragraph does not apply when maintainers of separate sections are temporarily working together, unless one of the maintainers is required by proper authority to assume responsibility and direction as a leading maintainer.

(d) Signalman, Signal Maintainer. (Effective June 19, 1921.) A man qualified and assigned to perform work generally recognized as signal work, together with all mechanics' work connected therewith, shall be classified as a signalman or signal maintainer.

* * * * *

(f) Signal Helper. (Revised, effective January 16, 1948.) An employe assigned to perform work generally recognized as helper's work assisting other employes specified herein shall be classified as a signal helper. A signal helper, when working alone, or two (2) or more helpers working together, may perform such work as cleaning and oiling interlocking plants, drilling rail with hand drill, mixing concrete, excavating, digging holes and trenches, handling material, and performing all other work generally recognized as signal helper's work, but shall not be permitted to do work recognized as that of other classes covered by this agreement."

I.

While the Agreement does not contain any provision that specifically precludes Carrier from contracting out hazardous signal work or any provision which specifically reserves hazardous signal work to the signal employes, we find that hazardous signal work is properly within the purview of the Scope Rule. It is unnecessary to cite precedent or rely on rules of contract construction to reach this conclusion. The very nature of railroad work generally and railroad signal work specifically assumes inherent hazard.

To hold otherwise would demand a conclusion that all of the work enumerated in the Scope Rule was not hazardous.

II.

Did the Carrier have the right to contract out the digging and back filling of the CDC code cable trenches?

Carrier strongly asserts that the Scope Rule is not all inclusive, and "that 'signal work' shall include only that 'spelled out' in the rule. The rule does not 'spell out' or otherwise provide that employes of the signalmen's class or craft shall perform common labor or that they shall, as here, dig ditches."

Carrier makes the further argument that if paragraph (f) of Rule 2 permits (but does not require) Signal Helpers to dig trenches and forbids Signal Helpers to do work "recognized as that of other classes covered by this Agreement," then it cannot be said that Carrier has granted to any employe under the Agreement the exclusive right to the work of digging trenches. The only work, Carrier contends, that is reserved to Signalmen is skilled work.

We are of the opinion that the prevailing view is that if the common labor or unskilled work is a necessary incident to or an integral part of the skilled work then it is work properly reserved to that class or craft under the Scope Rule of the Agreement. It falls within the residuum of "all other work generally recognized as signal work."

In Award 6214 (Wenke) the rule is stated:

"Digging ditches and refilling them cannot be said to be the exclusive work of any class of employes. The classification of this type of work must be determined by the reason for doing it; that is, its primary purpose. See Awards 3688, 4077 and 6165 of this Division.

Generally speaking we find the work of digging and refilling a ditch or trench in which to lay a cable is work incident to the installation of that of which the cable is a part. See Awards 565, 1218, 4543 and 5161 of this Division."

In Award 13236 (Dorsey), a dispute arising from this property, it is stated:

"We will accept the Carrier's averment that Signalmen have not performed all the work of digging holes, cutting trenches, lifting, etc. on Carrier's property. But, the issue herein narrows and is concerned with whether Signalmen perform those tasks when required in the installation of signals.

Carrier seeks to persuade us that the only work reserved to Signalmen is skilled work. The inclusion in the Agreement of the classification 'Signal Helper' convinces us that the Agreement covers common labor incident to the skilled work."

We are further persuaded by other awards involving these same parties on substantially the same question. Awards 9749 and 11733.

It should be noted that while we may have taken issue with the method of assessing damages by the referee in Award 9749, the general rule relative to incidental work enunciated in that award is nonetheless correct.

We conclude, therefore, that the Agreement was violated in both respects.

III.

We come next to the question of damages.

The Organization contends that the proper measure of damages is 148 straight-time man hours to be divided among six Signal Maintenance employes on a proportionate basis, including 30 hours for a foreman, alleging that this was work that was signal work which "they should have been permitted to do, or were entitled to do."

Carrier contends that Claimants are not entitled to any compensation because they were on duty and under pay at the time claims arose. To allow a monetary award, Carrier asserts, under the guise of compensatory damages, is tantamount to a penalty and prohibited.

As noted earlier, L. A. Meeks and W. C. Meeks were the only two Claimants on duty in connection with the installation of the code cable at the Wells Viaduct. The other four Claimants were performing work for the Carrier in their respective territories to which they were bulletined.

An analysis of prior awards of this Board as well as court rulings on the question of damages is clearly indicative of the confusion and complexity of the problem. The situation was deemed by some to be especially exacerbated by court's opinion in **Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Company** (C. A. 10th) 338 F2nd 407, (cert. den. 85 S. Crt. 1330), discussed below.

Carrier, without effort, is able to cite long lists of awards holding that no monetary loss precludes recovery; no recovery where Claimants were on duty and under pay; allowing recovery under such situations would be nothing more than a penalty which is prohibited; the Board only has jurisdiction to grant awards only for actual losses; and an award, if any, should only be for nominal damages.

The Organization, with equal facility, is able to cite awards of comparable volume showing that the penalty concept is valid even though actual loss is not shown; the absence of a penalty provision in the agreement does not bar recovery; the penalty concept is justified in order to assure compliance and deter Carrier from violating the agreement with impunity; wage loss is immaterial when the violation is in disregard of employes' rights; a penalty is imposed to the extent of the work lost and who gets the penalty is but an incident to the claim; being on duty and under pay does not preclude recovery because this is work lost to the craft; the sanctity of the agreement is the primary consideration.

A review of the history of awarding damages by this Board reveals that the penalty theory found its beginnings in an opinion rendered by a presidential fact finding board in 1937 which stated:

> "The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violations."

Since that finding in 1937, there has been a long line of awards from this Board, and particularly the Third Division, holding, in effect, that given a violation by the Carrier reparations flow, not as a matter of actual monetary loss subjected to proof of damages but on the basis of the "sanctity of the agreement" or on the basis of a literal "penalty." Other awards attempt to reconcile their holdings by denying the penalty theory and allowing compensation on the basis of a breach of agreement **without a showing of proof of loss.**

In Award 10963, Referee Dorsey examined the question in considerable detail and concluded that the National Railroad Adjustment Board is not vested with authority to impose a penalty unless expressly provided for in a collective bargaining agreement; a finding of violation does not in and of itself entitle a Claimant to monetary damages; and that the Claimant must meet the burden of proving actual monetary loss before there can be compensation.

In November, 1964, the United States Court of Appeals for the Tenth Circuit decided **Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Company, supra.** The case involved a complaint by the Brotherhood that the Carrier violated its bargaining agreement by unilaterally changing a straightaway run to a turnaround run. The District Court, on the basis of stipulated facts including the fact that the aggrieved employes had suffered **no actual monetary loss or hardship,** found the agreement to have been violated and awarded nominal damages in the amount of one dollar per day for each claim. The Court of Appeals affirmed the lower court and stated:

"The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations.[1] The Board has no specific power cannot be inferred as a corollary to the Railway Labor Act. See Priebe & Sons v. United States, 332 U. S. 407, 413. And if as counsel for the Brotherhood contends, there exists within the industry a long established and accepted custom to pay what would amount to a windfall for contract violations such as here occurred, such custom was not established by finding, nor requested as a finding, in the procedures before either the Board or the District Court. We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach or an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Atlantic Coast Line R. R. v. Brotherhood of Railway Clerks, 4 Cir., 210 F2 812, 815; United Protective Workers v. Ford Motor Co., 7 Cir., 223 F2 49, 53-54. Absent actual loss, recovery is properly limited to nominal damages. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 10 Cir., 113 F2 308; Norwood Lumber Corp. v. McKean, 3 Cir., 153 F2 753; 5 Williston, Contracts (rev. ed.) § 1339A.
Thus, the Court held:

1. The Board has no power to enforce penalty provisions without specific provision in the collective bargaining agreement.

2. Recovery for violation is limited to actual monetary loss, i.e. the amount the employe would have earned less such amount he in fact earned.

3. Absent proof of actual loss, recovery is limited to nominal damages.

The practical effect of the **Trainmen** case is obvious: it puts Claimants to strict proof of actual monetary loss. This has been evident by the many awards which have followed in the wake of the **Trainmen** case sustaining claims and granting one dollar nominal damages.

We have thus observed the damages pendulum swing from the penalty theory in 1937 to the actual loss theory in 1966. Notwithstanding its possible effects, we are constrained to abide by the **Trainmen** case and the later awards of this Board.

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[1]Counsel states that a review of awards of the National Railroad Adjustment Board as of September 18, 1963, indicates that there are more than 1,000 cases involving railroads throughout the United States, in which a Carrier has been required to pay a basic day's pay for a violation of a contract provision although the contract did not contain any provision for punitive damages or penalties. At least 110 of these awards involved the D&RGW. We have not, of course, made such a review. However, we find no statement in any of the awards to which we have been specifically referred that indicates the alleged custom to have been established as a fact. And, indeed, several of the awards hold that actual loss is a prerequisite to an award.

Turning to the instant case, we look for proof of actual loss in a situation where the Claimants were on duty and under pay at the time the Agreement was violated.

In such cases employes are entitled to be protected against the loss of opportunity to work, and such loss, if it can be proved, is compensable. Employes have a right under the Agreement not to be deprived of work that would otherwise have accrued to them.

As stated in Award 5200 (Wenke):

> "This Board has often held, and it is fundamental in order to maintain the scope of any collective agreement, that work belonging to those under the agreement cannot be given to those not covered thereby. This is true even if, in order to perform the work, it is necessary for the employes under the agreement to work overtime."

We conclude, therefore, that L. A. Meeks and W. C. Meeks are entitled to be compensated for the loss of opportunity to work to the the extent set forth in the claim. The remaining four Claimants, bulletined in other districts, have failed to sustain the burden of proving loss of opportunity to work and that portion of the claim is therefore denied. There is no basis for the claim of 30 man hours for a foreman, and that portion of the claim is also denied.

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 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

Claim sustained consistent with this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14371, DOCKET SG-14481 (Referee Nicholas H. Zumas)

The majority conceded that "the Agreement does not contain any provision that specifically precludes Carrier from contracting out hazardous signal work or any provision which specifically reserves hazardous signal work to

the signal employes" and then found that "hazardous signal work is properly within the purview of the Scope Rule." Thus the question raised by the Carrier, that this particular work was beyond the capacity of claimants, remains unanswered.

The majority also concluded that "if the common labor or unskilled work is a necessary incident to or an integral part of the skilled work then it is work properly reserved to that class or craft under the Scope Rule of the Agreement;" that "it falls within the residuum of 'all other work generally recognized as signal work.' " While the evidence reveals that signal employes on occasions perform unskilled work, there is no evidence that they have done so exclusively or that it was intended by negotiators of the agreement that such work be performed exclusively by signal forces.

Although Award 14371 properly denied the claims of four claimant Signal Maintainers who were assigned to other maintenance territories, we submit that the proportionate claim of the two remaining Signal Maintainers should likewise have been denied for lack of proof of any actual wage loss. When claimants are on duty and under pay at the time of the alleged violation, there can be no actual loss, nor is there anything in the applicable agreement pertaining to "loss of opportunity to work" as alluded to by the majority.

With the assistance of contractor's employes, these two claimants were fully engaged in the Wells Viaduct installation during their regular hours of assignment. The hazardous work involved could not reasonably have been required of or performed by the two maintainers (skilled as they are in the performance of their assigned duties) either during their regular hours or on an overtime basis. Moreover, none of the hazardous work on the viaduct project was performed when the two claimants were not on duty.

On completion of the installation, the two claimant Maintainers continued to work their regular assignments, and to protect any signal trouble which required the calling of claimants for service outside their assigned hours. Thus even on the basis of the majority's conclusions, there was no actual loss nor any showing of loss with reasonable certainty.

Award 5200, cited by the majority, is not analogous. In that case there existed a vacancy in a third shift clerical assignment which was temporarily filled by Carrier's using an employe of another craft. The Board, in Award 5200, held that the work of the third shift position belongs to employes covered by the Clerks' Agreement, even if in filling the vacancy it is necessary that Carrier temporarily use regularly assigned clerical employes (of other shifts) on an overtime basis. No such condition existed in this case.

For these reasons, and to the extent indicated herein, we respectfully dissent.

R. A. DeRossett
C. H. Manoogian
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W. M. Roberts

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