Award No. 14693
Docket No. SG-12370

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Baltimore and Ohio Railroad Company that:

(a) The Carrier violated and continues to violate the Signalmen's Agreement, commencing on or about July 30, August 3, 20, 25, 26, September 2, 1959, and thereafter, when it farmed out, removed, or otherwise arranged or assigned generally recognized signal work, namely the production of concrete battery boxes, to an outside contractor.

(b) The employes on the Cumberland Signal Shop Roster as of August 1, 1959, each be paid at their respective rates for an amount of time equal to that consumed by other employes, who have no rights under the Signalmen's Agreement, in performing this generally recognized signal work.

EMPLOYES' STATEMENT OF FACTS: For many years prior to May 15, 1959, this Carrier's signal forces employed in the Zanesville, Ohio, Signal Shop performed all work in connection with the production of concrete signal battery boxes. On May 15, 1959, the Carrier closed the Zanesville, Ohio, Signal Shop and the Wicomico Street Signal Shop located at Baltimore, Maryland, and moved both signal shops to Cumberland, Maryland, where a consolidated signal shop was established.

After the consolidated signal shop at Cumberland, Maryland, was established, the Carrier discontinued the practice of assigning all work in connection with the production of concrete signal battery boxes to its signal employes and commenced purchasing the concrete signal battery boxes from an outside manufacturer. The Carrier's action was unilateral and was done without consulting the Brotherhood's representatives on the property.

In view of the Carrier's unilateral action in removing recognized signal work from its signal employes, to be performed by persons not covered by the agreement, General Chairman H. C. Guscott filed the following claim with Mr. A. L. Jordan, Signal Engineer, under date of September 1, 1959:

Shop Roster as of August 1, 1959, each be paid at their respective rates for an amount of time equal to that consumed by other employes, who have no rights under the Signalmen's Agreement, in performing this generally recognized signal work."

Since the work at the Zanesville signal shop was performed by no more than one signalman and one helper, and on most occasions by one signalman alone, the Carrier presupposes that the wage claim in this case is necessarily confined to the same number of employes at the Cumberland signal shop.

The claim in this case made at both parts (a) and (b) is totally without merit. The Carrier intends to demonstrate that there has been no violation of the Signalmen's Agreement in this claim.

OPINION OF BOARD: Carrier discontinued manufacturing or constructing concrete battery boxes and contracted with an outside Company for the construction of such boxes following the consolidation of a signal shop formerly located at Zanesville, Ohio with the signal shop at Cumberland, Maryland. The record discloses that signal employes made concrete signal battery boxes at Zanesville, Ohio for approximately 35 years prior to the consolidation. Petitioner contends that such work is covered under Section (j) of the "Scope Rule" contained in the controlling Agreement between the parties and that Carrier violated the Agreement when it unilaterally contracted out the work to be performed by employes other than signalmen. Section (j) of the "Scope Rule" reads as follows:

"(j) All other work generally recognized as signal work."

In the first instance, Carrier contends that the claim is not properly before us because part (b) of the claim does not name specific Claimants and must be rejected under Section 1 (a) of Article V of the August 21, 1954 Agreement between the parties. This objection was not raised by Carrier on the property and no reference was made to it until submission of this dispute to the Board. We have repeatedly held that such objections are procedural in nature and that the parties may waive procedural requirements. (Awards 11044, 11752 and 14465.) Thus, Carrier will be deemed to have waived objection to consideration of the merits of the dispute.

Insofar as the merits of the dispute are concerned, Carrier contends that it had a managerial right to purchase concrete battery boxes from outside sources and that Petitioner has failed to sustain the burden of proving that the disputed work belonged to signal employes. Carrier states that the consolidation of the two signal shops was pursuant to an Agreement between the parties and that the new shop did not include facilities for the manufacture of concrete products, a situation known to Petitioner. Carrier asserts that a substantial amount of this type of work had been contracted out since 1950 and therefore, Petitioner cannot rely upon past practice in support of the claim.

An examination of the Agreement between the parties authorizing the consolidation of the two signal shops discloses that the disputed work was not considered by the parties. Although it is correct that some concrete work was contracted out before the instant dispute, there is no evidence that battery

boxes had been constructed or manufactured by other than signal employes prior to the present dispute.

The Scope Rule in the controlling Agreement does not by specific terms or otherwise include the construction of concrete battery boxes. However, Petitioner has offered proof that employes covered by the Agreement have in the past customarily performed such work on the property. Therefore, the disputed work falls within the purview of Section (j) of the Scope Rule. (Awards 6284, 10379 and 11845.)

Although the concrete battery boxes purchased by Carrier may be suitable for use at any location on the railroad, they come in several sizes in accordance with the specifications of Carrier and cannot be considered so-called stock items. Thus, we are confronted with contracting out of work traditionally performed by Signalmen. Insofar as the economic consequence to Carrier, this is a subject which should have been discussed and negotiated with Petitioner prior to Carrier's unilateral action in violation of the controlling Agreement between the parties.

We find that the work here involved has been customarily and traditionally performed by signalmen and that Petitioner's claim to said work as against non-employes, is well founded. Carrier violated the Agreement.

Part (b) of the instant claim demands payment to the employes on the consolidated signal shop at Cumberland, Maryland as of August 1, 1959, for an amount of time equal to that consumed by other employes, who have no rights under the Signalmen's Agreement in performing the disputed work. Petitioner has offered no evidence that such employes formerly constructed concrete battery boxes for Carrier or were available to perform such work following the consolidation of the signal shops into a single shop at Cumberland, Maryland. Inasmuch as no actual loss has been established flowing from Carrier's contract violation, this Board is without jurisdiction to award damages under Court decisions and prior awards of this Board. **Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R. Co.**, 338 F. 2d 407, cert. den. 85 S. Ct. 1330 (1965); Awards 14204, 13958, 13390-4, 13334 and 13209. Accordingly, we must dismiss that part of the claim which relates to damages without prejudice. (Award 14205.)

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 Contract was violated.

AWARD

Paragraph (a) of the Claim is sustained.

Paragraph (b) of the Claim is dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

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

DISSENT TO AWARD 14693, DOCKET SG-12370

The Majority, consisting of the Referee and the Carrier Members, very properly found that the work involved is covered by the Agreement and that Carrier violated the Agreement when it contracted out the performance of it. Serious error was committed by the Majority, however, in dismissing part (b) of the Claim. Most distasteful is the fact that the basis on which the money portion of the claim was dismissed not only places petitioner, one of the principals to the contract, in a hopeless position as to enforcement of the Agreement but actually rewards Carrier for having violated the Agreement. Furthermore, the lack of proof defense was supplied by the Majority.

This award makes mockery of the fundamental principle that where there is a wrong there is a remedy. Even the court case and most of the awards cited and relied upon by the Majority recognize this principle.

G. Orndorff
Labor Member
8-19-66

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