Award No. 15062
Docket No. SG-14595

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, 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) The Carrier violated the current Signalmen's Agreement, as amended, when, during the week of October 22, 1962, it arranged and/or otherwise permitted recognized signal work to be done by persons not covered by the agreement and who hold no seniority or other rights to the work — which consisted of digging some 1,355 feet of ditch for the installation of underground signal cable for use in connection with the so-called L. B. Foster crossing signal installation near Mile Post 620.5.

(b) The Carrier be required to compensate Messrs. W. C. Meeks, M. G. Hendricks, M. L. Grant and E. G. Wilson, Signal Department employes who were working on the installation of the crossing signals, for all time the contractor and his forces were used for the aforementioned work but not less than the amount of money paid to the contractor (approximately 15 cents per foot of ditch dug), or eight (8) hours to each of the four signal employes at their respective overtime rates of pay on October 23, 24, and 25, 1962.
[Carrier's File: SG-18298]

EMPLOYES' STATEMENT OF FACTS: This dispute, like many others from this property, involves work which Carrier contracted out to persons not covered by the Signalmen's Agreement. On October 23, 24 and 25, 1962, a ditch for underground signal cable was dug by a contractor at a crossing near M. P. 620.5 on the Charlotte Division, which work was necessary account Signal Department employes installing highway crossing signals.

The facts are not in dispute. The work was performed on the dates listed above. There was a total of 1,355 feet of ditch dug for which Carrier paid 15 cents per foot. The work was done with a back-hoe, the operator of which was not an employe of Carrier. Carrier has ample mechanized equipment to do the digging incident to an installation of crossing signals such as the one here involved.

long by backhoe machine owned by Reeves Ditching & Contracting Co. on October 23, 24 and 25, 1962 did constitute "generally recognized signal work" and presented the claim submitted to the Board.

Claim, being without basis and unsupported by the agreement, was declined as it was handled through the usual channels on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts involved in this dispute are not in issue. This claim is based upon the contention that Carrier violated the Scope Rules of the controlling Agreement between the parties when it permitted an outside Contractor's employe operating a backhoe machine, to dig a ditch approximately 1,355 feet long, 2 feet deep and 18 inches wide, for underground signal cables in connection with the installation of automatic electrically controlled and operated flashing light highway crossing signals at the crossing of Carrier's tracks by Jones Ferry Road, at approximately milepost 620.5 on Carrier's Charlotte Division. A total of 9⅓ man hours was required by the contracting company to perform the disputed work on October 23, 24, and 25, 1962.

Petitioner contends that the work performed by the employe of the outside contractor with a backhoe is work of a kind usually performed by Carrier's employes in the installation of crossing signals by Carrier and falls within the purview of the Scope Rule, the pertinent provisions of which are as follows:

"ARTICLE I.

SCOPE — RULE 1.

(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."

* * * * *

"CLASSIFICATION — RULE 2 (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."

Petitioner avers that the Scope Rule includes the installation of highway crossing protective devices and their appurtenances; that the disputed work herein is part of the installation of such highway crossing signals; and further that prior Awards of this Board involving the same parties fully support its position.

Carrier contends that the Scope Rule restricts the work of Signalmen to generally recognized signal work on ". . . electrically operated highway crossing protective devices and their appurtenances" and that such employes do not have a contractual right to perform all work on or in connection with the installation of such devices; that the burden of proof is on Petitioner to show that employes covered by the Agreement have exclusively performed the claimed work throughout Carrier's property which it has not met by probative evidence; and further that Claimants were actually working on the project every day for which claim is made and suffered no losses.

The parties herein have been involved in a series of disputes involving the application of the Scope Rule before us. (Awards 9749, 11733, 13236, 14121, 14371 and others.)

Substantially the same questions were considered by the Board in our Awards 13236 and 14371 as are before us for determination in the instant controversy. Again, we are confronted with contracting out of unskilled work, which is incident to skilled work properly reserved to signalmen by the Scope Rule of the Agreement. We cannot find that Awards 13236 and 14371 are either erroneous or palpably wrong and, therefore, hold that said Awards are controlling under the doctrine of stare decisis insofar as the substantive issues in dispute are concerned. Thus, we find Carrier violated the Agreement.

The remaining question for determination is the matter of damages. Organization contends that the proper measure of damages is payment for all time the contractor and his forces were used for the disputed work but not less than the amount of money paid to the contractor or eight (8) hours to each of the four named Claimants at their respective overtime rates of pay on the claim dates. Carrier contends that Claimants are not entitled to any compensation because they were working on the project every day for which claim is made and suffered no monetary loss.

The record supports Carrier's assertion that the Claimants were performing work for the Carrier on the claim dates and no evidence was proffered by Petitioner that would support a finding that the named Claimants were available to perform such work on an overtime basis or otherwise denied an opportunity to work.

Many Awards of this Board have allowed punitive damages or penalties for contract violations even though the controlling agreements contained no penalty provisions and no actual losses were alleged or shown. More recent Awards on the subject of damages and court opinions have held that damages shall be limited to Claimants' actual monetary loss or hardship arising out of the violation of an Agreement and that this Board is without authority to employ sanctions or penalties, except to the extent of nominal damages. Awards 14920, 14693, 14371 and 13236; Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western Railroad Co., 338 F. 2d 407, cert. den. 85 S.Ct. 1330.

Although the arguments advanced in support of penalties as a necessary deterrent to further contract violations are persuasive, we are compelled to follow the later Awards of this Board and recent decisions of the courts until such time as the Supreme Court considers whether or not we have the statutory power to impose penalties for violations of Agreements. Accordingly, we will deny that part of the claim which relates to damages. (Award 13958.)

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 Contract was violated.

AWARD

Paragraph (a) of the Claim is sustained.

Paragraph (b) of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION
ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1966.

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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 denying part (b) of the Claim. Most distasteful is the fact that the basis on which the money portion of the Claim was denied places Petitioner, one of the principals to the contract, in a hopeless position as to enforcement of the Agreement.

Furthermore, this Award makes mockery of the fundamental principle that where there is a wrong there is a remedy. Even the court case cited and relied upon by the Majority recognizes this principle.

G. Orndorff
Labor Member

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