Award No. 16090
Docket No. SG-15743

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, 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, on April 28 and 29, 1964, Supervisor J. R. Lipscomb and Assistant Supervisor T. R. Hill, Asheville, North Carolina, elected to perform signal work covered by the Agreement and changed track circuits from the original AC track circuits to DC track circuits between Mile Posts S-100.5 and S-125.8 on the Asheville Division.

(b) Signal Maintainers F. P. Higginbotham and J. E. Smith, Ridgecrest and Biltmore, North Carolina, who were entitled to perform the signal work and should have been used instead of the Supervisor and Assistant Supervisor, be compensated at their respective hourly rates of pay for eight (8) hours each on each day — April 28 and 29, 1964 — that the officials worked in violation of the Agreement.

(Carrier's File: SG-20483)

EMPLOYES' STATEMENT OF FACTS: This claim is a result of the diversion of Scope work. On April 28 and 29, 1964, Signal Supervisor J. R. Lipscomb and Assistant Signal Supervisor T. R. Hill, neither of whom is covered by the Signalmen's Agreement, performed Signal work incident to a change over on the Asheville Division, between Mile Posts S-100.5 and S-125.8, from AC to DC type track circuits.

The change over was decided upon following signal trouble, the details of which are related in a letter dated July 29, 1964, to General Chairman Melton by Mr. F. P. Higginbotham, the Signal Maintainer on the territory. In that letter Mr. Higginbotham states:

"At 6:00 P. M. on April 22, 1964, I was called account Xtra 4188 west reported Signal S-1221 red. Signal was clear on arrival. I walked the track circuit west of S-1221 and found no open joints. I tested for grounds, loose connections or any equipment that might not be performing properly but was unable to find any trouble. I then tested

Carolina, and J. A. Smith, signal maintainer, Biltmore, North Carolina, for pay for 8 hours each on April 28 and 29, 1964, in addition to pay for 8 hours worked and paid for those days.

The facts and circumstances have already been explained to you in detail. There is no point in my repeating them except to emphasize the fact that there was an emergency and Mr. Higginbotham requested assistance. Furthermore Higginbotham and Smith worked on April 28 and 29 and were not adversely affected. They do not have a contract right to double pay on those days.

Claim being absurd, without basis and unsupported by the agreement is declined."

On December 16, 1964 the claim was discussed in conference between the Brotherhood's General Chairman and Carrier's Director of Labor Relations following which on December 17, 1964 Carrier's Director of Labor Relations addressed the following letter to General Chairman Melton:

"In our conference yesterday we discussed the claims on behalf of F. P. Higginbotham, signal maintainer, Ridgecrest, North Carolina, and J. A. Smith, signal maintainer Biltmore, North Carolina, for pay for 8 hours each on April 28 and 29, 1964, in addition to pay for 8 hours worked and paid for those days.

The facts in connection with these claims have already been explained and are a matter of record. Undisputed is the fact that both claimants were on duty and under pay on April 28 and 29, 1964. They were not adversely affected and do not have a contract right to double pay on those days. Furthermore as I explained in our conference, numerous Board awards have denied claims where, as here, the claimants were on duty and under pay when the complained of work was performed.

Claims being absurd, without any basis whatever, and unsupported by the signalmen's agreement, I confirm my previous declination of the same."

OPINION OF BOARD: In this dispute Brotherhood on behalf of Signal Maintainers F. P. Higginbotham and J. E. Smith claims violation of the Agreement because on April 28 and 29, 1964, Supervisor J. R. Lipscomb and Assistant Supervisor P. R. Hill performed signal work in connection with a changeover from AC track circuits to DC track circuits on the Ashville Division.

On April 22 Signal Maintainer Higginbotham was called to investigate a report that one of the signals on his assigned territory was read. Although the signal was clear upon arrival, Mr. Higginbotham found evidence of 12.5 volts of foreign current. For this reason he notified Assistant Supervisor Hill who helped him continue to seek the source of the problem. They repaired insulated joints but they again found the presence of foreign current. The Supervisor was notified and on April 28 Signal Maintainer Higginbotham assisted him and the Assistant Supervisor in changing track circuits from AC current to DC current. The work was completed on April 29.

Brotherhood contends a violation of the Scope Rule because signal work was diverted to persons not covered by the Agreement.

Carrier denies the violation of the Agreement pointing out that Mr. Higginbotham was not capable or qualified to perform the work required on the dates in question for he called upon the Assistant Supervisor for assistance. It also argues that the emergency justified the use of the Supervisor and the Assistant Supervisor to do the work. In addition, it states that Mr. Smith and Mr. Higginbotham suffered no monetary loss since Mr. Higginbotham participated in the work that was done and Mr. Smith was busy working on his own territory.

The work performed by the Supervisor and the Assistant Supervisor in changing the track circuits from AC to DC current is clearly within the Scope of the Agreement. As such it is work which Signalmen have a contractual right to perform.

As a Signal Maintainer with experience for more than twenty-five years Mr. Higginbotham cannot be regarded as unqualified to change track circuits. He performed the necessary tests and inspections and followed proper procedures to determine the cause and correct the difficulty. Just as he reported the nature of the problem and presented his suggestions for correction to his immediate supervisor, Mr. Hill, so did Assistant Supervisor Hill consult with his superior Signal Supervisor Lipscomb as to the advisability of changing the track current to DC current. The decision to make the change was made by Signal Supervisor Lipscomb who provided the necessary material. Mr. Higginbotham's action in referring the problem to the Assistant Supervisor was due not to his lack of ability, but to the fact that he properly recognized that the responsibility for changing to another type of current did not belong to him and furthermore could not be made without necessary materials which he had no authority to provide.

The fact that Assistant Supervisor Hill was aware of the problem on April 22, but the work was not begun until April 28 does not give evidence of an emergency and provides no justification for supervisory personnel not subject to the Agreement to perform Signal Work.

For these reasons, we hold that the Agreement was violated and Signal Maintainers Higginbotham and Smith are entitled to compensation as requested in Paragraph B of the Statement of Claim.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of February 1968.

CARRIER MEMBERS' DISSENT TO AWARD NO. 16090, DOCKET NO. SG-15743

The majority erred in finding a violation of the Agreement in the circumstances here involved. In prior Award 12231, involving the same Agreement and the same parties, we found that the Agreement was not violated when signal and electrical supervisors and their assistants have through necessity directed and lent assistance in installations such as here involved. The claim herein should have been denied on the same basis.

The majority further erred in its consideration on the issue of damages when it disregarded precedent Awards, some of which involved the same parties as involved herein, and sustained the claim that Claimants who were on duty and under pay and not adversely affected be paid unearned sums of money as an exaction, penalty or windfall. The more recent pronouncement on this issue is found in Brotherhood of Railroad Trainmen, et. al., v. Central of Georgia Railway Company, Civil Action No. 1720, United States District Court for the Middle District of Georgia, Macon Division, decided on December 11, 1967. (The District Court's opinion also covers Brotherhood of Locomotive Engineers, et. al., v. Central of Georgia Railway Company, Civil Action No. 1721.) The District Court there held:

> "Under Gunther it is now, even in this suit to enforce a money award, an uncontrovertible fact that the Carrier breached that letter agreement. A crucial question remains, however, namely, whether in this particular case this court is bound by the Board's money awards. The organizations say 'Yes.' The Carrier says 'No.' The organizations say that Public Law 89-456, 89th Congress, H. R. 706, withdraws this entire matter from court jurisdiction. This would seem to be an over-contention in view of this sentence in the amendment: 'The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct.' 45 U. S. C. A. §153 First (q). This significant language appears in the Senate Committee Report accompanying the amendment:
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> > 'The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award "arbitrariness or capriciousness" on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary and capricious. This was done on the assumption that a Federal court would have

the power to decline to enforce an award which was actually **and indisputedly without foundation in reason or fact,** and the committee intends that, under this bill, **the courts will have that power.'** (Emphasis ours.)

* * * * *

It will be noted that the letter switching agreement above quoted does not as much as hint at any penalty pay or liquidated damages for its breach. It contains no suggestion that in the event the Carrier should violate the agreement by making a change in assignment of switch local service except through negotitions with the engine and train service local committees, any organizations or any members would be entitled to any damages, such as a basic day's pay or otherwise, or to any relief, other than, of course, the right to compel the Carrier to un-do the change and comply with the agreement.

* * * * *

The Carrier contends that since the 'Schedule[s] of Wages, Rules and Regulations' and the letter agreement provide for and contemplate no damages for the violation under consideration, and contemplate no claims for damages as distinguished from a grievance procedure to require compliance with the agreement, the First Division has failed in the language of the amendment to the Act 'to conform, or confine itself, to matters within the scope of the Division's jurisdiction,' and that for that reason the award should not be enforced, and, on the contrary, should be set aside by this court, except only as to the few small awards under Claims 1, 2 and 4, which do not involve the principle contended for under Claim 3, or are of such small amounts as not to justify opposition. It contends also that the awards under Claim 3 are, in the language of the Senate Committee Report, 'actually and indisputedly without foundation in reason or fact,' and that for that reason this court must 'have the power to decline to enforce' it. This court agrees with those contentions. Whether we regard the Board as primarily an administrative tribunal, or as primarily a board of arbitration (it partakes of the nature of both), it must act responsibly, and if it, as an administrative tribunal, is construing and interpreting an agreement its interpretation must find some basis in the language of the written agreement, or in the conduct of parties under that language, or in some uniform custom and practice concurred in by the parties. No such basis exists here. If it acts as a board of arbitration and is arbitrating a dispute it must act within the scope of the submission:

> 'An award must be made on matters included within the agreement for submission and must not exceed the powers granted by the submission. In general, an award on matters not included in the submission is void, and is always open to attack on the ground that the arbitrators exceed their powers.' 5 Am. Jur. 2d, Arbitration and Award, §137, page 619.

And the Carrier has never voluntarily agreed that the Board should decide whether the agreement calls for damages, much less penalty payments, as distinguished from an award ordering a restoration of the original home terminal.

Thus the order of the First Division insofar as it relates to Claim 3 must be set aside for failure of the Division to comply with the requirements of the Act and for failure of the order and award to confine itself to matters within the scope of the Division's jurisdiction. It should be set aside rather than remanded to the Division. The Division held this controversy on its dockets from February 6, 1954 until January 20, 1959, 4 years, 11 months, and 14 days. We know that dockets are crowded, but the Carrier is not responsible for this controversy's remaining undecided by the First Division for such a long period of time. Perhaps precedence should be given to grievances arising under contracts and agreements which do not provide for either compensatory or penalty payments.[6] This case, therefore, now stands for decision by this court rather than by the First Division. While the Adjustment Board, in properly handling a controversy, if there be no failure of the Division to comply with the requirements of the Act and no failure of the order to conform or confine itself to matters within the scope of the Division's jurisdiction, may not be bound by common-law principles where its interpretation of a contract is not 'wholly baseless and completely without reason' (Gunther, supra, at page 261), nevertheless, when, because of the Board's failure to comply with the requirements of the Act and failure of its order to conform or confine itself to matters within the Division's jurisdiction, its award must be set aside and the controversy determined by a court, the court is then bound by common-law principles. This means that the award as it relates to all three of the claimants in Claim 3 cannot stand and must be set aside because the letter agreement contemplated no such awards but only grievance procedures or complaints to compel compliance therewith; and the award as it relates to Avera and Nunn cannot stand and must be set aside for the additional reasons that there must be applied the general law of damages relating to contracts: 'that one injured by breach of 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 R. Co. v. Brotherhood of Ry., etc., 210 F. 2d 812, 815 (4th Cir. 1954) . . .'; Brotherhood of Railroad Trainmen v. Denver & RGW R. Co., 338 F. 2d 407, 409 (10th Cir. 1964)."

For the reasons stated, we dissent.

P. C. Carter
W. B. Jones
R. E. Black
G. L. Naylor
G. C. White

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[6]While these cases have been pending in this court since January 18, 1961, they were so pending at the desire of counsel for all parties. Fortunately, a trial could be, and was, afforded as soon as counsel desired it, and following the evidentiary hearing counsel requested, and were allowed, until November 6, 1967 to complete the filing of briefs.

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