Award No. 19148
Docket No. MW-17200

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when Signal Department forces were assigned or otherwise permitted to dig trenches under and along tracks at Mile Post 181-10 on July 6 and 7, 1966. (System Cases Nos. 359 and 360).

(2) Track Foreman Edward H. Duley and Trackman Demen Lichoff each be allowed 16 hours' pay at their respective straight-time rates because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On July 6 and 7, 1966, the Carrier assigned a Signal Maintainer, a Signal Helper and one trackman to perform the work of digging in new cable and installing new pot heads at the home signal of the Nova interlocking plant located at Mile Post 181-10. The performance of this work required that a ditch be dug, approximately thirty (30) inches deep, through the west gound siding, through the west bound main line and into the east bound main line into which the new cable was placed. After placing the cable in the ditch, said ditch had to be filled and the tracks involved restored to their original condition.

Even though the parties have agreed that the work of digging and backfilling of ditches near and under the Carrier's tracks, regardless of the purpose thereof, belongs to Maintenance of Way Employes, the Carrier assigned or otherwise permitted the two signal department employes, who are not covered by the scope of the Carrier's agreement with the Maintenance of Way Employes, to assist the trackman dig and backfill the ditches.

The Claimants, Track Foreman Duley and Trackman Lichoff, were willing and available to have performed this work if the Carrier had given them the opportunity to do so.

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated April 1, 1951, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

This Board has a positive legal obligation to hear this entire dispute from a standpoint of both the BMWE and BRSA and to decide with finality to which craft the protected work properly belongs.

In the opinion rendered by Mr. Justice Black, the cause was remanded, the Court Directing the Adjustment Board: "* * * to resolve this entire dispute upon consideration not only of the contract between the railroad and the telegraphers, but 'in light of * * * (contracts) between the railroad' and any other union 'involved' in the overall dispute, and upon consideration of 'evidence as to usage, practice and custom' pertinent to all these agreements. * * *."

Justices Stewart and Brennan joined in a separate concurring opinion. Mr. Justice Stewart concluded:

> "Until now the Adjustment Board has dealt with the claim of the telegraphers as though it were totally unrelated to the claim of the clerks. To take this piecemeal approach to the underlying causes of this controversy not only invites inconsistent awards, but also ignores the industrial context in which the disputed contract was framed and implemented.
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> This case aptly illustrates why the Board cannot judge one-half of a problem while closing its eyes to the other half. The disputed provisions of the collective agreement were drawn before technological progress telescoped two work stations into one. The agreement did not explicitely provide for such a change. But it was designed to cover an extended period of time, and its language is sufficiently general to allow for flexibility in the light of changing circumstances."

Mr. Justice Stewart concluded:

> "Only by proceeding as the Court today directs can the Board properly decide cases of this kind. The provisions in the Railway Labor Act which state that the Board's orders are ot be directed only against the carrier do not detrack from the power of the Board to fulfill its tasks. For if the telegraphers and the clerks both advanced their claims and the Board directed the carrier to honor the claims of only one union, the other union would be bound just as though it had lost in a multilateral in rem proceeding. Sec. 3 Freeman, The Law of Judgments Para. 1524-1526 (5th ed. 1925).
>
> Since the Board has failed to use procedures which allow for an informed and fair understanding of the dispute between the petitioner and respondent, I concur in the opinion and judgment of the Court."

This Labor Tribunal now stands in a correct posture to examine, review and reach conclusions as to the basic work assignments in this case and to decide, upon hearing all the evidence, as to the particular craft or class to whom this work properly belongs. It is the position of the Carrier, as stated hereinbefore, that the proper collective bargaining agent for the employes to whom this work correctly and properly belongs is the BRSA.

OPINION OF BOARD: On July 6 and 7, 1966 Carrier assigned a Signal Maintainer, a Signal Helper and a trackman in connection with the installation of new pot heads and cable at the home signal of the Nova interlocking

plant. This dispute arises from the fact that Signalmen did some trenching and/or backfilling in the 45 foot long trench dug under Carrier's tracks in connection with the project. In its submission Carrier states in part:

> "There is no dispute between the parties as to that part of the factual record showing the work, posing the basis of claim in this case, was performed by employes coming under the scope of an agreement between Carrier and its employes represented by the Brotherhood of Railroad Signalmen of America."

Carrier contends and, we so find, that the purpose of the assignment of the trackman was to do the trenching and backfilling. The record supports a finding that he could not perform the hand digging and backfilling alone in the time span involved.

The letter of November 4, 1966 from Carrier's Labor Relations Manager denying the Claim at the final step on the property reads in relevant part as follows:

> "In fact, the record clearly indicates that the work in question should have been performed by the Maintenance of Way employe who was at the work location."

That was the posture of the cast when it left the property. In its submission, however, Carrier raised the question of the involvement of the Brotherhood of Railroad Signalmen of America. Pursuant to Transportation-Communication Employes' Union v. Union Pacific Railroad Company (385 U.S. 157), this Division, on August 6, 1971, notified the Signalmen of the dispute and offered that Organization an opportunity to make a submission to the Board in connection with the case. Signalmen did file a submission.

The Signalmen's position briefly is that it is proper to use signal employes to dig and backfill trenches for underground signal cable, pot heads, signal foundations, or similar signal equipment and wiring on apparatus. It concludes that Carrier's assignment in this case was proper. It also cited a series of awards from this Division as well as the Second Division of this Board. The Awards cited stand for the propositions that (1) The purpose for which work is performed determines to which class or craft the work belongs. Second Division Award 2513, Third Division Awards 3638, 4077, 5161, 6165, 8217, 9001, 10862 and 11618 and (2) Signal work is classified by "systems" Second Division Awards 2183 (cab signal system); 4157, 4246, 4247, 4236 (CTC System); 1835, 2810, 2973, 3173, 3604, 3871 (car retarder system); Third Division Awards 10730 and 12300 (car retarder system). We will discuss the citations later on in the Opinion.

We have reviewed the Scope Rules of both Organizations and find that on a fair reading of their broad provisions that both could lay claim to the work of trenching and backfilling. Rule 6 of the Signalmen's agreement provides that a Signal Helper may do "excavating". It cannot be denied that under Rule 1(d) of the Maintenance of Way agreement that work required "in the construction and maintenance of roadway and track" would include digging and backfilling. Awards that hold that the purpose for which the work is performed have solved disputes of this nature in the past. Before considering the various awards however we should consider the practice on the property as revealed in the letter of July 8, 1954 from Carrier's then Labor Relations Manager in the settlement of a similar claim. The letter reads in relevant part as follows:

"A number of awards of the Adjustment Board have established the principle that digging trenches for signal cables is signal helper's work, except where such trenches pass under the track, in which case it is trackmen's work. On the basis of the facts in this case it seems to me that all of the trenching done by trackmen was in fact under the track structure and therefore properly trackmen's work * * *."

Of course, settlements are not always binding for future disputes as there are many pragmatic considerations entering into such settlements. However, they do have weight on the property. Particular weight can be accorded to such a settlement if the parties by their conduct evince a desire to be bound thereby. We have only to look to Carrier's letter of November 4, 1966 (quoted above) to see that there has been no change in Carrier's position between 1954 and 1966.

The cases cited by Signalmen and Carrier reveal an inclination by this Board to be bound by the purpose of the work. Award 5161 involved a claim by Maintenance of Way Employes that digging holes for signals was Signalmen's work and claim for Signalmen's rate for trackmen was sustained. Award 2513 (2nd Div.). Claim by electricians that work of trenching under tracks by trackmen where trench was to hold communications cable was electrician's work sustained. Award 11618 was a claim filed by Maintenance of Way employes to the effect that digging under tracks by trackmen was the performance of Water Service Department to obtain Water Service Department Helper's rate, it was sustained. Other cases cited held similarly but do not involve trenching and backfilling under tracks. We shall not burden the Opinion with a discussion of each case. On the other hand in Award 1134 where Signalmen claimed the work of trenching under tracks where signal work was the purpose involved it was held to be the work of trackmen. This case was followed in Award 5491 where claim of Maintenance of Way employes to electricians rate for such excavation was denied with the statement:

"We cannot conclude that under circumstances here proven that claimants were required to fill the position of other employes within the meaning of Rule 32. Rather, they were performing divisible work, under and along the roadbed, their recognized domain, for which they were responsible and to which their regular rate of pay applied."

The Awards cited by all parties while of great assistance are not dispositive of the situation.

Support can be found in the record that it was Carrier's desire to use trackmen for the work herein and its position changed when the case left the property. Carrier denies that there is Scope coverage and that the practice on the property is controlling to the claim of Petitioner. Petitioned relies on its Scope Rule and the letter of July 8, 1954 which it states was rigidly adhered to and points out that the denial of the practice by Carrier is not properly before this Board as it was never raised on the property.

We find, under the circumstances of this case, following a close scrutiny of the record that it was this Carrier's practice since 1954 to reserve the trenching and backfilling under and along tracks to Maintenance of Way employes and we so find. We have considered all of the contentions properly before us and find that for Carrier to have departed from this practice would have required a further agreement with Maintenance of Way employes.

Having so found we also find that there is no proof anywhere in the record as to the time spent by Signal Maintainer and Signal Helper in doing the work in dispute. It would be highly implausible that they spent all of the time during the two days involved doing the work as it is not denied that they also laid cable, removed and renewed equipment. However that is what is sought by the claim.

Thus while we will find that the agreement has been violated we will not award back pay. To do so would be clearly arbitrary as we would have to speculate as to the amount of time involved. It is noted, though not dispositive, that Claimants were on duty and under pay during the days involved. Carrier puts the matter in these words:

> "The fallacy of this position is obvious. To support such a conclusion, one would have to say that the Signal Maintainer and the Signal Helper spent their entire tour of duty of eight hours on each of the claim dates performing what the Employes allege to be Maintenance of Way Employes' work. It is perfectly clear this is not the case."

We deny the claim for reparations on the basis that amount sought is not supported by any evidence in the record and hence is excessive.

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 as indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April 1972.

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