Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35078
Docket No. SG-34472
00-3-98-3-153

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(CSX Transportation, Inc. (former Louisville and Nashville
(Railroad Company)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Louisville and Nashville Railroad:

Claim on behalf of M. D. Warner, R. C. Storms, and A. L. McFarlin for payment of 40 hours each at the time and one-half rate account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule and the Atlanta Terminal Agreement, when it used a contractor to paint signal system equipment at the Atlanta Terminal on January 4, 5, 6, 7, and 8, 1997, and deprived the Claimants of the opportunity to perform this work. Carrier's File No. 15(97-83). General Chairman's File No. 97-208-3. BRS File Case No. 10432-L&N."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employes was advised of the pendency of this dispute and chose to file a Submission with the Board.

On February 4, 1997, the Organization filed a claim on behalf of Claimants M. D. Warner, R. C. Storms, and A. L. McFarlin alleging the Carrier violated Rule 1, Scope of the Agreement, and paragraph 3(c) of the Atlanta Terminal Agreement. The Organization maintains that the Carrier violated the Agreement when it used forces other than those listed in the Rules to perform work at the Consolidated Atlanta Terminal on January 4, 5, 6, 7, and 8, 1997. The Organization argues that on the above dates, the Carrier instructed and/or directed an outside contractor, the Richardson Painting Company to paint signal system equipment (air compressor tanks and air lines) used exclusively by the Signal Department at Tilford Yard. The Organization argues that the work in question has been done exclusively by the signal forces in Seniority Districts 9 and 10 in the past and that the air compressor tanks and air lines at issue were used solely for the operation of signal equipment. The Organization maintains that the Claimants were ready, willing, available, and qualified to perform the work and that the Carrier failed to give the Claimants the opportunity to do so. The Organization also argues that even though the Claimants were fully employed at the time of the claim, the Carrier did not have the right to use an outside contractor to perform the work at issue and could have used the Claimants on an overtime basis. In addition, the Organization contends that the work in question does not belong to BMWE-represented employees because the work involved signal equipment that accrues to the Signalman's Agreement. The Organization further argues that although some kinds of work are common to several classes of employees, it is the purpose of the work that determines which class of employees has preference to the work. The Organization asserts that the work involved the painting of apparatuses or appurtenances used for the signal system and, under the Scope Rule, such constitutes Signalmen's work. The Organization contends that the work in question had nothing to do with equipment installed and maintained by other employees, but involved the maintenance of signal equipment specifically covered by the Scope Rule and reserved to BRS-represented employees covered by the Agreement. In addition, the Organization argues that there is no requirement to demonstrate the exclusive performance of work when the work in question has been given to a contractor. The Organization argues that the Carrier be required to pay each Claimant 40 hours at time and one-half each Claimant's respective rate of pay, which

are the minimum amounts of time that the Organization is aware that employees from the outside contractor were observed working.

The Carrier denied the claim, arguing that the work at issue is not reserved exclusively to the Organization and, in fact, has been performed by BMWE-represented employees. The Carrier maintains that the Agreement between the Brotherhood of Maintenance of Way Employes and the Carrier, particularly Appendix 5, identifies the work in question and delegates responsibility for the work to the BMWE-represented employees. The Carrier also contends that the penalty claimed by the Organization is for work that involved no overtime and that the Organization offered no showing that the amount of time claimed is the amount of time worked by the contractor. The Carrier maintains that even if it is found to be in violation and a penalty is due, the penalty for work lost is the pro-rata or straight-time rate. In addition, the Carrier asserts that Claimants Warner, Storms, and McFarlin did not suffer any loss of earnings as a result of the contractor performing the work in question because they were on duty and under pay working on other projects that could not be delayed.

The BMWE's Third Party Response concurred with the position of the Organization. BMWE maintains that the Board should sustain the Organization's claim in full, which would not conflict with Agreements in effect between BMWE and the Carrier. BMWE maintains that although it has the contract right to maintain/paint tanks and air lines at other than the locations listed in Appendix 5, the Brotherhood of Railroad Signalmen has the contract right to maintain signal systems and that part of that maintenance may include air compressors and air lines that have been allowed to deteriorate so as to interfere with the Carrier's signal system, which is work specifically covered by the Organization's Scope Rule. BMWE argues that the Organization had the right to perform the painting work in question as long as it was not a part of a general painting project. BMWE contends that air line maintenance is a classic example of overlapping craft jurisdiction. BMWE also maintains that the Carrier's insistence on a Third Party Notice is nothing but an attempt to pit one union against another in an attempt to free the Carrier from the contractual obligations it has to both. BMWE further argues that the case at hand is a contracting out of work case and does not involve a dispute between crafts and that the Carrier disregarded its obligations to both crafts by contracting out the work to an outside contractor. In addition, BMWE argues that if the outside contractor did not perform the tank and air line maintenance in question, the BRS-represented employees would have at some

point. BMWE also argues that if the Carrier is allowed to maintain inadequate manpower levels and that its current employees are fully employed and cannot perform required work, the Carrier would then contract out ever increasing levels of work by simply maintaining inadequate force levels.

The Board reviewed the record in this case and finds that the Organization met its burden of proof that the Carrier violated the Agreement when it used a contractor to paint signal system equipment at the Atlanta Terminal on January 4, 5, 6, 7, and 8, 1997. The Carrier acted wrongfully when it used a contractor to paint air compressor tanks and pipelines used exclusively for the signal system.

The Scope Rule states the following:

"This agreement covers the rates of pay, hours of service and working conditions of all employes, classified herein, engaged in the construction, installation, repair, inspecting, testing and maintenance of all interlocking systems and devices; signals and signaling systems; wayside devices and equipment for train stop and train controls; car retarders and car retarder systems; power operated gate mechanism; automatic or other devices used for protection of highway crossings; spring switch mechanism; electric switch targets together with wires and cables; train order signals in signaled territory and elsewhere within the limits of a signal maintainer's territory; power or other lines, with poles, fixtures, conduit systems, transformers, arresters and wires or cables pertaining to interlocking and signaling systems; interlocking and signal lighting; storage battery plants with charging outfits and switch board equipment; sub-stations, current generating and compressed air plants, exclusively used by the Signal Department, pipe lines and connections used for Signal Department purposes; carpenter, concrete and form work in connection with signal and interlocking systems (except that required in buildings, towers and signal bridges); together with all appurtenances pertaining to the above named systems and devices, as well as any other work generally recognized as signal work.

* * *

NOTE 2: Effective March 22, 1961, work covered by signal employes on Seniority Districts Nos. 9 and 10 with respect to:

painting
train order signals
bonding of track
yard track indicators
crossing gates

shall continue to be performed by signal employes on those districts." (Emphasis added.)

Because the Carrier clearly violated the Agreement when it contracted out the work, the Board finds that the Claimants are entitled to relief. However, the Claimants requested time and one-half for the violation. The record reveals that the Claimants were working elsewhere at the time of this incident. As the Board has stated in many previous Awards, the Claimants cannot be allowed the punitive rate as a penalty when it is clear that they were performing work and getting paid at the time of the violation. Consequently, the Board orders that each of the Claimants shall be paid 40 hours at the straight-time rate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of November, 2000.