Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35409
Docket No. SG-35413
01-3-99-3-300

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Burlington Northern Santa Fe Railway Company
(former Atchison, Topeka and Santa Fe Railway)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Claim on behalf of J.K. Puff, J.M. Howard, D.K. Battles, L.D. Facklam, J.F. DeLong, R.L. Howell, R.A. Marston, M.W. Waugh, M.E. McDonald, J.R. Miller and J.D. Wolken, for a total of 632 hours to be divided equally among the Claimants and paid at their respective time and one-half rates plus skill differential pay, account Carrier violated the current Signalmen's Agreement, particularly Rules 1 and 2, when it used an outside contractor to repair 79, DA-10 switch machines from April 15 through May 10, 1996, and denied the Claimants the opportunity to perform this work. Carrier's File No. SIB 96-08-29AA. General Chairman's File No. 96-32-01. BRS File Case No. 10931-ATSF."

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.

The Claimants in this case were regularly assigned at the Carrier's Signal Repair Shop at Topeka, Kansas. Beginning on or about April 15, 1996, and continuing through May 10, 1996, the Carrier sent a total of 79 DA-10 switch machines from the Signal Repair Shop facility to an outside contractor to be rebuilt. The Organization initiated a penalty claim because of this action by the Carrier alleging that the negotiated Scope Rule on this property in conjunction with the established practice on this Carrier of performing such work by the Signalmen constituted a violation of the Rules Agreement and deprived the covered employees of available work opportunities which properly accrued to them. The claim as presented requested eight hours pay for each of the 79 switch machines sent to the outside contractor. This total was to be divided among the eleven named Claimants.

In support of their contention of "past practice" under the coverage of the Scope Rule, the Organization presented numerous affidavits from Signalmen attesting to the contention that Signalmen had, in fact, repaired and rebuilt switch machines such as the ones here involved "as far back as 1972," and the "last one rebuilt at the Shop was March 1994. . . ." The Organization acknowledged that if, during the rebuilding of a switch machine, the cylinder was found to be out-of-round then - and only then - would the cylinder itself be sent to an outside machine shop for re-boring after which the re-bored cylinder would be returned to the Signal Shop for the Signalmen to continue the rebuilding process.

In further support of this contention, the Organization pointed out that at the time the switch machines here involved were sent to the outside contractor, the Shop Signalmen were required to send to the outside contractor for their use all of the spare parts which were then on hand at the Shop for the Signalmen's use.

The Carrier denied the claim at all stages of handling primarily with the assertion that work of the type here involved did not accrue "exclusively" to the employees of the Topeka Signal Shop and that the Carrier had in the past utilized outside contractors to rebuild not only the DA-10 type of switch machines here involved, but also the NA-15 type of pneumatic switch machines "had in the past been sent to an outside source for rebuilding." The Carrier additionally argued that the DA-10 switch machines here involved were not only rebuilt by the outside contractor but also contended that the "rebuild included enhancements to the existing design . . ." inferring that such

"enhancements" were beyond the capabilities of the Shop Signalmen. The Carrier further argued that the named Claimants were not the "proper" Claimants and that, in any event, they were fully employed during the period of this claim.

The Board has reviewed all of the material presented by the parties and has considered the respective positions advanced by the parties during the three-year period of dispute handling on the property prior to bringing the dispute to the Board. The arguments presented to the Board have been reviewed, considered and evaluated with the following result.

First of all, the Carrier's argument relative to the "exclusivity" feature is misplaced. In Third Division Award 13236 we read:

> "Carrier's premise is that we are here confronted with a Scope Rule which does not specifically vest Signalmen with the right to the work here involved. From this it argues that to prevail Signalmen must prove that the employes covered by the Agreement have in the past 'exclusively' performed such work, throughout the property; and, not only to the extent it is an incident to the skilled work of Signalmen. We believe this to be a misapplication of the exclusivity doctrine.
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> The Agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The record contains no evidence that the Claimants suffered actual monetary loss or hardship from the violation of the Agreement. Therefore, since the 'Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act . . . recovery is limited to nominal damages.' Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company, (C.A. 10, decided Nov. 19, 1964). Accordingly, we will award each Claimant nominal damages of ten dollars ($10)."

That opinion was buttressed by Third Division Award 25934. Such an opinion is equally applicable to the instant situation and is reaffirmed here.

The Carrier affirmatively argued that it had in the past utilized outside contractors to rebuilt not only the DA-10 type switch machine here involved but also had type NA-15 pneumatic switch machines rebuilt by outside contractors. It is significant that in the review of this case file the Board has not been furnished with a reference to a single incident of such use of outside contractors. No dates; no invoices; no statements of performance; nothing but the unsupported affirmation that such contracting-out had been performed.

The Organization, on the other hand, presented affidavit testimony from the employees who actually performed this type of work in sufficient detail to be verified down to the name of the Signalman - along with his employee number - who performed the rebuilding incident which occurred in 1994.

The Carrier additionally contended that when the DA-10 switch machines were sent to the outside contractor for rebuilding, certain unspecified "enhancements" were made to the existing design of the switch machines. As an affirmative defense, the Carrier is required to support this contention relative to "enhancements" by something more than the statement itself. No such support is found in this case file.

The Board concludes that the work here in dispute does, in fact, accrue to Signalmen. They have done it before. The Carrier, in fact, admits that such rebuilding work had been done by the Signalmen albeit on a limited basis. There is no showing that any change was made to the switch machine which would somehow place the rebuilding work beyond the capabilities of the Signalmen. There has been no probative evidence submitted to support the contention that such out-sourcing of work was, in fact, performed in the past.

Having thus concluded that the work here involved should have accrued to the Signalmen, we come to the remedy which is claimed. The Organization asserts that eight hours is needed to fully rebuild a DA-10 switch machine and that inasmuch as there were 79 switch machines rebuilt the total of 632 hours (8 x 79) is the proper remedy to be divided among the eleven named Claimants. The Organization offers no evidence or support for their eight-hour measure of work performed or to support the idea that the outside contractor actually performed 632 work hours in their rebuilding of the switch machines.

The Carrier argued in a twofold fashion in this regard. First, they contended that not more than four hours was required to rebuild a DA-10 switch machine. Secondly, they insisted that no payment at all was justified because all of the Claimants were fully employed during the period of the claim. Again the Board finds no evidentiary support for the four-hour time measure advanced by the Carrier.

As to the "fully employed" argument, the Board is impressed with the logic set forth in Third Division Award 32125 wherein it was held:

> "With respect to the remedy, Claimants shall be made whole. The fact that Claimants were employed at the time the contractor performed the work in this case does not extinguish their right to relief. Claimants lost work opportunities as a result of the Carrier's violation of the Agreement. However, it appears that some of the hours claimed have been previously paid as a result of a prior settlement. There is no evidence - e.g., a settlement agreement or exchange of correspondence or the like - in this record to show that the prior settlement disposed of all of this dispute. Those previously paid hours shall be offset against Claimants' entitlements under this Award."

Likewise in Third Division Award 28185, the Board held:

> "With respect to remedy, the Board recognizes that the Claimants were fully employed during the period that the work was performed. However, Carrier has not introduced any evidence that the work could not have been assigned to the Claimants on either an overtime or rescheduling of work basis. Clearly a monetary remedy is appropriate on two grounds: loss of work opportunity and, further, in order to maintain the integrity of the Agreement. Carrier is correct, however, that the Claim is excessive. In this instance the record substantiates the fact that two hours was all that the work took. Thus, Claimants are entitled to two hours pay each, but at the pro-rata rate for work not performed."

And again in Second Division Award 11660, it was held as follows:

> "Carrier has argued that Claimants were fully employed on the day of the incident and therefore did not lose any time or compensation. When work

reserved to a particular craft is improperly assigned to individuals outside the Agreement full employment of Claimants is not a bar to recovery of reparations. In Second Division Award 7504 we stated:

> 'The fact that the Claimant was under pay and at work at another location at the time the Foreman performed the work on the heating and air conditioning controls is not sufficient to defeat a claim for pay.
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> . . . To say that the claimant is not entitled to pay because, at a given moment, he was under pay elsewhere would obviously give the Carrier a latitude of work assignment not sanctioned by the rules.'"

So too in this instance. To permit a Carrier with impunity to use and outside contractor to perform Agreement-covered work would be to create intolerable opportunities for mischief and eventual undermining of the negotiated Rules Agreement.

The subject of this claim alleges that the work performed by the outside contractor occurred during the period beginning April 15, 1996, through May 10, 1996. The loss of work opportunity brought about by the Carrier's violation of the Agreement occurred during this 25-day period. Therefore, it is the Board's conclusion that the appropriate remedy for this violation would be one day's pay for each day of the 25-day period of the claim at the straight-time rate of pay for work not performed. The total amount thus derived to be equally divided among the eleven named Claimants.

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 26th day of April, 2001.