Award No. 906

Docket No. SG-803

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ATCHISON, TOPEKA & SANTA FE RAILWAY SYSTEM

STATEMENT OF CLAIM: "That the Carrier violated the Signalmen's agreement by assigning work covered by such agreement to employes or other persons not covered by such agreement and claim that Harry Matticks, Arthur Wood, R. W. Mitten, Denzil Mott, W. R. Sinclair, Fred Hynson, J. H. Bradley and others affected be paid the difference between the rate received as signal helper or assistant signalman, as the case may be, and the rate of a signalman for all time worked by Western Union forces in handling signal line wire and other signal equipment in connection with curve changes on the Missouri Division of the Santa Fe System starting about June 10, 1937, and continuing until projects were completed. The adjustment in rates of pay to be made according to the seniority rights of the employes to the work mentioned."

EMPLOYES' STATEMENT OF FACTS: "An agreement is now in effect, bearing the date of February 1, 1929, between the Santa Fe Railroad System and its employes represented by the Brotherhood of Railroad Signalmen of America, governing the rates of pay and working conditions of all classes of signal department employes up to and including gang foremen. The said agreement contains provisions for the classification of such employes and provides that they shall be accorded employment in conformity with their seniority rights in the highest seniority class in which they hold such right.

"During the month of June 1937, the employes mentioned in this claim were employed as assistant signalmen or helpers, as the case may have been, even though they were recorded as holding seniority rights in the signalman's class (Class B), this condition prevailing because of force reductions and they, therefore, were compelled to accept employment in the lower class in order to continue in the service of the company.

"In June, 1937, signal line work was started on the Missouri Division in connection with the moving of joint Santa Fe—Western Union poles made necessary because of reduction in curves of track being made at a number of locations on that Division. The existing signal line wires and signal cross arms were removed from joint Santa Fe—Western Union poles, the signal circuits were temporarily run in cables and after the track curve changes were made and the joint poles relocated, the signal line wires and cross arms were reinstalled. The work of removing and replacing of the signal line wires and cross arms was assigned to and performed by Western Union employes. Western Union employes, or the work they perform, do not come within the purview of the signalmen's agreement effective February 1, 1929.

"The assignment of this work to the Western Union Telegraph Company forces was protested and the above claims filed with the Management in the

There is in existence an agreement between the parties bearing effective date of February 1, 1929.

OPINION OF BOARD: The first question is whether the disputed work here performed by Western Union employes—the handling of signal line wire and signal cross-arms—was work of the sort "generally recognized as signal work" within the meaning of the scope rule of the agreement between the parties. We conclude that it was.

The physical character of the work was precisely the same whether the handling of signal wires and signal cross-arms, etc., was performed in connection with jointly owned poles (in which case the Western Union did the work in most instances if the jobs involved relocation, but otherwise if they did not) or in connection with Carrier owned poles (in which case Signalmen did the work). The work was all the same thing, though it could be done more cheaply by the Western Union forces when they were engaged in relocating; and no other class of railroad employes was conceivably entitled to any of it after the first agreements had been made in 1922 between the Carrier and the Signalmen's and Shop Crafts' Organizations, respectively. In these circumstances the work was plainly within the Scope rule. Whether the practice of assigning some of this work to the Western Union was sufficient to constitute an implied understanding that in particular circumstances this work, though otherwise Signalmen's work, could be lifted out of the Scope rule and assigned to non-signalmen, will be discussed presently.

The next question is whether the agreement between the parties prevented the Carrier at its will from assigning portions of this work to Western Union forces. The Carrier stresses the fact that the agreement applies to "Employes" and contends that when the work is given to persons not employes there is nothing for the agreement to operate on. This contention has frequently been made in the past, and has been overruled by a series of decisions holding that agreements of the sort which come before this Board contain an implied term that, in the absence of express or mutually understood exceptions, work of the character covered by the Scope of an agreement cannot be assigned to persons not subject to the agreement. Thus, it has consistently been held that, barring such exceptions, work cannot be taken from under an agreement and "farmed out" or assigned by contract or otherwise to outside agencies. See Awards 180, 323, 360, 364, 521, 602 (Applying to this Carrier), 615 and 757 of this Division and, among others on the First Division, No. 351. The theory of these decisions has most fully been expressed in the last-named decision.

The principle stands as established on this Board, and it is fully applicable here. Award 643 of this Division is not in point because there the Depot Company, to which it was claimed that work had been farmed out, was simply operating its own property, whereas here the signal wires and signal cross-arms are the property of the Carrier and not of the Western Union; and the claim before us, as distinct from some broader assertions made by way of argument, relates only to the wires and cross-arms and not to the location or relocation of the poles.

We come now to the question, which is the real crux of the case, whether the practice of using Western Union employes to do the signal work in connection with relocations of jointly owned pole lines was such as to create an implied understanding that signal work performed under such circumstances was outside the scope of the agreement. Prior to the period of Federal control it appears that this work was handled by men in the Shop Crafts. None of it was performed by Western Union employes, because the contract with the Western Union then provided that all work should be done by the Carrier's employes, though under Western Union supervision. The fact that signal work was done by shop craftsmen is explained by the fact that there were then no agreements regulating this work. When rules were promulgated under Federal control, it is clear that the handling of

signal wires and apparatus became the work of signalmen (subject to an express exception in the case of signal maintainers devoting 50% or more of their time to linemen's work as then defined); and it became altogether their work when the agreements of 1922 were made, and the exception just noted was eliminated. Since no signal work was done by Western Union forces prior to 1922, it is only the practices since 1922 which count.

The record is clear that since 1922 signalmen repeatedly were used (1) to install signal wires and signal cross-arms on new joint poles, (2) to add more signal wires and cross-arms to old joint poles, (3) to transfer signal wires and cross-arms from Santa Fe poles to joint poles, and (4) in exceptional instances to transfer signal wires and cross-arms in connection with the relocation of joint poles. Save for these exceptional instances the transferring of signal wires and cross-arms in connection with relocation of joint poles was done by Western Union forces without protest for fifteen years; and the record indicates an impressive volume of this work.

The question is whether this absence of protest was sufficient, under the circumstances, to constitute an impliedly agreed upon exception to the scope rule. On the Carrier's side it was pointed out that revisions of the agreement were made by the parties, before the present claim arose, in 1927 and 1929 and that no question of the Western Union work was raised; the employes' reply was that these were not general revisions but that the only changes were in the rates of hourly paid employes originally prescribed in an appendix to the 1922 agreement. Granted that the employes were negligent in their treatment of this matter, they are not seeking, and could not properly seek, redress for claims anteceding the present one; and we think that under the circumstances they are entitled now to bring a stop to practices which have violated the agreement. That their failure for many years to protest was not regarded by the Carrier as having ripened into an agreed upon exception to the scope rule seems to us conclusively indicated by the instructions sent out in December, 1936, by Messrs. Gist (Lines East) and Maxson (Gulf Lines), respectively, as follows:

> "I am advised that in the past there has been followed the practice **in some cases** of having the Western Union people take care of the transferring and installing of signal wires, cross-arms, and the like. However, in the future all **signal work**, whether it be on what we call exclusive Santa Fe signal pole lines or a joint line, should be handled by our signal employes.* * * *." (Bold added)

> "It has apparently been the custom in the past, **at least on some portions of the System**, to have Western Union forces perform the work of transferring and installing wires, cross-arms, and the like, on joint pole lines, and perhaps on exclusive Santa Fe poles. Recently, the Signalmen's Organization protested this procedure and contended that such work belongs to those governed by its agreement with the Company. **The matter was referred to Mr. Gregg** and he has ruled that all such work must be performed by our own employes and **not contracted out** to the Western Union. * * * *."
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> "I do not know that we have used Western Union forces for this work on the Gulf Lines, but you should be governed by Mr. Gregg's ruling in the future." (Bold added.)

These instructions seems to us of controlling significance. In the first place, they do not make nearly as much of the past practice as the Carrier since has made. Secondly, the description of all this work as "signal work" and the reference to "contracting it out" should be weighed in the light of the Carrier's present position. Thirdly, and most important, these in-

structions emanated, as a result of a protest by the Signalmen, from Mr. Gregg, Assistant to the Vice-President, the highest official of the Carrier to whom appeals by the employes could be taken. It is scarcely conceivable that Mr. Gregg would have issued these instructions if he had believed either that the work in question was not covered by the Scope of the Agreement, or that the failure to protest in the past had created an implied agreement taking the work out of the scope. Officials of his rank, responsibility and experience do not lightly issue such instructions, and when they are issued they may properly be taken as evidence of the first importance.

The instructions were reversed on March 6, 1937, by a new set of instructions issued by the four general managers of the road, and promptly and vigorously protested by the Employes. The substance of these instructions was that where the pole line work **"is of such magnitude as to require the services of an organized telegraph gang"** (1) the work of attaching **new** signal wires and signal cross-arms to joint poles could (optionally with the Carrier) be assigned either to signal employes or to Western Union forces, and (2) the transferring or handling of **existing** signal cross-arms and wires in connection with repair or relocation of joint poles should be assigned to Western Union forces. In either event if the magnitude was not such as to require a telegraph gang, the work should be assigned to signal employes. (3) The discontinuance of Santa Fe pole lines and the transference of wires and cross-arms to joint pole lines should be signalmen's work, **except** that if it was necessary first to repair or reconstruct the joint pole line the Western Union forces could (optionally with the carrier) be assigned to do the whole job. (4) Day to day maintenance of signal wires should be assigned to signalmen, but (again optionally with the carrier) Western Union forces could be used to do work on signal cross-arms or wires incident to pole change-outs, raising wires, etc., where the assistance of local signal forces was not "required." (5) The only function specifically and under all circumstances insured to the signalmen in the case of joint poles was the making of connections to signal wires (which was done in this case), and the installation of such equipment as transformers and lightning arresters.

The Carrier now declares that this formula, with its ifs and buts and the wide choice which it contains of using signalmen or Western Union forces on signal work according to circumstances, represents not only a synthesis of past practices but the things the Carrier is supposed to do under its contracts with the Western Union. Indeed, the only explanation offered for the Gregg instructions of December 1936 is that he overlooked the contractual obligations of the Carrier to the Western Union; a mistake which the instructions of March, 1937, were designed to rectify.

We may search the Carrier's contracts with the Western Union in vain for the slightest suggestion of obligations commensurate with these instructions.

The original 1888 contract, still in force, required the Carrier to supply the labor in connection with the construction and reconstruction of the **"telegraph lines** and wires embraced in this agreement." (Bold added.) There is not a word in this contract about **signal wires,** and concededly it had no reference to them whatever. The 1921 contract (made shortly before the first agreement with the signalmen) required the Western Union to supply the labor in connection with the construction, reconstruction and extraordinary repair of the **"telegraph line** now or hereafter covered" by the 1888 contract. Again not a word about **signal wires.**

On June 20, 1922, several months **after** the agreement with the signalmen was entered into, a third contract was made, which recited the making of the 1888 contract "relating to the construction . . . . of a telegraph pole line, wires and appurtenances. . ," and added that the Carrier "desires to use for carrying their **signal wires** the poles" so covered. (Bold added.) Here is the first reference to signal wires in the series of contracts, and here

too is the first contractual grant of authority to the Carrier to put its signal wires on the jointly owned telegraph poles (permission to do which had informally been given previously). Thus, it is perfectly clear, beyond the possibility of dispute, that it is not till we get to the third contract, executed after the signalmen's agreement, that signal wires are touched upon; and then when they are touched upon, what does this third contract provide?

It specifies, in the first and second section, two items of work relating to the adaptation of joint pole lines to the accommodation of new signal wires—items which, as was conceded at the hearing, have no relation to the case before us. The contract then provides that the labor on these items may be performed by Signalmen if the services of an organized telegraph gang are not required. Certainly this implies that where a telegraph gang is required the Western Union will do the job; but this solitary implied contractual right of the Western Union (if it can be deemed valid in view of the prior agreement with the signalmen, a point we need not pass on) to do signalmen's work is limited to the two items mentioned, neither of which have the slightest connection with the case before us; and the contract goes on to say that it "relates **only** to the performance of the work **hereinbefore specifically mentioned** and shall not otherwise alter, vary or in any way affect" the old contract of 1888 (which relates only to telegraph lines and wires).

That is all there is to the claim that the Carrier is required by contract to have the Western Union forces do the signalmen's work of transferring signal wires and signal cross-arms. The claim simply evaporates upon examination of the contracts. What emerges is the perfectly understandable desire of the Carrier to use the Western Union forces on signal work whenever expense will thereby be saved.

Comparing the simplicity and restricted nature of the contractual set-up with the complicated and discretionary nature of the instructions issued in March, 1937, it is difficult to credit the assertion that these instructions were issued in order to insure compliance with the Carrier's contractual obligations to the Western Union. The employes' explanation of the instructions is that soon after the Gregg instructions were issued the Carrier embarked upon plans for large-scale curve reductions necessitated by the introduction of new, high-speed trains, and necessitating in turn the extensive relocation of joint pole-lines; and that in anticipation of this work, and to save expense, the new instructions were put forth. This explanation rests only upon surmise, but the inference is not wholly gratuitous in view of the Carrier's statement in its brief that "in 1937 the Carrier was engaged in a program of line and curve changes necessary in preparing to operate high-speed trains. Because of this program it was necessary at points in Missouri to re-locate and reconstruct pole lines."

However this may be, we think the record warrants the conclusion that the failure to protest past practices did not ripen into an agreed upon exception to the scope rule; that the work which is in question here was signalmen's work; and that under the agreement it could not properly be farmed out to persons not covered by the agreement.

The claim in this case should be restricted to the employes specifically named therein, since the correspondence shows that they were the only ones discussed in conference.

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 Carrier violated the agreement in assigning the signal work in question to Western Union Telegraph employes.

AWARD

Claim sustained with respect only to the employes specifically named therein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1939.