Award No. 4713
Docket No. SG-4426

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: (a) Claim that the Carrier violated and continues to violate the Scope of the Agreement effective February 1, 1946, between the Carrier and the Brotherhood when on or about March 1, 1947, it contracted, farmed out, assigned or otherwise allotted a portion of the work specifically enumerated in said Scope to persons not covered by said Agreement.

(b) Claim that the senior qualified Signal Department employes of the Middle Third Division Seniority District, by classes, be paid at their respective overtime rates of pay for all hours worked by the employes of the Union Switch and Signal Company while those employes performed the work of wiring of signal circuits in the relay houses and relay cases used in the construction of the centralized traffic control system between Newton and North Wichita, Kansas, and between South Junction, Wichita, and Mulvane, Kansas, located on the Middle Division Seniority District of the Signal Department.

EMPLOYES' STATEMENT OF FACTS: The signal work involved in this claim constitutes a portion of the construction and installation work of centralized traffic control systems on the Middle Division Seniority District.

The Signal Section, Association of American Railroads, defines Centralized Traffic Control as:

> "A term applied to a system of railroad operation by means of which the movement of trains over routes and through blocks on a designated section of track or tracks, is directed by signals controlled from a designated point without requiring the use of train orders and without the superiority of trains.
>
> Centralized Traffic Control is the term used to designate the complete modern system that has been developed to provide an economical means for directing the movement of trains by signal indication without the use of train order."

A comprehensive official treatise on Centralized Traffic Control is available through the medium of Chapter IV of American Railway Signaling Principles and Practices, published by the Signal Section, A.A.R., 30 Vesey Street, New York, N. Y. (For the sake of brevity, "Centralized Traffic Control" will hereafter be abbreviated to C.T.C.)

An agreement bearing effective date of February 1, 1946, is in effect between the parties to this dispute which covers all the employes of this Carrier

i. e., to levy a fine on the Carrier. There is nothing in the Railway Labor Act to give this Board any such authority. Nor is there any provision in the Agreement calling for any fines or penalties in case of violations. The penalty rate for work lost because it was given to one not entitled to it under the agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193, 3271. (Award 3277 cited in Award 3371)." (Emphasis supplied.)

See also Awards Nos. 3049, 3251, 3587, 3745 and others.

In conclusion, the Carrier reasserts that it has the fundamental right to purchase completely assembled and wired signal appurtenances and appliances, such as are involved in this dispute, and, further, that the purchase of such signal appliances and appurtenances, fully assembled and wired, from the manufacturer did not constitute the contracting or farming out of work, in violation of the current Signalmen's Agreement. The Carrier further asserts that the absence of any complaint or protest with respect to the purchase of fully assembled and wired signal appurtenances and appliances, such as is complained of in this dispute, by the Carrier from the manufacturer for use in other C.T.C. installations is conclusive evidence of the Brotherhood representatives' acceptance of and concurrence in the foregoing conclusion. The instant claim is unquestionably without merit or schedule support and should be denied in its entirety.

The Carrier is uninformed as to the arguments the Brotherhood may advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence or argument as it may conclude are necessary in reply to the Brotherhood's ex parte submission or any subsequent oral argument or briefs presented by the Brotherhood in this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: In essence the question before us whether centralized traffic control work covered by the Scope Rule may be removed from the Agreement and performed by others, not covered by the Agreement, in a factory off the property of the Carrier.

For convenience we quote from the Agreement:

"SCOPE

"This agreement governs the rates of pay, hours of service and working conditions of employes in the Signal Department, including foremen, who construct, install, maintain and/or repair signals, interlocking plants, wayside automatic train control equipment, centralized traffic control, automatic highway crossing protective devices, including all their appurtenances and appliances, or perform any other work generally recognized as signal work.

The classifications as enumerated in Article 1 include all the employes of the Signal Department performing the work referred to under the heading of 'Scope'."

The Association of American Railroads describes centralized traffic control (CTC) as a term used to designate the complete modern system that has been developed to provide an economical means for directing the movement of trains by signal indication without train orders.

Instrument or relay houses or bungalows, and instrument or relay cases, the internal fitting-up and wiring of both of which is in question here, constitute an integral part of the centralized traffic control (CTC) system. We shall refer to them as houses and cases. The houses, usually 5' x 7' and larger than the cases, are welded steel except in a few locations where excessive dampness, as near the sea, indicates concrete. The Carrier states that each house contains ninety (90) or more different kinds of instruments and materials. These instruments and materials must be so assembled or fitted-up and wired within the house or case as to make a complete unit which, when

tied into the central system and energized, becomes an integral part of the centralized traffic control system.

The assembling (fitting up) and wiring of these various instruments in the house or case may be done in a shop on the property of the Carrier, as was done with some of the cases in the instant situation and with houses earlier; in the field at the site on the property; or in a factory specially equipped for this work, as was done with the houses and cases that the complaint here deals with.

Historically, the first installation that meets the A.A.R. definition of CTC appears to have been completed in 1927 on a stretch of New York Central R.R. track in Ohio.

With respect to the introduction of CTC on the lines of the instant Carrier, it says: "Prior to 1943, the Carrier had very little centralized traffic control territory, the largest existing installation being between Dodge City and Kinsley, Kansas, a distance of 36 miles, which was placed in operation in January, 1931." There appears to be no question that all of the assembly or fitting-up and wiring in connection with that installation or others between 1931 and 1943 was done by signal employes.

In 1943, an expanded CTC program was undertaken, during which nine or ten separate installations, totalling approximately 600 miles, were completed between California and Kansas. In all of those installations, it is maintained by the Carrier, the houses and cases of the character here involved, were completely fitted-up and wired in the factory, except where concrete houses were used, in which event factory-wired shelving was supplied. These equipped shelves were then fitted into the concrete houses by signal employes. "The unprecedented extent of these installations," the Carrier says, "together with all other signal work which was being performed during the same period, made it necessary to adopt more modern methods of construction than had previously been used . . ."

It is with respect to these specific installations that the Carrier would have us believe, in the absence of complaint on the part of the Organization during that period, that the procedure had so ripened into custom and practice as to give acquiescence to a change or modification of the Agreement.

In the instant case, Newton to Mulvane, Kansas, nineteen (19) houses and sixty-one (61) cases were purchased from the factory completely fitted-up and wired, ready for connection into the system. Eighty (80) cases, sixty-seven (67) of which were used or reclaimed cases, were fitted-up and wired by signal employes. All of the houses and cases, factory-purchased and signalman-assembled-and-wired alike, were installed by signal employes, i. e., tied into the control system by them.

The Organization makes a point of the fact, not disputed in the record, that these houses and cases are "made to order" from detailed drawings or blueprints furnished by the Carrier to the manufacturer—each "tailor-made" to suit the needs of a particular spot or location in the system. Thus, even though they are shipped from the factory as complete units, it is contended, they are not standard catalogue items available for general use elsewhere on this Carrier's property or on other properties. This contention was confirmed subsequently by the Carrier when, in response to a request from the referee for clarification of this procedure, identical affidavits were submitted by two of the Carrier's operating officials explaining the procedure in detail. We quote pertinent parts:

> "(2) In connection with the installation of CTC systems, it is our practice to send the signal companies drawings prepared in the signal engineer's office showing the circuits which are to be used at different locations along the railroad involving differences in detailed apparatus for each location. On occasions there may be circuits used which will be the same for each location, but in the majority of cases the circuits vary according to actual field requirements.

(3) After the signal companies receive the circuit plans from the railroad signal department, it is necessary for the signal companies to prepare detailed wiring plans for instrument cases or for instrument houses. Upon completion of these wiring diagrams, the signal companies perform the necessary wiring, including application of all instruments completely wired in place with the single exceptions of storage batteries which are installed by the railroad field forces, and the storage batteries are furnished by the railroad. the wiring is complete ready for storage batteries.

(4) It is up to the engineers of the signal department to determine the proper type of instruments to be applied to the house or instrument case.

(5) The affiant further states that detailed wiring diagrams were furnished the officers of the carrier by the Union Switch and Signal Company for each of the instrument houses or cases involved in this docket."

Signal employes fitted-up and wired new houses and cases on the Carrier's property, in addition to the salvaged ones, that differed in no respect in construction or function, so far as the record shows, from the factory-built ones.

Clearly all of this is signal work. Performing some of the work off the property, however much the Carrier may insist it is thereby distinguished, does not change its character; it merely changes the method of doing it and the place where it is done. All of these houses and cases, whether wired internally by signalmen on the property or in the factory, perform the same function in the signal control system; all must be accurate and mechanically and electrically responsive if the system is to function effectively and safely. To include all of it within the Scope Rule is to neither add to nor subtract from the Rule; rather, it is to respect the integrity of the Rule. The Carrier's contention that assembling (fitting-up) and wiring these houses is signal work only when it is done on Carrier's property, is untenable.

The Carrier contends: "The Scope Rule is simply a general declaration of what is generally recognized as signal work." Such an interpretation would make the Rule practically meaningless and useless. We are not persuaded that that is the interpretation the parties had in mind when they adopted the Rule. This Board has held repeatedly that it is a well-established rule that a Carrier may not let out to others the performance of work embraced within an agreement with its employes unless it can be established the work requires equipment and skill which the Carrier itself cannot otherwise provide, or that it possesses unusual characteristics of magnitude or novelty. Awards Nos. 727, 2338, 3251, 3423, 3823, 4584. See also Award No. 1501 for a comprehensive discussion of the skills involved in signalmen's work under a similar Scope Rule and their responsibility for safety.

The Carrier expresses fear that if the claim here is sustained, the Organization may be encouraged to go on and demand that the assembly and internal wiring, in effect, the manufacturing, of the various small parts and appliances that go to make up the larger house and case units, be withdrawn from the factory, where they always have been manufactured, and assembled on the property by the signal employes.

The Organization denies that this is its aim. It says: "Work generally recognized as signal work does not comprehend manufactured articles which can be stored in a stockroom and be sold or dispensed by routine storeroom requisitions." In any event, a claim to manufacture these parts is not before us in spite of the fact that the Scope Rule contains these words: ". . . including all their appurtenances and appliances . . ." If the Rule needs further clarification on that technical point, we think the parties should undertake it. We shall confine our conclusions to the claim before us.

That at least one party to the Agreement is anxious for clarification or modification is indicated by the proposal by the Carrier to the Organization in October 1947 to permit "contracting with outside persons . . . for the in-

stallation of large construction project . . ." and "for purchasing factory assembled or completely wired units of signal equipment". The status of this proposal is not shown in the record, but that it was submitted to the Organization remains unrefuted.

There is no showing that the quality of workmanship of the purchased houses and cases is higher than that done by Carrier's signal employes, nor that the overall cost is less. The Carrier does contend, however, that to purchase separately the various parts (90 or more different kinds of instruments and materials) that go to make up a complete house unit, store them adequately and protect them against loss or damage, account for them and issue them, would throw a burden on it that the factory now assumes. This presupposes no relief through negotiation.

In Award No. 4653, where the question of improved methods of operation was an important consideration, as it is here, we said, "This Board is not disposed to hamper improvements . . . We think only the most efficient methods of operation . . . will meet the challange of other modes of transportation." We said, however, we do not possess authority to change agreements and recommended further collective bargaining "looking toward the preservation of the gains from the enterprise shown in developing new methods while at the same time respecting the integrity of seniority rights".

What abount practice and laches? The Organization maintains, in response to the Carrier's contention that it did not protest the purchase or use of wired houses and cases from the factory in the numerous installations from California to Kansas from 1943 until the present installation was begun in 1947, that they were war years. This explanation would be more impressive, if, during that period, when traffic demands, passenger and freight alike, were uncommonly heavy on this and all other carriers, accompanied by a widespread manpower shortage, the Organization had not brought other claims involving contract work on this Carrier's property before this Board.

Does this failure to make a prompt formal protest or claim constitute an agreement upon an exception to the Scope Rule? We think not. To hold otherwise here would tend, in our view to encourage rather than to discourage unilateral action in place of negotiation for agreement interpretation. We do not think the doctrine of laches applies as we applied it in Award No. 1289, cited here in behalf of the Carrier, and other awards similarly cited, among them Awards Nos. 72, 213, 383, 643, 1102, 1134, 1435. We think the record warrants the conclusion that the failure to protest the purchases in question did not ripen into an agreed-up exception to the Scope Rule. Award No. 906. We conclude that the work in question here was signalmen's work and that under the Agreement it could not properly be contracted out to persons not covered by the Agreement. We distinguish this conclusion from that drawn in Award No. 4712, where we dealt with an initial installation with which neither the Carrier not the signalmen had had previous experience, and from Award No. 1217, where the work developing films, was of a specialized character neither previously done nor apparently contemplated in the Agreement.

We think Award No. 4662 supports our conclusion. There, in denying Signalmen's claim, we said, "This is a stock item manufactured by the Signal Company and available to all railroads. It is not manufactured at the direction of the Carrier or to its specifications." There is no dispute that the houses and cases in the instant case were specially made to specifications furnished by the Carrier.

A total of 131 awards has been cited to us by the parties. They have been helpful. It is unnecessary, we think, to analyze all of them here or to list them. We have cited some of them. Obviously, in that number there are some conflicts, but we are persuaded our conclusions here on all points find substantial support in large numbers of them.

With respect to penalty, it is not possible to determine from the record before us which signal employes, if any, were affected by the violation, or to what extent. Only the parties, through analysis and negotiation, are likely to be able to do this. We shall, therefore, remand that phase of the case to them for such adjustment as is warranted by the facts they develop.

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

The Agreement was violated.

AWARD

Claim (a) sustained. Claim (b) remanded to the parties as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of February, 1950.

DISSENT TO AWARD 4713, DOCKET SG-4426

The primary error in Award lies in the fact that the Scope Rule contained in the agreement between the Carrier and its Signal Department employes, represented by the Brotherhood of Railroad Signalmen of America, is interpreted by the Referee so that its coverage is extended to include hours and activities of the employes of a manufacturing company, completely independent from this Carrier, engaged in the production and sale, among other things, of articles to be used in the CTC system of train operation.

The Railway Labor Act, under the authority of which the National Railroad Adjustment Board was created and exists, was legislated so as to include employes of companies which the railroads controlled. Congress amended the law so as to bring within its scope those operations which formed an integral part of railroad transportation, but which were being performed by companies not then subject to the Railway Labor Act. As Mr. Eastman told the Senate Interstate Commerce Committee, April 10, 1934, the thought was that business concerns which function so as to be an integral part of the railroad transportation system "should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves." Thus, the coverage of the Railway Labor Act was extended to protect employes of companies "directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service . . . in connection with the transportation . . . of property transported by railroad."

When Congress enacted the 1934 Railway Labor Act Amendments, it had before it the whole story of the problems and evils which needed legislative treatment, including the subject of "farming out" work. Congress dealt with these matters by enlarging the coverage of the Act to the extent shown in the preceding paragraph, and it evidenced a clear intention against drawing into its scope each and every independent contractor or manufacturing concern which might have business dealings with a carrier.

The record does not show that the Santa Fe Railway has any interest whatsoever in the Union Switch & Signal Company, a manufacturing company whose plant is in Swissvale, Pennsylvania, hundreds of miles away from the right of way of this Carrier. No one disputes the fact that this Company

is in the business of manufacturing signal equipment for any customer that wants to buy. It is common knowledge that it is not in the railroad business; nor is it in any manner, directly or indirectly, controlled by any carrier by railroad. It has its own employes, plant, and organization. Neither Santa Fe nor any other railroad has any control or supervision over those employes, their wages, services, or assignments. Finding such factors present, any other administrative agency of the government would decide that this manufacturer is an independent contractor and that its wages, rules, and working conditions had no connection with the case.

This Signal Company manufactured and furnished relay houses, bungalows, and cases, equipped with the necessary relays, appurtenances, and appliances, completely wired, with the exception of the installation of the batteries therein and the connecting up of the relays to the batteries. This equipment did not become the property of the Carrier until it was received on its line of railroad and accepted, after which it was turned over to its Signal Department employes, who constructed and installed the CTC system here involved. There was no work taken away from the employes covered by the agreement. All such employes were engaged in full-time work, and in fact some were required to work overtime.

This Award holds that this Carrier cannot purchase from a manufacturing concern assembled and wired signal appurtenances to be installed by the Carrier's signal employes. This is unwarranted interference with the rights of the Carrier in freedom of purchase of manufactured articles necessary in the economical operation of its business.

The second error is found in the statement contained in the Award reading:

> "The Organization makes a point of the fact, not disputed in the record, that these houses and cases are 'made to order' from detailed drawings or blueprints furnished by the Carrier to the manufacturer —each 'tailor-made' to suit the needs of a particular spot or location in the system. Thus, even though they are shipped from the factory as complete units, it is contended, they are not standard catalogue items available for general use elsewhere on this Carrier's property or on other properties. This contention was confirmed subsequently by the Carrier when, in response to a request from the referee for clarification of this procedure, identical affidavits were submitted by two of the Carrier's operating officials explaining the procedure in detail."

The construction of the houses and cases referred to in the above quotation was not involved in this claim. The claim involves:

> ". . . the work of wiring signal circuits in the relay houses and relay cases . . ."

Thus, we find the Referee is attempting to justify his sustaining Award, on the premise that these houses and cases were made to detailed drawings or blueprints furnished by the Carrier to the manufacturer, and to distort the true intent of the affidavits to fit this conclusion. The affidavits set forth in understandable language just what drawings were furnished by the Carrier to the Signal Company. Upon receipt of these drawings, the Signal Company engineers drew up the detailed plans for the wiring of the relay houses, bungalows, or cases, and furnished the Carrier with copies of such wiring diagrams for use and guidance in its maintenance of the relays, appliances, and appurtenances in the relay houses, bungalows, and/or cases.

The third error is that the Referee holds that Award 4662 supports his conclusion in sustaining this claim. Award 4662, denying the claim of the Signalmen, stated:

> "This is a stock item manufactured by the Signal Company and available to all railroads. It was not manufactured at the direction of the Carrier or to its specifications."

The Referee in the present dispute states:

> "There is no dispute that the houses and cases in the instant case were specially made to the specifications furnished by the Carrier."

Inasmuch as the construction of these signal houses, bungalows, and relay cases was not involved in the claim, there was no occasion for the Carrier to comment thereon. Had they been involved in the claim, on the basis stated by this Referee, his attention would have been promptly called to the fact that these houses, bungalows, and relay cases are stock items and can be purchased by any railroad from the manufacturer according to their stock number. **They are catalogue items.**

Award 4662 is the only award treating the subject of carrier's right to purchase assembled and completely wired signal appurtenances or appliances from manufacturers. The Referee ignores entirely the concluding paragraph of Award 4662, which, in our opinion, is controlling of the instant dispute and which states:

> "This Board cannot agree with the contentions of the Claimant. The purchase and delivery to the Carrier of any manufactured piece of signal equipment or device **cannot be** a violation of the scope rule. The rights of Employes under that rule are confined to work generally recognized as telegraph, telephone and signal work in connection with the installation and maintenance thereof, **and such wiring as may be necessary on the property of Carrier in the installation of such devices.** The Employes performed all the work necessary in installation and wiring of the equipment involved here after its purchase from the manufacturer." (Emphasis ours.)

The Referee also refers to several other awards of this Division in support of his sustaining the instant claim—Nos. 2338, 3251, 3423, 3823, and 1501, all of which involve work performed on the property of the Carrier by persons not covered by the agreement. Awards 727 and 4584 bear no analogy to the present dispute. The work performed by the manufacturer in this dispute was **not** done on the property of the Carrier. Award 4712, by the same Referee who handed down the award before us, also involved work performed **on the property of the Carrier** by persons not covered by the Signalmen's agreement.

Further, the Referee failed to give due consideration to another important fact. From 1943 into 1947, the Santa Fe's major CTC systems, including the one in this case, were being constructed. During this period purchases of the same kind as those in this Award were made from this same manufacturer, without any protest or claim being asserted by the Signalmen's Organization until April, 1947, that these purchases, freely and openly made during these five years, amounted to a violation of the Signalmen's agreement.

The current agreement was executed December 21, 1945, and became effective February 1, 1946. During the negotiations leading up to the execution of the current agreement, no protest or claim was asserted that the Carrier's purchases, as herein made the subject of a claim, were in violation of the Signalmen's agreement. The Employes had full knowledge during the years 1943, 1944, and 1945 that Carrier was purchasing from the manufacturer these relays, appliances, and appurtenances assembled and wired by the manufacturer in the houses, bungalows, or cases. In spite of this knowledge, the Employes reenacted the identical Scope Rule which was contained in the previous agreement and made no effort to change it.

That the Organization was alerted during this period to the policing of its own agreement cannot be denied. It was vigilant and active. This is seen by the fact that within this same period the Organization brought two disputes before this Division charging violations of its agreement. In each case it charged that signalmen's work was being contracted to outsiders who were performing the same within the right of way limits of the Carrier. The work in question was that of the construction of pole lines on the Carrier's property, as described in Awards 2983 and 4233 of this Division.

Acquiescence of this kind on the part of an Organization is regarded in law the same as an agreement by the Organization that the purchases by the Carrier, as described in this claim, were not a violation of the agreement which in no way prohibited such purchases.

This is especially true where, as here, the new agreement was entered into and made effective in the period, without protest or claim by the Organization that the Carrier's action was in violation of the existing agreement, and with a reenactment of the same provisions of the earlier agreement. The Third Division has so held in numerous awards which were called to the Referee's attention, including Award 2436 wherein this Division said:

> **"Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself.** See Awards Nos. 507, 1257 and 1397." (Emphasis ours.)

In the instant dispute, the Referee brushed these numerous awards aside and adopted a conclusion contrary to the dominant awards of the Third Division.

Finally, it is a basic error to treat the claim which this docket presents as being one which belongs in the category of "farming out work" cases. No authority is cited by the Referee which upholds his award that the purchase of this manufactured equipment, in and of itself, is forbidden by the general language of the Scope Rule in the Signalmen's agreement.

The Award contains no exact formula to guide any one; it is contrary in principle to the two awards which it attempts to reconcile, namely, Third Division Awards 4662 and 4712. This Award is a road block against modern methods of expediting improvements so as to attract more traffic to the rails and provide regular employment for railroad workers. By this Award the right of railroad management to purchase manufactured articles for its signal employes to install, maintain, and keep repaired is curtailed except on condition that the railroad, in addition to the cost of such equipment, shall pay its own signal employes, as a bonus, the equivalent hours worked by the manufacturer's employes on the equipment.

Based on the foregoing reasons, and in view of the fact that the Referee's conclusion rests on nothing more than an implication and is surrounded with doubt, we dissent from the majority opinion and findings.

/s/ C. P. Dugan
/s/ A. H. Jones
/s/ R. H. Allison
/s/ J. E. Kemp
/s/ C. C. Cook