Award No. 10560
Docket No. MW-9551

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

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

(1) The Carrier violated its Agreement with the Brotherhood of Maintenance of Way Employes when it assigned employes outside the scope thereof to perform the usual, customary and traditional work of Bridge and Building Department employes in connection with the installation of automatic crossing gates at Dana Street, Wilkes Barre, Pennsylvania;

(2) The employes holding seniority rights in the Bridge and Building Subdepartment on the Division where the work was performed each be allowed pay at their respective straight time rate for an equal proportionate share of the total man-hours consumed by the other employes in the performance of the work referred to in part one (1) of the claim.

EMPLOYES' STATEMENT OF FACTS: Maintenance of Way and Structures Department employes (Carpenters, Masons and Mason Helpers) have historically and traditionally performed the work necessary in excavating, building forms, erecting concrete foundations, back-filling and installing crossing gates on this property.

On or about September 30, 1955, Signal Department employes, who hold no seniority rights under the effective Agreement, were assigned to perform the work of installing automatic crossing gates at Dana Street, Wilkes Barre, Pa. This work consisted of the necessary excavation, building of forms, back-filling, pouring and finishing of concrete and installation of the crossing gates.

Qualified B&B Sub-department employes were available and willing to have performed this work, as in the past, had the Carrier so instructed.

The claim as set forth herein was filed, the Carrier denying the claim.

Secondly, the provisions of Section 3, First, (j) of the Railway Labor Act, reading as follows, have not been met;

> "(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

There is no question but what the Signalmen, who are performing the work which is claimed by the Maintenance of Way Employes, are "employees" who are "involved", therefore must be given "due notice of all hearings". Therefore, your Honorable Board must afford the Signalmen an opportunity to participate and present their views.

Third: should your Honorable Board decide that this case should not be dismissed for any of the reasons previously given, and assume jurisdiction, the Carrier contends that the Signalmen assigned to perform the installation of automatic crossing gates was not in violation of any effective agreements and, therefore, a sustaining award is not warranted.

The Carrier affirmatively states that all data contained herein has been presented to the employes' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: In September 1955 Signal Department employes were assigned the task of installing automatic crossing gates at Dana Street, Wilkes Barre, Pennsylvania. They did all the necessary excavation, building of forms, back-filling, pouring and finishing of concrete, and installing.

The Brotherhood of Maintenance of Way Employes claims that since its Maintenance of Way and Structures Department Carpenters, Masons and Mason Helpers have historically and traditionally performed this type of work on this property they should have been given the Dana Street assignment.

There is no dispute over the fact that Brotherhood of Maintenance of Way employes have customarily done all work concerned with installing manually or mechanically operated crossing gates. This work has been assigned exclusively to the Maintenance of Way and Structures Department.

On the other hand, the installation of automatically operated gates has consistently been assigned to Signal Department employes. Between December 1947, when the first automatic gate was installed and October 1955, when the instant claim was submitted, a total of 57 such gates were installed by men under the purview of the Brotherhood of Railroad Signalmen. The Carrier believes that this work properly belongs to the Signalmen, and not to the Brotherhood of Maintenance of Way Employes.

Brotherhood of Maintenance of Way Employes' Scope Rule provides:

"RULE 1

> "The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all subdepartments of the M. of W. and Structures Dept., represented by the Brotherhood of Maintenance of Way Employes, and such

employes shall perform all work in the M. of W. & Structures Dept. This agreement shall not apply to the following:

"1. — Track, Bridge and Building Supervisors, or other comparable Supervisory officers and those of higher rank.

"2. — Clerical and civil engineering forces.

"3. — Employes in signal, telegraph, and telephone maintenance departments."

The conflict between Brotherhood of Maintenance of Way Employes and Signalmen concerning work assignments led to discussions among the two Organizations and the Carrier at least as far back as 1952. The history of these discussions may be summarized as follows:

1. In October 1952 Engineer of Structures Minetti met with B.M.W.'s General and Local Chairmen and Signalmen's General Chairman. According to the Carrier, Brotherhood of Maintenance of Way Employes representatives (1) were agreeable to the Signal Department performing installation of maintenance of automatic gates and painting of all connected electrical apparatus, (2) insisted that Brotherhood of Maintenance of Way employes paint wooden cross arms on these gates. However, General Chairman Fox of the Signalman claimed this painting work for his men and, on November 15, 1952, wrote the Carrier that (1) the Signalmen could not concede to non-Signalmen periodically painting crossarms because such work was generally recognized as signal work throughout the country, (2) Signalmen claimed any and all work pertaining to automatic gates, including installation and maintenance.

2. On February 13, 1953 Engineer of Structures Minetti wrote Manager of Labor Relations Duffy (sending copies to representatives of the two Brotherhoods) asking Duffy to render a decision for future guidance of the departments in view of Signalmen General Chairman Fox's position as expressed in his November letter. Minetti noted that Brotherhood of Maintenance of Way Employes Local Chairman Miller had been agreeable to Signalmen handling all maintenance of automatic crossing gates with two exceptions: (1) Structure Department men should handle normal painting of gate arms (this would occur about once every four years), (2) if a gate arm was severely damaged and had to be replaced, the Structure Department should construct and paint it, although Signalmen would install it.

No reply or comment on this communcation was made by the Brotherhood of Maintenance of Way Employes General Chairman.

3. In April 1955 Brotherhood of Maintenance of Way Employes General Chairman Carl Bello, who had succeeded Miller, raised a question with Maagement concerning when and how the work of painting automatic gate installations had been given the Signalmen. Engineer of Structures Minetti replied, on April 20, 1955 that (1) he didn't know when the practice started, (2) he found the practice in existence in 1949 when he became Structures Department head, (3) no question about the matter had been raised until 1952, and none between 1953 and 1955, (4) the question involved a jurisdictional matter which should be settled between the two Organizations.

4. On May 23, 1955 Management endeavored, unsuccessfully, to resolve the question of who should paint gates, cross back signs, etc. with the General Chairman of the two Organizations.

5. On June 3, 1955 Carrier's Vice President N. N. Bailey wrote the respective Presidents of the two Organizations and asked for their assistance. Shortly thereafter Baily was advised by both men that the controversy could best be handled by representatives on the property.

6. After the Brotherhood of Maintenance of Way Employes' claim in the case at hand was submitted (in October 1956), the Carrier met with representatives of the two Organizations in an effort to reconcile their differences. This conference, held on January 30, 1957, proved unavailing and was followed, on February 6, 1957, by a lengthy letter from Signalmen Vice President Fields to Carrier's Manager of Labor Relations Duffy in which Fields noted: (1) Brotherhood of Maintenance of Way Employes was claiming work (including installation and maintenance of automatic crossing gates) which was generally recognized signal work under the Brotherhood of Railroad Signalmen's Agreement, (2) no "jurisdictional dispute" existed since the work in question had been customarily and traditionally performed by signalmen, (3) regardless of the outcome of pending disputes and claims, the Brotherhood of Railroad Signalmen did not intend relinquishing its right to the work and would file its own claims if the work were to be assigned persons not covered by the Signalmen's Agreement.

On February 9, 1957 Brotherhood of Maintenance of Way Employes General Chairman Bello wrote the Carrier to register his disagreement with Field's February 6 letter. He also noted (1) the work had traditionally and historically been performed by Brotherhood of Maintenance of Way Employes, (2) a change of method in performing work does not serve to remove such work from the Agreement, (3) the present claim — and any future violations of a like kind — would be processed to the Adjustment Board. (Three other claims were submitted and are now pending before this Board. One — Award No. 10217 — was decided December 1, 1961. Another (MW-9603) concerns a claim almost identical to the one at hand, namely, whether Carrier violated the Scope Rule by assigning men outside of the Bridge and Building Department to perform work in connection with installation of crossing gates, signs, relay houses and other signal housing structures. The fourth claim (MW-9604) alleged violation of the Scope Rule when painting work in Belmar, N. J. was assigned to men outside the B&B Department.)

At the outset Carrier raises a question regarding this Board's authority to decide the case at hand. Since two Organizations claim the work for their members, Carrier contends, there exists a jurisdictional dispute which the Board should not entertain.

It is obvious, of course, that if a "jurisdictional dispute" is defined as one in which two labor Organizations make overlapping claims, we have that kind of an issue here. But, from the standpoint of administering the Act which guides this Board, these facts are crucial: (1) the Brotherhood of Maintenance of Way Employes has a valid and binding contract with the Carriers; (2) that Brotherhood has submitted a claim alleging its contract has been violated; (3) the Brotherhood of Railroad Signalmen declined the Board's invitation to appear and file papers on documents in connection with this case.

Under the circumstances, we would be remiss in our duty were we not to decide the Brotherhood of Maintenance of Way Employes' claim of contract violation, despite the acknowledged desirability of having this type of dispute resolved directly by the two Organizations. While the Board remanded a companion case (Award 10217) to the parties on the grounds that a jurisdic-

tional dispute beween Brotherhood of Maintenance of Way Employes and Brotherhood of Railroad Signalmen could not be determined here, we note a major distinction in facts. In Award 10217 Brotherhood of Maintenance of Way Employes claimed that its Scope Rule had been violated when the task of painting signal masts between Palmerton and Jim Thorpe, Pennsylvania was assigned to Signalmen. In evaluating the evidence the Board noted: "The record reveals a direct contradiction in respect to which Organization has performed the work. . . ." In the case at hand, however, the record does not contain any such contradictions.

What, then, of the Brotherhood of Maintenance of Way Employes' claim? If the work in disupute is defined as excavation, building of forms, backfilling, pouring and finishing of concrete and installation of **automatic** crossing gates, then the record shows clearly that (1) Brotherhood of Maintenance of Way employes were never assigned such work, (2) Brotherhood of Railroad Signalmen employes were consistenly assigned such work from its inception in 1947. On this basis the Brotherhood of Maintenance of Way Employes' claim would have to be denied.

However, if the disputed work is defined in terms of crossing gates generally — not limited to automatic gates — then the record shows that only Brotherhood of Maintenance of Way men have been assigned the aforementioned tasks.

The real problem, then, is to determine which practice controls.

Had the Brotherhood of Maintenance of Way Employes' complaint about assignment of automatic gate work to Brotherhood of Railroad Signalmen men been submitted at or near the time when such work was first performed, we would most likely have sustained its claim. The long and consistent custom and practice would have been held persuasive. But we have here a situation where no real complaint was filed between December 1947 and 1956 — a period of more than eight years. Before the first complaint was submitted (MW-9603), 57 automatic gates had been erected and installed by Brotherhood of Railroad Signalmen men in about 26 different cities in two states. Clearly, Brotherhood of Maintenance of Way Employes had knowledge of these installations.

Perhaps Brotherhood of Maintenance of Way Employes representatives did not affirmatively acquiesce to the propriety of these assignments (certainly there is no written agreement on file). But the record shows: (1) At an October 1952 conference the then Local Chairman, discussing installation and maintenance of automatic crossing gates and painting of electrical apparatus, objected **only** to the Carrier's use of Signalmen to paint wooden crossarms or to construct replacement gate arms; (2) No protest concerning erection and installation of automatic crossing gates was registered in 1953 or 1954, although 21 installations were completed during those years (there were 11 in 1952); (3) while some questions were apparently raised by a new Brotherhood of Maintenance of Way Employes General Chairman in April 1955, the subject then discussed was painting, not erection or installation of crossing gates.

These facts are significant in light of the Brotherhood of Maintenance of Way Employes' Scope Rule which (1) limits contract coverage to men who "perform all work in the Maintenance of Way and Structures Dept.", and (2) specifically excludes "Employes in signal, telegraph, and telephone maintenance departments." This type of Scope Rule must be interpreted in the light of customs and practices and the parties' own conduct. Here the record

shows that for eight years a particular type of work was performed by men outside the scope of Brotherhood of Maintenance of Way Employes' contract. While there is no evidence of why the Brotherhood failed to protest, that failure, in our opinion, is sufficient to warrant the conclusion that its claim must be denied on the ground that, at least as of 1957, it did not possess exclusive jurisdiction over the disputed work.

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, find 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1962.