Award No. 10728
Docket No. MW-9603

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, 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 crossing gates, signs, relay houses and other signal housing structures;

(2) The employes holding seniority in the Bridge and Building Sub-department on the division where the work was performed each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by the other employes in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On this property, the work of installing, maintaining, and repairing mechanically operated crossing gates as well as the work of installing, maintaining and repairing cross buck signs has been traditionally and historically assigned to and performed by the Carrier's Maintenance of Way and Structures Department employes.

Commencing on or about May 1, 1955, the work of installing automatic crossing gates at Seventh, Twelfth, Thirteenth, and Sixteenth Avenues; automatic gates and flasher lights at Ninth and Tenth Avenues, and automatic flasher lights at Eighth, Seventeenth, and Eighteenth Avenues in Belmar, New Jersey, was assigned to the Carrier's Signal Department employes, who hold no seniority rights under the provisions of this Agreement.

The work consisted of the necessary excavation and backfilling, the erection of relay housing structures, construction of the necessary concrete foundations, the placing of the units or standards, cross buck signs, and etc., on the foundations, installing the gates, installation of the necessary electrical apparatus, as well as the painting of the facilities at each crossing.

The Employes contend that all of the above described work, except the installation of electrical apparatus, belongs to the employes holding seniority in the Bridge and Building Sub-department.

partments.", whereas the instant claim involves the installation of automatic crossing gates and flashers, which work does not come within the aforementioned quote of "work in the M. of W. and Structures Department", as the installation of automatic gates and flashers is under the jurisdiction of the Signal Department, a department separate and distinct from the Maintenance of Way and Structures Department.

The employes take the position that this is not a jurisdictional matter between the two Organizations. However, inasmuch as the Signalmen have taken the position this is their work, as found in Vice President Fields' letter of February 6, 1957, and the position of the Maintenance of Way Employes as evidenced by their claim that the installation of automatic crossing gates and flashers is their work, we do not know how this question can be resolved other than as a jurisdictional question, which your Honorable Board lacks authority to decide.

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 employe or employes 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 "employes" 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: About May 1, 1955 the Carrier began to install automatic gates and flasher lights at various street crossings in Belmar, New Jersey. The work, which was assigned to Signal Department Employes, consisted of excavation, backfilling, construction of concrete foundations, placing cross buck signs and associated units on the foundations, installing the gates and electrical apparatus, and painting the facilities, at each crossing.

The claim is that all of the above work, except the installation of the electrical apparatus, belongs to employes holding seniority in the Bridge and Building Sub-Department of the Brotherhood of Maintenance of Way Employes.

It is undisputed that prior to 1947 the work of installing, maintaining and repairing manually or mechanically operated crossing gates, as well as the

work of installing, maintaining and repairing cross buck signals, was considered to be the exclusive work of employes of the B&B sub-department.

It is also undisputed that since 1947, when the first automatic crossing gate was installed on the property, all work on a total of 68 such installations was performed by signalmen, without specific protest by maintenance-of-way employes.

The Employes' main contention is that the mere fact these crossing gates were to be operated by a different method does not remove the work from the Scope Rule since the contract covers the character of the work and not the method of performing it.

The Carrier raises a question about the validity of the claim since it does not identify the places or times the violation was alleged to have occurred. Also, the Carrier states that the Board does not have jurisdiction to hear the dispute because the issue to be decided is a jurisdictional dispute between two organizations. Its chief contention, however, is that practice on the property has changed the Scope Rule of the Maintenance of Way Employes.

The Carrier's complaint that the claim is vague and indefinite is generally well taken. Buckshot pleading which omits places and times of alleged violations is defective and normally should be dismissed. Since the Employes filled this void in their statement of the facts, however, we may overlook the deficiency.

Much of the argument of the parties on the property, before the Board and on brief to the referee was concerned with the question whether or not a jurisdictional dispute was involved. The Employes argued the negative of the question vigorously and contended that only a contract interpretation was involved. The Carrier argued the affirmative just as vigorously and maintained that because a jurisdictional dispute between two organizations was involved this Board had no power to settle the issue and, therefore, was without jurisdiction to hear the dispute at all.

In our view, each is right in part and each is wrong in part.

We can think of no more classic example of a jurisdictional dispute between unions than this one. It meets every test of textbook theory or practical labor-management relations. The essence of the fight is which organization shall do the work. But this does not mean that this Board is without jurisdiction to settle the claim. The maintenance-of-way employes have a contract with the Carrier. A legitimate question is raised whether this contract covers the work involved. The Board can answer this question; therefore it has jurisdiction to settle the claim. The fact that the practical effect of the Board's decision will be to settle a jurisdictional dispute between organizations does not reduce the jurisdiction of the Board to hear the claim. If the Board could not answer the question of the extent of the Scope Rule of the Maintenance of Way Employes it might be argued successfully that it had no jurisdiction in the proceeding.

Accordingly, we proceed to the merits of the claim.

The controlling question to be decided is whether or not work once reserved exclusively to one craft shall forever be reserved to that craft despite changes in apparatus used or techniques in doing the work or where new skills are required — in short, where the practice has changed.

The rule relied on by the Employes in support of their claim is the Scope Rule, reading as follows:

"Scope

The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all sub-departments 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. and 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."

Scope Rules such as this one are common in the railroad industry. In effect they say that the employes covered shall do the work which is theirs. The content of the work is determined empirically, or in more familiar terms, by reference to "history, tradition, custom and practice." In Award 10673 we examined this test to determine work content. We concluded that each of the words in the phrase had a different shade of meaning and that, under appropriate circumstances, practice could change the content of work established by history and tradition.

It should be emphasized that such change depends as much on how the work developed historically, as on the new practice. Or, to put the same thought another way, the deeper the roots of the scope rule, the more it will take in the way of new conditions to change it. Thus, some scope rules state specifically which employes are to do what work. Short of equitable estoppel, all the practice in the world will not change the employe-work relationship of this rule, But where the scope rule is more general, as here, changes in apparatus, techniques for doing the work and the need for skills of other crafts to do some of the work, begin to weigh in the balance. No yardstick can be determined in advance to specify when and under what conditions the balance will shift. In the absence of new agreement by the parties, the more revolutionary the machine, the more sophisticated the technique, the more extensive the use of different skills, the greater is the likelihood that the scope rule has been changed. We believe that the circumstances in the case before us have changed the scope rule.

The record shows that on March 3, 1952 the Vice-President and General Manager of the Carrier wrote to the General Chairmen of the Maintenance-of-Way Employes and Signalmen, jointly, asking for an understanding between the organizations on the division of work. In an attempt to incite action he concluded his letter with the words:

"* * * unless I hear from you to the contrary by March 15, 1952 I will assume that it is your mutual desire that all crossing flashers will be painted in the future by employes under the Scope of the Brotherhood of Railroad Signalmen."

The Employes here argue, correctly, that this ultimatum of the Carrier had no effect on their contract when they did not reply as demanded. Such unilateral action of the Carrier could not of itself change the terms of a contract conceived bilaterally. What is important about this correspondence, however, is that when the Carrier did not hear from the Employes it issued **instructions** that all crossing flashers would be painted by employes under the Signalmen's Agreement. Clearly, the Carrier forced the issue. But no protest was made by the Maintenance-of-Way Employes even though the signalmen did all the work on approximately 27 automatic gates between the time of the letter and the first protest in 1955.

Since Maintenance-of-Way Employes have never worked on automatic gate installations on this property and signalmen have worked on all 68 such installations, beginning with the first one in 1947, without specific protest from the Maintenance-of-Way Employes, it is fair to assume that the maintenance-of-way employes have acquiesced in a new practice. The new practice is so strong, measured in terms of its importance, notoriety and length of time, that it should be construed to have changed the Scope Rule, and we so hold.

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 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 3rd day of August 1962.