# Award No. 12534
# Docket No. TE-10483

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Louis Yagoda, Referee

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## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## THE MONONGAHELA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Monongahela Railway for payment of:

1. Time claim of Extra Block Operator Emma G. McGrady dated February 2, 1957, requesting eight (8) hours' time 3rd trick "KN" Tower, account "MU" Extra 421-423-419 north using switch at this point to run around shop car. No operator on duty.

2. Time claim of Extra Operator Emma G. McGrady dated February 12, 1957, eight (8) hours' time, 2nd trick, "KN" Tower, account "MU" Extra 412-403 north using switch at this point to set off car. No operator on duty.

3. Time claim of Extra Block Operator Emma G. McGrady dated February 13, 1957, requesting eight (8) hours' time, 2nd trick, "KN" Tower, account Engine 425 south (River Pool) using switch at this point to pick up car. No operator on duty.

4. Time claim of Extra Block Operator Emma G. McGrady dated March 9, 1957, requesting eight (8) hours' time, 3rd trick "KN" Tower, account "MU" Extra 405-423-418 north operating switch at north and "MN" Siding ("KN" Tower) to switch shop car out of train. No operator on duty.

EMPLOYES' STATEMENT OF FACTS: The Monongahela Railway is principally a coal and coke carrier operating approximately 175 miles of railroad. Its main track extends from Brownsville, Pennsylvania (some 50 miles south of Pittsburgh) southward to Fairmont, West Virginia, a distance of 70 miles. It connects with the Pennsylvania and New York Central lines at Brownsville, and with the Baltimore and Ohio at Fairmont. The control of the Monongahela is lodged with these three railroads.

"KN" Tower as referred to in the Statement of Claim is situated at the north end on "MN" Siding (Mile Post 36.0). The siding is approximately 4.2 miles long, the southern terminal being at Maidsville, West Virginia (Mile Post 40.5). The Schedule of Rates of Pay for Block Operators of the Telegraphers' Agreement between the parties, effective September 1, 1949, lists KN office as follows:

"The evidence of record does not disclose any rule in the agreement that prohibits brakemen from throwing switches in connection with their own train movements under circumstances described in this record."

## AWARD 17416

Where claimant road brakemen were required to throw switches for purpose of crossing over helper engines at intermediate points, claim for an additional day at through freight rate on premise that towermen formerly performed this service, also that they were performing service for another train, was denied.

"The evidence of record does not disclose any rule in the agreement that prohibits brakemen from throwing switches in connection with their own train movements under the circumstances described in this record."

## CONCLUSION

Carrier has shown that there is no rule in the Telegraphers' Agreement which grants to that class of employe the exclusive right to handle switches and there is no rule in any agreement in effect on this property which prohibits trainmen from handling switches in connection with the movement of their own train. Carrier has shown that the four claims that were paid, which claims are relied upon by the organization as establishing a precedent, were allowed in error by local authorities and carrier has set forth the reasons for the denial of the subsequent claims. The fact that Time Table Nos. 72 and 73 listed "KN" as a Train Order Office has no bearing on the merits of these claims as "KN" Train Order Office was abolished by General Order No. 3088 effective March 12, 1954. Carrier has shown that there is no need for the services of a block operator at that point as the work has disappeared and the records indicate that "MN" passing siding has been used on only eight occasions since "KN" Train Order Office was abolished on March 12, 1954, approximately three years prior to the instant claims, and these occasions were caused by setting off shop cars, emergencies, etc.

Carrier submits that it should not be deprived of the right of use of this passing siding when the need arises and should not be compelled to pay an unjust penalty when the switch to the siding is handled by a trainman in connection with the movement of his own train. Carrier's position is supported by awards of the National Railroad Adjustment Board.

Carrier submits that these claims are without merit, and earnestly requests that they be denied.

**OPINION OF BOARD:** For a number of years, Carrier maintained 24 hour switch service at "KN" Tower near its Maidsville Yard, with Block Operators on three shifts at 8 hours each. There was also maintained a hand-operated ground switch to a nearby passing siding which was also operated, when necessary, by these Block Operators. Sometime in 1952, the "KN" complement was reduced to a two-shift office. On October 26, 1953, it was reduced to a one-shift office. On March 12, 1954, the remaining shift was abolished and all of the facilities of the Tower, including the building itself, were removed.

The Petitioner's claim is that on four seperate occasions, the work of handling the ground switch was improperly assigned to and done by other than Block Operators covered under the Agreement between the subject parties. In consequence, time claims are made for payment of Extra Block Operator Emma G. McGrady for the periods during which the claimed work was allegedly improperly performed by others.

The basis on which the Petitioner puts forward its claim is that the work of throwing these switches belongs exclusively to the Block Operators under the Scope Rule of the Agreement. In support, it contends that this work had been done customarily and exclusively by the Block Operators; that the work was explicitly negotiated in the Agreement and comprehended in the rate of pay assigned these duties in instructions given in time-tables, including the one currently in effect when the violations occurred; and that the Carrier consistently and continuously recognized in other ways that this work belonged to its telegrapher employes, manifesting this particularly by its own statements and actions shown in a previous claim submitted to this Board, (Docket No. TE-5141, Award No. 5248) as well as by the payment of restitution in four earlier claims identical in circumstances with the present ones.

The record bears out the Petitioner's contention that employes of the claimed jurisdiction were assigned to the ground switch exclusively and continuously throughout a substantial period of time starting with the period during which "KN" Tower was in full operation, and continuing through the various periods of reduction of staff up to the point of liquidation of the Tower operation. The record further shows that even after the Tower operation had been terminated, four successive grievances were filed on behalf of Block Operators claiming that others had impermissibly been allowed to handle the ground switch. In each case, — two in August, 1954, one in January, 1956 and one in December, 1956, — the violation was acknowledged by the Carrier and eight hours' pay allowed to each of the respective eligible employes.

We agree with the Carrier that in general, this Board has recognized the work of handling ground switches as normally belonging to certain members of train operating crews when they are shifting their own trains. Among others, First Division Awards 8194, 16741, 16881, 17416. Absent any other compelling particularized circumstances, our Awards recognize such assignments.

There is however, also a well-established line of Awards affirming that where the Scope Rule is general in nature, referring to positions covered, as here, rather than a description of the work, we must look to tradition, custom and practice to determine whether said work has been embedded in the expectations and commitments of the parties and has the consequent force of agreement law. See for example, Awards 1314 and 6284.

The Carrier argues forcefully that the physical situation here, as a matter of practical reality, made the continued assignment of Block Operators to the isolated, widely-separated instances of operation of this switch, inefficient and burdensome. It points out that the switch has been used only eight times in three years. But the employer has already, in practice, argued against its own position in this respect, by having prolonged the thread of continued assignment when it voluntarily yielded successively to all four of the Organization's earlier claims for retention of jurisdiction during a period of two years after the Tower was liquidated and its crew disbanded. The Carrier states now that these concessions were in "error". We have no way

of looking behind them to determine whether this was so. But the record on its face, supports the Petitioner.

As to the possible operational awkwardness which may be created from a business and managerial point of view, the choice must be made by us in favor of upholding consistent principles well established by a line of Awards, even if at some points the results may be somewhat burdensome on either side. As we said in Award 6907:

> ". . . There are and always will be instances where one party or the other finds the bargain it has made to be a burdensome one, and sometimes even oppressive and onerous, but we are powerless to do equity as between them."

It has been here shown that the work of handling this ground switch was consistently, continuously and exclusively reserved to the claimant class of employes throughout its whole history including the more recent period when conditions were the same as those present at the time of this claim. We must rule that the rights of preference of the subject employes to this work have been established and must now be sustained.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May 1964.

## DISSENT TO AWARD NO. 12534

## DOCKET NO. TE-10483

Award 12534 is correct in recognizing that there is "a well-established line of Awards affirming that where the Scope Rule is general in nature, referring to positions covered, as here, rather than a description of the work, we must look to tradition, custom and practice to determine whether said work has been embedded in the expectations and commitments of the parties and has the consequent force of agreement law," but it is in palpable error in departing from that principle and from another well-established principle followed in early Awards 1314 and 6284, which are cited by Award 12534 in support thereof notwithstanding that these two early Awards involved clerical agreements on other Carriers. For illustration:

Award 1314 recognized that it is proper to abolish a position and assign the remaining duties thereof to a position outside the scope of the agreement provided such duties are "normal and incident to it".

Award 6284 held as follows:

> "Clerical work, in its technical sense, performed by an employe not covered by the Clerks' Agreement as incident to the duties of his regular assignment is not necessarily within the Clerks' Agreement."

Applied to the instant case, even these early Awards required denial of the claim herein because Award 12534 itself states:

> "We agree with the Carrier that in general, this Board has recognized the work of handling ground switches as normally belonging to certain members of train operating crews when they are shifting their own trains."

Furthermore, Petitioner neither denied Carrier's contention herein "that the handling of switches is not now and never has been assigned exclusively to employes of any craft", nor has it contended or shown that the system-wide practice on this property confers exclusive rights on telegraphers to the work of throwing switches.

Numerous Awards were cited to the Referee showing that this Division has held most consistently down through the years and up to the present time that, inasmuch as agreements are system wide and not sectional, the system-wide tradition, custom and practice is controlling, and that, where work may be performed by more than one craft, performance by one does not confer exclusive rights thereto. One such Award is 5248, involving the same parties as in the instant case. Award 12534 identifies Award 5248, supra, as also having been cited by the Petitioner herein. In that previous Award, this Division denied claims of block operators at the same tower as herein covering the handling of train orders, holding as follows:

> "The record shows that on this property train orders have been handled by employes not under the Telegraphers' Agreement."

For the foregoing reasons we dissent. Obviously, what is done at one isolated point cannot be controlling in interpreting the provisions of a system-wide agreement, concerning which Petitioner itself admitted as follows:

> "* * * The applicable Agreement between the Monongahela Railway and the Block Operators, represented by the Order of Railroad Telegraphers, does not enumerate or define the duties of the block operators, * * *."

> "* * * The Scope Rule of the Agreement does not propose to spell out in so many words the work which is embraced within the terms of the Agreement. The rule here is within the category of those 'general in character', where tradition, custom and practice define the work encompassed by the agreement. * * *"

**W. H. Castle**
**D. S. Dugan**
**P. C. Carter**
**T. F. Strunck**
**G. C. White**