Award No. 13289

Docket No. SG-12772

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Baltimore and Ohio Railroad Company:

On behalf of Signal Maintainer H. A. Rickey for eight (8) hours at time and one-half rate account B&B Employes installing train order board at Gilmer, West Virginia.

EMPLOYES' STATEMENT OF FACTS: On March 2, 1960, the Carrier assigned its B&B (Bridge & Building) employes to install a train order board and support posts at Gilmer, West Virginia, in connection with converting this from an agency to an agency-train order station.

Inasmuch as B&B employes hold no seniority or other rights under the Signalmen's Agreement, Mr. H. A. Rickey, Local Chairman, presented a claim, dated March 11, 1960, to Mr. C. G. Crawford, Division Engineer. The claim was on behalf of Signal Maintainer H. A. Rickey, on the basis train order boards on the Monongah Division have been installed and maintained by signal forces, and are a part of the signal system. On March 14, 1960, Division Engineer Crawford denied the claim, asserting it has always been the practice that train order boards be installed by B&B forces.

The claim was subsequently discussed in conference by Local Chairman Rickey and Division Engineer Crawford, and the following Memorandum of Conference was prepared:

"Memorandum of Conference held at Grafton, W. Va., March 24, 1960

Between

Mr. C. G. Crawford, Division Engineer and Mr. H. A. Rickey, Local Chairman Brotherhood of Railway Signalmen.

Present at Conference

Mr. C. G. Crawford, Divn. Engr., and Mr. H. A. Rickey, Local Chairman B.R.S.

Railroad Signalmen of America of this dispute and gave them notice of all hearings in connection therewith."

In recent Award 2785 (Second Division) (System Federation No. 30 v. B&O) (Referee Ferguson) it was held in part:

"If notice is given in such cases, the involved party notified, would in effect be requested to appear in a dispute in which he was involved, before a division other than the one designated by the Act as having jurisdiction over his craft.

Even in the fact of this dilemma, there has been a growing body of awards and decisions by U. S. Circuit Courts of Appeal holding that notice should be given to those involved. In keeping with the duty imposed by the Act and as decreed by the courts we hold that this Division 'of the adjustment board shall give due notice of all hearings to the employe or employes * * * involved.'"

In addition the Carrier directs attention to Third Division Awards 7975, 8022, 8023, and 8050 on this subject.

In Award 8050 (BRS v. AT&SF) this Division held as follows:

"OPINION OF BOARD: Before proceeding to consider this case on its merits we have a procedural and jurisdictional question. Every court or administrative agency, such as this Board, must first observe its jurisdiction and it should not purport to decide matters outside its jurisdiction. If it does decide such matters without proper jurisdiction its decision is invalid and may be set aside for naught by the proper court.

The Carrier members of the Board contend that a third party is involved and that under Section 3 First (j) of the Railway Labor Act (45 U S C 153, First (j)) this Board has no jurisdiction to proceed in this matter unless and until the third party is given due notice of hearing in accordance with the section. At an earlier stage in these proceedings the Carrier members of this Board moved that notice be given to the third party, but the motion failed for want of a majority. They now reassert the contention before this Referee sitting as a member of the Division.

It is self evident that if we sustain the contention of the Signalmen in this case on its merits that work now being performed by Communications Department Employes, represented by the International Brotherhood of Electrical Workers, will in the future be lost by the latter craft. These employes have not written any letters or filed any application or motion to intervene in this matter. To complicate matters further they are under the jurisdiction of another Division of this Board.

Our first question is, 'Are the Communications Department Employes represented by the I.B.E.W. "involved" as the terms is used in the Act?'

The Act does not refer to 'interested parties' or 'necessary parties' and it makes no provision for intervention of parties as do all codes of Federal and state procedure and no specific provisions for settling the claims of all parties in one proceeding.

It does not follow that every time some third party is mentioned that a third party is involved but our Federal Courts of Appeal have discussed the matter many times and they are in substantial agreement that employes sought to be ousted from their jobs have a right to notice and an opportunity of participating in the hearing (M K & T R Co v Brotherhood of Ry & S S Clerks, 188 F2d 302 (C A Ill 1951)); that every person who may be adversely affected by an order of the Railroad Adjustment Board should be given reasonable notice (Hunter v A T & S F Ry Co, 188 F2d 294 (C A Ill 1951), certiorari denied 342 U S 819, 72 S Ct 36, 99 L Ed 619, rehearing denied 342 U S 889, 72 S Ct 172, 96 L Ed 667.); that employes sought to be ousted have a vital interest in the proceedings and a right to notice and an opportunity to participate in the hearing before the Board, and without such notice the award is void. (Order of R R Telegraphers v New Orleans, T & M Ry Co. 229 F2d 59 (CA Mo 1956) certiorari denied 350 U S 997, 76 S Ct 548, 100 L Ed 861).

The Supreme Court of the United States has never held anything clearly to the contrary and these propositions stand as valid principles of law as of the present time.

In the Whitehouse case (Ill Central R Co v Whitehouse, 212 F2d 22 (C A Ill 1954) reversed in 349 U S 366, 75 S Ct 845, 99 L Ed 1155, modification denied 350 U S 811, 76 S Ct 37, 100 L Ed 727), on which the labor members rely, Justice Frankfurther, speaking for a majority of the U S Supreme Court, made some observation in regard to the problems involved in the third party notice but decided none of them. He did make some comments that justified some doubts. However, his opinion and decision disposed of the matter on the narrow ground that the Carrier took its case to court prematurely, before exhausting its administrative remedy. Nothing more was decided.

Since that time the Eighth Circuit in 1956 (Telegraphers v New Orleans case cited above) has reiterated the principles of law stated above and the Supreme Court has refused to review this decision by way of certiorari. It therefore stands as law on the subject.

We concur in Award 8022 by Guthrie as a correct analysis of the present state of the law.

We conclude that there is a genuine third party interest and a third party 'involved' in this case and that this Board is without jurisdiction to proceed further without first giving notice as required by Section 3 First (j) of the Railway Labor Act and that any award without it would be void and enjoinable.

Spokesman for the labor members has requested the Referee, in case he should find that a third party is to be notified, to state just what may be accomplished by the intervention of a third party who works under a different contract and who is subject to the jurisdiction of another Division of this Board.

The request is a fair one. It points up some of the practical problems involved and perhaps some deficiencies of the Act. Admittedly this Board cannot modify or renegotiate the two contracts even if they do overlap. It is possible for both contracts to cover the

same work. If so it will not be the first time a gentleman betrothed to one lady has found himself unable to fulfill his rash commitments to another. Perhaps this Division cannot give a binding interpretation of the third party contract. Perhaps congress is in a better position than we to come up with an answer to these practical problems.

The Labor Member's question can best be answered though by quoting from the latest court opinion, that of the Eight Circuit in Telegraphers v New Orleans (cited above);

> "'Obviously it is desirable to settle controversies such as these involving so-called "overlapping contracts" on the basis of the existing contracts wherever possible instead of compelling resort to the machinery provided by Sec. 6 for changing agreements. Of course this may not always be possible, but it is certainly much more likely to result if both parties to the dispute are brought before the Board with their respective agreements and each is considered in the light of the other, together with the usage, practice and customs of the industry, or of the particular carrier.'"

Without prejudice to any statement made hereinabove or petition contained therein the Carrier desires to respond fully to the Employes' notice of intent covering this dispute.

CARRIER'S STATEMENT ON THE CASE: It is the position of the Carrier in this case that the wage claim made here is without merit. The Carrier intends to demonstrate that there has been no violation of the Signalmen's Agreement on this property in this case. The wage claim is not valid.

The train order board in question is described:

The train order board at Gilmer locates on the Coal & Coke Branch of the Monongah Division. The surrounding area consists of a series of spur tracks to mines and coal tipples. Gilmer is 5 miles from Burnsville Junction, West Virginia. Gilmer is a train order station where there is an AOB (Agent Block Operator). Under time table instruction the train order station at Gilmer is open daily 8:00 A. M. to 5:00 P. M except Saturday and Sunday. There are no fixed signals at Gilmer and eastward third class trains may register with Form "C" during hours the operator is on duty.

The train order board at Gilmer is installed on a wooden post. It has no electric illumination. By night it is lighted by a lantern when the train order board is in effect.

A recent photograph of the train order board at Gilmer shows:
(photograph not reproduced)

The Scope Rule of the Signalmen's Agreement is examined:

The "Scope Rule" appearing in the agreement between this Carrier and its employes represented by the Brotherhood of Railroad Signalmen of America, effective October 1, 1951, reads in full as follows:

"SCOPE

This Agreement governs the rates of pay, hours of service and working conditions of all employes classified in Article I of this

Agreement, either in the shop or in the field, engaged in the work of construction, installation, inspecting, testing, maintenance, repair and painting of:

(a) Signals including electric locks, relays and all other apparatus considered as a part of the signal system, excluding signal bridges and cantilevers.

(b) Interlocking systems, excluding the tower structure.

(c) Highway crossing protection controlled or actuated by track or signal circuits.

(d) 1. Signal Department conduits, wires and cables, overhead or underground.

Note: See Mediation Agreement of May 5, 1942, and agreed interpretation thereto appearing on pages 52 and 53 with respect to reconstruction and/or renewal of poles used jointly by Railroad and Western Union.

2. Power lines installed primarily for signal purposes. Where power is supplied from signal power lines for other purposes Signalmen's work will include line taps, transformers and service line up to and including a fused switch adjacent to said power line. Where power is supplied from other sources for Signal Department purposes, Signalmen's work will exclude work from such source to and including a fused switch or approved receptacle at designated point of delivery. Signalmen's work will include all work from such point of delivery to and including signal facilities.

(e) Wayside equipment necessary for cab signal, train stop and train control systems.

(f)

(g) Centralized traffic control systems.

(h) Spring switches where point locked or signal protected, excluding work normally performed by track forces.

(i) Bonding of all track except in electrical propulsion territory.

(j) All other work generally recognized as signal work.

No employes other than those classified herein will be required or permitted, except in an emergency, to perform any of the signal work described herein except that signal supervisory and signal engineering forces will continue in their supervisory capacity to make such tests and inspections of all signal apparatus and circuits as may be necessary to insure that the work is installed correctly and properly maintained. The term "emergency" as used herein is understood to mean the period of time between the discovery of a condition requiring prompt action and the time an employe covered by this Agreement can be made available."

The claim made here arises on a principal contention that in some fashion or other the "Scope Rule" of the Signalmen's Agreement has been violated. The work in question dealt with the installation of the train order board on a wooden post; yet nowhere in the Scope Rule of the Signalmen's Agreement does there appear any reference to such a train order board. Although it is perhaps as negative definition, a "train order board" has already been defined before this labor tribunal as being neither "an electrical apparatus" nor a "signal appurtenance." Accordingly, it cannot be described as a "signal" or as part of the signal system. Certainly, it is not the kind of "wayside equipment" that is described in the Scope Rule.

It is quite plain that this installation did not fit the category of "highway crossing protection", Signal Department "circuits, wires and cables", "power lines installed primarily for signal purposes", "centralized traffic control systems", "spring switches", or "bonding of all track".

The Agreement between this Carrier and its employes represented by the BMWE effective April 1, 1951, plainly requires the Carrier to use its B&B forces in the construction of railroad structures. The existence of this requirement was recognized when the Signalmen's Agreement effective October 1, 1951 was negotiated. The coverage of the Signalmen's Agreement excludes in paragraphs (a) and (b) of the Scope Rule any and all structures that might otherwise be considered as part of a signal system.

In the face of the specific exceptions appearing in the Scope Rule of the Signalmen's Agreement it follows that the work composing the basis of complaint is comprehended neither by paragraphs (a), (b), (c), (d), (e), (g), (h) nor (i) of the Scope Rule.

One question left remaining in this case is as to whether or not this work is covered by paragraph (j) i.e. "* * * all other work generally recognized as signal work. * * *."

The proper answer to this question is in the negative. The Carrier submits as follows:

There is no definite practice on the B&O system assigning the work of erecting wooden train order boards to signalmen or their helpers:

It has already been ruled before this Division that where a scope rule makes no express reference to work in question, unless an appellant organization can show a definite practice assigning all such work to employes of that craft, then such organization cannot assert exclusive or solitary jurisdiction over that work. For example, in the instant case there is often a lack of uniformity as to the craft or class erecting wooden train order boards even on particular divisions. The prevailing practice with respect to the erection of train order boards and supporting posts on this system at the time this claim arose was for B&B forces to handle such work on six of the then operating divisions while signalmen handled it on the other seven. On this record it certainly cannot be said that work associated with erecting wooden train order boards and posts was work that by custom and practice had been generally recognized as signal work on the railroad. On the contrary, the opposite conclusion is true. With such a diversity the Signalmen's Committee on this property stands in no position to argue the exclusive or solitary reservation of this kind of work to its employes. This same situation appeared in Award No. 8001 (BRS v. Pennsylvania Railroad System) (Referee Bailer) where claim was denied with the following holding in part:

"The weight of the evidence impels the conclusion that on the system as a whole it has been the past practice for the disputed work to be done by employes of both the Telegraph and Signal Department and the Maintenance of Way Bridge and Building Department. Since the subject Agreement does not expressly confer jurisdiction over the disputed work to T&S employes, and in view of the practice as here found, it follows that the petitioning Organization does not have exclusive jurisdiction over said work. A denial award is warranted."

On the Monongah Division, locale of the the instant claim, the practice decidedly favored giving the work of erecting train order boards to B&B forces:

When this case first originated on the property the Carrier's Division Engineer stated that both the division signal supervisor and the division master carpenter, both of whom had worked on the Monongah Division for many years, had informed him that it had always been the practice for B&B forces to install train order boards. On the other hand, the claimant in this case, Signal Maintainer Rickey, had submitted to his organization copies of his time slips for January 29, March 10, May 5 and July 6, 1954, October 24, 1956, and September 16, 1957, claiming from 2 to 8½ hours, each, because of repairing, renewing, taking down or painting train order signals or train order boards, or both, at Walkersville, Frenchton, Camden-on-Gauley, Alexander, WN Tower and locations not specified on his time slip. In rebuttal to these time slips, the signal supervisor, who was working on the division at the time, advised that, if the train order boards were repaired by the claimant on those occasions, it was done of his own accord and without any instructions from the signal supervisor.

For example, in a statement dated at Grafton, W. Va., May 26, 1961, Signal Supervisor Tucker, submits the following:

"Grafton, W. Va., May 26, 1961

TO WHOM IT MAY CONCERN:

I have been an employe in the Signal Department since 1936. Since I have been so employed it has always been the practice for employes in the B&B Department to install train order boards, as was done at Gilmer, W. Va.

/s/ E. B. Tucker
E. B. Tucker
Signal Supervisor."

In addition, Master Carpenter Gillespie submits the following statement under that same date:

"Grafton, W. Va., May 26, 1961

TO WHOM IT MAY CONCERN:

I have been employed in the B&B Department since December 1919. During the time that I have been so employed it has always been the practice for B&B forces to install train order boards. This is the reason that a carpenter was used in making the installation at Gilmer, W. Va.

/s/ W. G. Gillespie
W. G. Gillespie
Master Carpenter."

Summarily put, two experienced supervisors on the Monongah Division, with many years service, going back to December 1919, state without qualification that it has always been the practice for B&B employes to install train order boards on the Monongah Division. Master Carpenter Gillespie assigned the work done by the B&B forces at Gilmer in installing the train order board as harmonious and consistent with the standing practice on that division. His comments are echoed by the signal supervisor. Suffice to say, on the Monongah Division, locale of the instant dispute, the practice decidedly favors performance of the work of erecting train order boards by B&B forces.

It has been authoritatively ruled before this Board that a train order is not an "electrical apparatus" and certainly not a "signal appurtenance.

There is, perhaps, no positive definition of a "train order board" before this tribunal. Nonetheless, there is clearly an authoritative ruling before this Board that a train order board is neither "an electrical apparatus" nor "signal appurtenance."

In Award 7789 (BMWE v. D&H) (Referee Smith) the Maintenance of Way organization on the property of the Delaware & Hudson Railroad, complained because that Carrier had assigned employes in its Signal Department on its Pennsylvania Division to paint certain train order boards. The Maintenance of Way organization contended that this was properly the work of the Carrier's B&B forces. In reply to the organization's position that Carrier contended that "It has always been the practice on this carrier for signalmen to perform incidental painting in connection with maintenance of signal apparatus." In this case that Carrier was not successful in its presentation. The claim in this case was sustained, the total effect of the holding concluding that train order boards were neither electrical apparatus nor signal appurtenances.

The pertinent part of "OPINION OF BOARD" in Award 7789 read as follows:

> "The confronting claim is made in behalf of the four senior furloughed painters covered by the Maintenance of Way Agreement, therein alleging that they should have been recalled to perform certain painting work between August 8 and 31, 1949, that was performed by employees not covered by said Agreement.
>
> It was asserted that the painting work in question inured to the employes in question inasmuch as they are classified as painters under rule 36(a) and as such are entitled to perform, within the meaning of the Scope Rule, the work here at issue. It was further contended that prior Awards 4845 and 4846 involving the parties hereto as well as this Carrier's position relative to this issue in Award 5599 clearly support the contention advanced.
>
> The Respondent took the position that the work here involved was incidental to the maintenance of signal apparatus and as such did not come within the Scope Rule of the Maintenance of Way Agreement, which specifically exempts signal employes. It was asserted that this work had always been performed by Signal Department thus creating both a past custom and practice as well as an interpretation of the Scope Rule. * * *

The painting in question took place at different locations over 34 miles of territory, and between the dates in question was performed 4 hours daily for a total of 80 hours. Painting was done on signal poles, order boards, concrete foundations, and possibly telephone boxes. In connection with telephone boxes it is noted that they are not mentioned in the record, the only reference thereto apparing in the claim. We are of the opinion that the sole issue that requires determination here is whether or not the work in question was incidental to the maintenance of signal apparatus. The Carrier here concedes that all 'general' or 'programmed' painting, even including signals and signal apparatus belongs to the Maintenance of Way forces. The Carrier conceded in its submissions to Award 5599 and the painting of buildings used for housing signal apparatus likewise belonged to Maintenance of Way forces. This was in effect what this Board held in part in Award 4845. This Award went futher in distinguishing the type of work (including painting) that pertained to the installation and maintenance of electrical appurtenances, which was not properly maintenance of Way work. While Award 4845, in addition to being concerned with housing for signal apparatus, was also concerned with short arm gates. Award 4846 had at issue the repair and maintenance of crossing gates with a distinction between those which were lighted and those which were not.

We are of the opinion that the question of whether or not this work was 'general' or "programmed' work while material is not controlling. We think the question at issue here, in light of Award 4845 is whether or not signal poles, concrete foundations, order boards and perhaps telephone boxes are electrical apparatus or appurtenances. Certainly none of these objects are electrical apparatus, and only a signal pole could conceivably be considered as a signal appurtenance.

We think this distinction was made in Awards 4845 and 4846 and we see no reason for departing therefrom here. A sustaining award is warranted." (Emphasis ours).

Observe that the holding in Award 7789 has plainly taken train order boards out from under the category of either "electrical apparatus" or "signal appurtenance." There is therefore a flat holding before this labor tribunal that since a "train order board" is not an "electrical apparatus" or a "signal appurtenance," work associated with erecting or maintaining such an object does not come within the scope or meaning of the rule applying to signalmen or to their helpers.

The work done here at Gilmer properly fell to B&B forces. There is no valid claim coming from employes under the scope of the Signalmen's Agreement. Carrier submits the claim in this case is wholly without merit and should be denied. Carrier respectfully requests that this Division should so rule and that the claim in its entirety be denied.

OPINION OF THE BOARD: The issue in this case is whether the installation of a train order board by employes other than those covered by the Brotherhood's Agreement violates that agreement.

Brotherhood contends that train order boards are a part of the signal system and that therefore the work of installing them is reserved exclusively to them by the explicit terms of the Scope Rule. While the Scope Rule is explicit in covering the installation of signals and all other apparatus con-

sidered as part of the signal system, it does not explicitly name train order boards, nor does it define signals or apparatus considered as part of the signal system so as to include or to exclude train order boards.

Brotherhood submits a quotation from a booklet issued by the Association of American Railroads: "The purpose of railroad signals is the transmitting of information to employes in charge of the operation of trains." Brotherhood argues that since train order boards are used for this purpose, they are signals and part of the signal system. This conversion of the quoted statement of purpose into a definition of work belonging exclusively to the Brotherhood can hardly be said to be such an inescapable conclusion imposed by the iron laws of logic that we might reasonably equate it to the explicit naming of train order boards in the Scope Rule.

Since the Scope Rule is silent about train order boards, the words "Signals * * * and all other apparatus considered as part of the signal system * * *" may be construed either to include or not to include train order boards. Where, as here, the language of a rule is ambiguous, clarification as to intent may sometimes be found in the history, custom or practice of the parties in agreeing to or in appling the rule. Brotherhood has not introduced into this record evidence of history, custom or a consistent practice adequate to support its reading the Scope Rule. Evidence in the record does prove however, that as a practice of long standing, this Carrier regularly assigned the work of installing and maintaining train order boards to employes not covered by the Brotherhood's Agreement as well as to those who were covered by the Brotherhood's Agreement.

Thus, on the basis of the evidence in this record, we cannot find that the installation of the train order board in question by employes other than those covered by the Brotherhood's Agreement violated the Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing theron, 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 10th day of February 1965.