Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32058
Docket No. SG-32192
97-3-94-3-617

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka and Santa Fe Railway (ATSF):

Claim on behalf of D.J. Season for payment of 40 hours at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly Rules 1 and 2, when it used an outside contractor to wire and install components for hot box detector equipment at Mile Post 132.4 at Edelstein, Illinois, and deprived the Claimant of the opportunity to perform this covered work. Carrier's File No. 94-14-4. General Chairman's File No. 01-1187. BRS File Case No. 9522-ATSF."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant in this case was a regularly-assigned Signalman on Signal Gang #31 at Chillicothe, Illinois. The claim which was presented on his behalf and which formed the basis of this dispute alleged a violation of Rules 1 and 2 of the negotiated agreement because of the fact that Carrier purchased from a private vendor a pre-wired hot box detector device. After the device as purchased from the private vendor was delivered to Carrier's property, it was installed at the designated work site by Carrier's Signal Department employees. There is no disagreement on these basic facts.

The Agreement rules here in dispute provide, in pertinent part, as follows:

"RULE 1 - SCOPE

(a) This Agreement governs the rates of pay, hours of service and working conditions of employees in the Signal Department, including foremen, who construct, install, maintain and/or repair signals, interlocking plants, wayside automatic train control equipment, traffic control systems (TCS), automatic highway crossing warning devices, including all their appurtenances and appliances; also electrically controlled car retarder devices, train order signals, electric signal and switch lamps, switch heaters connected to or through signal systems, hot box, high water, dragging equipment and slide detectors connected to or through signal systems; static protection installations, wayside automatic train stop (ATS), or perform any other work generally recognized as signal work performed in the field or signal shops.

* * * * *

(d) The classifications as enumerated in Rule 2 include all the employes of the Signal Department performing the work referred to under *the heading of 'Scope.'*

NOTE: Employes assigned to positions described in the Classification Rule of the Agreement will be trained and assigned, subject to qualification rules in the Agreement, to install, maintain and/or repair the systems and devices, including their appurtenances and appliances, set forth in the Scope Rule, which are introduced in the future."

"RULE 2 - CLASSIFICATION

(m) SIGNALMAN: A qualified employee assigned to a gang to perform work pertaining to the construction and maintenance of signal apparatus and appurtenances used in conjunction therewith. Such an employee may be used to assist Signal Maintainers in the performance of their work. (A Signalman shall not be used to supplant a Signal Maintainer.)"

The Board has examined and considered the arguments and citations advanced by the parties. The only conclusion which can be reached in this dispute was actually reached in 1950 when Referee Judge Edward F. Carter, sitting with the Third Division, authored Award 5044. The conclusions reached in Third Division Award 5044 - including the distinction which was made relative to Award 4713 which is again relied upon the by Organization in this case - are not only equally applicable in this particular case but also have been re-examined and reinforced by subsequent Awards of this Division. For example, see Third Division Awards 7965, 11438, 12553, 18814, 19645, 20467, 28195, 28648 and 28879 among others. It is fitting here to re-state the principles which have been with us since the adoption of Award 5044. There it was determined:

"The intent of the parties must be determined before the rule can be correctly applied. The wiring of relay houses by a manufacturer is not specifically spelled out as work within the Signalmen's Agreement. The Organization points out that the electrical appliances used were stock items that could be purchased and used indiscriminately for the purposes for which made. It is the integration of the various appliances and devices used, the method of wiring, and their regulation and adjustment within their functional range which produces the result sought. It seems to us that a Carrier, in the exercise of its managerial judgment could properly decide to purchase the engineering skill of the seller of railroad equipment, the benefits of its research and experience, the expertness of seller's employes, and a guarantee that it would operate efficiently and economically. Award 4712. To deprive a Carrier of this fundamental right of management is not contemplated by the rule. On the other hand, if Carrier chose to purchase the component parts of an intricate electrical system and have it assembled on the property, for reasons of economy or otherwise, it would clearly be the work of signalmen to perform in the

absence of specific agreement to the contrary. The purchase of equipment is a function of management. It may purchase by item or in quantity; it may purchase with or without warranties as to its functional operation; it may purchase by stock items or by having it built to order; it may purchase equipment wholly or partially assembled; all without infringing upon the work contracted to signalmen. When material or equipment is purchased and delivered to the property of the Carrier, any construction, installation, maintenance and repair growing out of its use on the property of the Carrier within the scope of the generally recognized work of a craft or of work specifically assigned to such craft, it is work which belongs to the employes of that craft.

There is no contracting or farming out of work belonging to these claimants in the present case. The equipment was never purchased and delivered on the property of the Carrier for use until after the work claimed had been performed at the factory. The rights of employes never attached until the Carrier acquired possession of it. We quite agree that if the equipment has been delivered to the Carrier in such a manner that the rights of claimants under the scope rule attached, that a contracting of the wiring and assembly of the unit would then be a farming out of work belonging to these employes. We fail to see, however, that a purchase of new equipment in whatever form it may exist, can constitute a farming out of work under the Agreement for the fundamental reasons that it never had been under the Agreement. That which was never within the scope of an agreement cannot be farmed out.

This construction of the rule is consistent with past practice on this Carrier. The record disclosed a number of instances where factory equipped instrument cases have been purchased without complaint on the part of the Organization. It is a clear indication that the Organization itself did not construe the Agreement to include the assembling and wiring of instrument cases by a manufacturer as the work of signalmen. As we have previously stated:

> 'The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the

> parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made.' Award 2436.

We conclude therefore that the contract as interpreted by the parties on this Carrier adds support to the interpretation that we have herein announced.

The Carrier cites Award 4662 in support of its position. In that case, the Board said:

> '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.'

The Organization argues that this award is distinguishable on the facts and applicable rules. We think it is clearly in point on principle and we adhere to what the Board there said.

The Organization argues just as persistently that Award 4713 controls the result in the present case. We think the same principle is involved in that case as in Award 4662. There appears to be a divergence of views in Awards 4662 and 4713. In the former it was held that the purchase and delivery of any manufactured piece of signal equipment or device cannot be a violation of the scope rule of the Signalmen's Agreement. In the latter case, the holding is directly to the contrary. The writer of this Opinion is in accord with Award 4662. It is the correct interpretation to be applied.

The contentions advanced by the Organization amount to an encroachment upon the prerogatives of management in one of its most important functions. Management should not be limited in its managerial prerogatives by placing a strained construction upon a rule that was never mutually intended by the parties. Such limitations upon the primary functions of management can be obtained only by negotiation, a function in which this Board can take no part.

For the reasons stated, we are of the opinion that there was no violation of the Agreement and that a denial award is required."

One of the most recent decisions on this same issue is found in Public Law Board No. 5616, Award 18 which held as follows:

"In the final analysis, what the Organization is contending is that Carrier is in violation of the Scope Rule of the Agreement when it purchased pre-wired bungalows from an outside vendor and installed them on Company property. That argument is not persuasive. While the Signalmen clearly, by Agreement, have all of the rights proposed by the Organization, once equipment or supplies reach the property, the Scope Rule cannot be extended to restrict Carrier's right to purchase equipment from outside companies.

This issue has arisen many times on the past on this Railroad, as well as on many others. Innumerable arbitration awards on the subject have been rendered. The more reasoned of those awards concludes that Carriers do have the right to purchase pre-wired signal devices from outside vendors. If the parties had agreed at any time in the past that the purchase of pre-wired signal equipment was a violation of the Scope Rule, their understanding could have easily been so stated in the Agreement. The fact that it is not so stated leads one to the conclusion that the parties never intended that the Scope Rule would be extended to mean pre-wired equipment could not be purchased."

The Board in this case concurs with the plethora of decisions which have been rendered on this issue. The claim as here presented is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of June 1997.