

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Delaware and Hudson Railway Company

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

(1) The Carrier violated the Agreement when it assigned a Signal Department employe instead of a Bridge and Building Department employe to prepare and paint signal cabins in Colonie Yard on April 6, 1984 (System Case 23.84).

(2) As a consequence of the aforesaid violation, B&B Mechanic D. Mamone shall be allowed five (5) hours of pay at his straight time rate."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Claimant worked as a mechanic in the Bridge and Building Subdepartment of the Maintenance of Way and Structures Department at all times relevant herein. On Friday, April 6, 1984, Carrier assigned a Signal Repairman the work of scraping and painting signal cabins at Colonie Yard. Signal cabins are small metal buildings used to house signal equipment at various locations along the right-of-way. At the time of this dispute, the buildings in question were in storage at Colonie Yard and were not being used to house signal equipment.

The Organization contends that the five hours of labor expended by the Signal Repairman to complete the scraping and painting was work which should have been assigned to its craft. In support of its claim, the Organization relies upon a June 10, 1957 Memorandum of Agreement, applicable under the current schedule Agreement, which provides that Maintenance of Way Employees will perform all painting work on all bridges, buildings, structures and other installations except minor spot painting which is necessitated by or is incidental to other work performed by Signalmen. In the Organization's view, the

work performed here clearly cannot be considered "spot painting" and therefore does not fall under the only exception where the work would not accrue to Maintenance of Way employees. In addition, the Organization argues that in prior isolated instances where Signalmen have painted signal cabins, claims were filed and the Carrier paid them. Accordingly, the Carrier should now be estopped from asserting that there is any past practice which supports its position.

The Carrier asserts that the work here involved was incidental to the maintenance of signal apparatus and as such did not come within the Maintenance of Way Memorandum of Agreement, which specifically exempts signal employees. It asserted that this work had always been performed by Signal Department employees thus creating a past practice.

A Third Party Submission was filed by the Brotherhood of Railroad Signalmen contending that the disputed work falls within the Scope Rule of its craft. Under the Scope Rule it is clear that the work of maintenance, repair and renewal of signal apparatus belongs to the Signalmen; and it is argued by the Signalmen that, as the area of general painting is a very broad one, that work patently falls under the heading of "maintenance" of signal apparatus as a task accruing to the Signal Department.

We have reviewed the record evidence in its entirety and find Carrier's contentions to be without merit. The Memorandum of Agreement, dated June 10, 1957, embraces "all painting work on all bridges, buildings, structures and other installations" The only exception, where the work properly belongs to the Signalmen craft, is where minor spot painting is performed which is necessitated by or is incidental to other work performed by Signalmen. We find that the record here is completely devoid of any evidence that the disputed work could be characterized as "minor spot painting." Moreover, there has been no evidence presented to show that the work was necessitated by or incidental to other work being performed by Signalmen. Therefore, it is this Board's view that the work in question falls squarely within that reserved to Maintenance of Way employees. That is precisely the same conclusion reached by this Board when presented with similar facts in Third Division Awards 4845 and 7789.

We also note that even if the language of the Memorandum of Agreement was not clear and unambiguous, Carrier's claim of past practice is belied by its own position taken in Third Division Award 5599, wherein it specifically acknowledged that the "painting of buildings used for housing signal apparatus has always been performed by B&B painters." Furthermore, a review of records proffered by the Organization indicates that where Signalmen have performed painting work similar to that at issue in the past, claims have been filed and paid by the Carrier. There can be no finding of past practice under these facts.


Finally, it is noted that in its Submission, the Carrier argued that in all cases previously advanced and upon which a decision has been rendered by this Board the issue concerned an existing operational structure such as a relay cabin, whereas in the instant case, the relay cabins were not permanently erected nor functional but were, in fact, excess and in storage. Since this argument was not advanced on the property, we are precluded from considering it.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1988.