Award No. 4870
Docket No. SG-4853

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY

STATEMENT OF CLAIM: That the Carrier violated the purpose and intent of the current Signalmen's Agreement when it assigned the work of splicing a cable carrying signal circuits to persons not covered by such agreement and in so doing required signal employes to lose time while this work was being performed.

That Signalman C. W. Wangenstein be allowed an adjustment in pay, in accordance with time report submitted on January 16, 1948, for seven (7) hours' pay at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: On January 15, 1948 underground signal cables were damaged by outside parties. These cables affected the operation of Clifton interlocking and the signals in that vicinity. Signal employes located and repaired the damage and restored the affected apparatus to normal service.

On the following day, January 16, 1948 Western Union cable splicers were employed to restore the lead sheath and insulated protection around the cables. The regular signal maintainer who maintains Clifton interlocking and his assistant were employed as well as extra signalman C. W. Wangenstein and his assistant in assembling materials necessary for permanent repairs. At the close of their regular work period, 3:30 P. M. Wangenstein and his assistant were released in order to return to their headquarters without overtime. Telephone Maintainer McNee was held to assist the Western Union forces and signal maintainer Coulbourne with his assistant were retained to protect the interlocking plant until the work was completed at 10:50 P. M.

During the course of the work in the excavation telephone maintainer McNee assisted the Western Union forces and he was retained until all work was completed at 10:50 P. M.

CARRIER'S STATEMENT OF FACTS: On January 15, 1948, three underground cables at Clifton Junction, Staten Island, were damaged by the employes of a sign company, resulting in interruption to the operation of the interlocking plant at that point. Signal employes located the damage and temporarily spliced the cables affected so that the interlocking was restored to service. Because no signal employes are qualified to apply lead sleeves to such cables and to seal them in the manner necessary to prevent damage from ground water, the Company secured the services of a Western Union cable splicer and his assistant to do this work on January 16, in accordance with previous practice in cases of this nature.

fore decided, including Awards 615, 757 and later ones, recognize that there is a line of demarcation between those that are within the scope and those that are without; that each case presents a factual situation which upon examination causes it to be cast to the one side or the other. That line has never been completely described, and perhaps because of the varying nature of undertakings, it never can be ascertained in a set and certain way. The general principles can be determined, but the particular facts of each controversy must be weighed and tested in the light of the scope of the contract and from that basis a decision can be reached as to whether it is within the scope of the Contract or forms an exception thereto.

A managerial judgment must be permitted whenever the case involves a highly skilled force, and other incidents that the Carrier probably could not provide from its force and equipment. Award No. 2338."

—The claim in this case was denied.

In Award No. 2812, the Opinion of the Division together with Referee Jay S. Parker specified in part:

"* * * It is not vigorously contended and its submission inferentially concedes that even though the Scope Rule makes no mention of the work attached to hours of service and working conditions referred to therein, necessary, reasonable and practical recognition of what is preserved to the employes through its provisions requires the implication that such work as at the time of the negotiation and execution of the Contract its employes were customarily engaged upon was contemplated by its terms. We go further and hold that we regard it as covering all work in the Maintenance of Way Department except such, there being no exceptions contained in the scope rule or elsewhere in the Agreement, as in view of the exigencies confronting the Carrier can under our decisions be properly excepted under what in judicial parlance is known for want of a better term, as 'operation of law'. Perhaps better for our purposes would be to describe it as that which from the very nature of the work involved the Carrier does not possess sufficient equipment and skill to perform under the exigencies of the situation prevailing and with which it is required to deal. * * *

Fairness requires, and we readily concede it, that in the building of bridges and construction of other projects involving services of a specific character under conditions where the Carrier does not possess the skilled force and other things such as equipment it could not provide or would not be justified in maintaining for rare occasions on which they would be required, the Carrier should be, and is, permitted to go outside and contract for their construction. * * *."

In view of the above the Carrier submits that the Awards of this Division do not support this claim.

On the basis of all that is contained herein, the Carrier respectfully requests that the Division to find this claim as being without merit and to deny it accordingly.

OPINION OF BOARD: This joint submission presents an issue as to the right of a signalman to an adjustment in pay for seven hours at time and one-half for January 16, 1948.

On January 15 three underground cables were damaged by employes of a sign company, resulting in an interruption of service of the Carrier's inter-locking plant. Signal employes located the damage and made temporary repairs to restore service. On the following day a Western Union cable splicer and his assistant were used to seal the damaged cables by applying

lead sleeves. The Carrier's regular signal maintainer, has assistant, the Claimant, (an extra signalman) and his assistant, together with a telephone and telegraph maintainer (not under the Agreement) were used to assemble and make available the necessary materials. All of these employes remained on the job until 10:30 p.m., when the repairs were completed, except the Claimant and his assistant, who were relieved at 3:30 P.M. to return to their headquarters.

It is the contention of the employes that the retention of the Western Union workmen was a violation of the effective Agreement and that by reason thereof the Claimant was improperly relieved from duty before the completion of the repairs.

The Scope Rule of the Agreement provides that "Signal Work" is understood to refer to work generally recognized as such. The Carrier's contention is, however, that there were no employes under the Signalmen's Agreement possessing the requisite skill to perform such intricate service as was here involved; and that over a long period of time such highly skilled operations have been contracted out with the acquiescence of the Organization.

Mere acquiescence of the employes in the continuance of a practice calculated to ignore the proper application of the scope rule of an agreement will not ordinarily constitute an estoppel, though it may result in a bar to the collection of retroactive penalties. We think it is also proper to say that when a carrier contracts out work which would appear to be within the scope of an agreement, it must assume the burden of establishing that such conduct was reasonably justified by the facts. Instead of assuming that burden this Carrier has sought to shift its obligation to the Organization. We quote from the Carrier's statement of its position:

> "Prior and subsequent to the performance of the duties described herein the employes failed to conclusively demonstrate in any manner that Claimant employe or any other employe coming within the scope of the Signalmen's Agreement at this location was capable of performing the specialized task of applying a lead sheath to a cable."

We must hold, therefore, that the Carrier has failed to establish that the work here in question was excepted from the Agreement, or that its signalmen were not competent to perform such service.

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 Employe involved in this dispute are respectively carrier and employe 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of June, 1950.