Award No. 9335
Docket No. SG-8481

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE NEW YORK CENTRAL RAILROAD, EASTERN DIVISION

(Except Boston Division)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the New York Central Railroad (Buffalo and East) that:

(a) The New York Central Railroad violated and continues to violate the provisions of the Signalmen's Agreement when it contracted, or otherwise arranged with persons not covered by the Agreement between the New York Central Railroad Line East and the Brotherhood of Railroad Signalmen of America, for the performance of generally recognized signal work in connection with a new Harlem River Bridge, New York City.

(b) The furloughed or reduced signal forces on the New York Central Railroad Line East who would have been entitled to this work under their Agreement with the New York Central Railroad be allowed an amount of time equal to that spent by outside forces in the performance of this signal work and in violation of the Signalmen's Agreement.

EMPLOYES' STATEMENT OF FACTS: The signal work involved in this claim consists of Scope work performed in the construction, installation, and inspection as required in the replacement of existing signaling facilities incident to the erection of a new Harlem River Drawbridge in New York, N. Y.

On or about April 23, 1954, workers not covered by the current Signalmen's working agreement started to perform Scope work on the new drawbridge, and to the best of the Brotherhood's knowledge it was planned to use the outside workers until the drawbridge is completed.

The transferred Scope work as involved in this case has, by custom and usage, as well as by the proper application of the Scope rule accrued to this Carrier's Signal Department employes covered by the New York Central—Signalmen's working agreement.

This Board, has, however, consistently decided that when a Carrier contracts out work it is not required to hold back any part of the work which its own employes could conceivably have performed. (Awards 3206, 4776, 4954, 5304 and 5521). This Board, in Award 6424, quoted as follows, from Award 2819:

> "Manifestly, a determination as to whether contracted work comes within the scope of the Agreement must be resolved from a consideration of the character of work as a whole, and not by breaking it down into all of its component parts. In other words, a carrier may not be precluded from contracting a project for which it does not possess and may not be reasonably expected to acquire the necessary skilled help and equipment merely because some isolated and incidental part of the work contemplated, if disassociated from the whole, would come within the scope of the Agreement. It would be difficult, indeed, to conceive of any proper subject of an independent contract that would not embrace some elements of work which, standing alone, would come within the purview of the Scope Rule."

The Carrier submits that the present case is aptly described by this language and calls attention to the fact that the Board in Award 6424 applied that language to deny a claim involving a construction job of comparative simplicity. The Carrier also calls attention to the fact that in Award 6424 Building and Trades Council members were involved and they, as here, threatened to strike unless they were awarded the work. In discussing this feature of the case, the Board stated:

> "The record before us discloses that there had been a previous conflict at Decatur in 1950 wherein a strike was threatened by the local building trades group because an attempt was made to use company electricians while a contracted job was in progress. It is commonly known that building trades will not work with others outside their group. We are unable to say whether the particular work here present, was susceptible of division so that the rough work could be assigned to the B&B workers and the finish work could have been held back till a later day to be done by the more skilled crafts of plumbers, plasterers, etc. In any event we should not substitute our judgment for that of management. We can only determine whether the Carrier's management was warranted in reaching the decision to contract the work."

The Carrier respectfully submits that the rationale of Award 6424 and similar awards control the instant case and this claim should be denied.

No facts or arguments have been herein presented that have not been made known to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute involves the work of installing and connecting signal equipment incident to the Carrier's erection of a new drawbridge over the Harlem River in New York City. It is Petitioner's contention that the Carrier violated their Agreement by farming out this signal work to persons not covered by the Agreement. The work was actually performed

by members of Local 3, I.B.E.W., employes of subcontractors engaged to take care of the electrical work.

There is no question but that the disputed work is within the Scope of the applicable Agreement and that as a general rule Carrier may not contract out work embraced within collective bargaining agreements. On the other hand, it appears settled that carriers may farm out large projects presenting novel situations or calling for the use of special skills, equipment or materiel. See, e.g., Awards 4776, 5304, 5563, 6492 and 7805.

Accordingly, in the present case, it was not inconsistent with its contract commitments for Carrier to use outside contractors and subcontractors to construct a new drawbridge to carry its rails as well as those of other carriers over the Harlem River. An examination of the record satisfies us that this construction work presented a difficult, complicated and novel problem and was not within the ordinary experience of the bulk of the Carrier's personnel who would otherwise be called upon to perform it. Moreover, time was of the essence in the performance of this work which had to be coordinated with City and State authorities building highways under the bridge.

However, Petitioner emphasizes the fact that Carrier did not include the signal work in the overall bridge construction contract but at first intended to have it performed by its own signal employes. It further points out that Carrier finally farmed the work out only as the result of the threats and insistence of Local 3, I.B.E.W. This Referee agrees with Petitioner that Carrier can not be relieved of its contract commitments because of pressures from rival labor organizations or other outside sources. We also are mindful that the disputed work standing alone did not call for the use of special equipment or the solution of novel questions, but on the contrary was not beyond the capacity of Claimants, for, as Carrier concedes, "it was, in fact, work ordinarily performed by signalmen".

Nevertheless, the controlling factor, in our view, is that the signal work in question was part and parcel of the entire bridge construction project which, we are told, required the services of twenty different classes of employes represented by thirteen different unions. While the Claimants, one of these classes of employes, could have undoubtedly performed the disputed work, it is neither proper nor practicable to require the Carrier to have subdivided the project to determine whether some of it could be handled by its own employes. We are not disposed to substitute our business judgment for that of Carrier in that regard. See Awards 4753, 4776, 4954, 5304, 5521, 5840 and 8757. A contrary holding would ignore the realities of the situation and unduly restrict the Carrier in carrying out unusual but essential projects important to the general public as well as its own operations.

It is true, as Petitioner states, that the awards cited in support of our conclusion are for the most part maintenance of way cases and situations where various carriers farmed out entire projects, in each case as a single contract. However, as heretofore mentioned, the important and key point is not that the disputed work is part of a single project contract but rather that it is intimately wedded to the entire construction job.

This is not a case where the Carrier has sought to emasculate the Agreement or to avoid its obligations by arbitrarily and unreasonably contracting out the work to persons outside the Agreement. The non-routine character of the project in question as well as the criteria set up in this

Opinion and other awards cited herein are, in our opinion, sufficient safeguards to prevent any such circumvention of contract commitments.

The claim will be denied.

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 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 7th day of April, 1960.

Dissent to Award 9335, Docket SG-8481

The majority, that is, the Carrier Members and the Referee, concede that the work in question is within the Scope of the applicable Agreement; that Carrier cannot be relieved of its contract commitments because of pressure from rival labor organizations or other outside sources; that the disputed work standing alone did not call for the use of special equipment or the solution of novel questions and that by Carrier's admission the work was not beyond the capacity of Claimants to perform. Nevertheless, the majority proceeded to deny the claim on the grounds that the signal work in question was part and parcel of the entire bridge construction project and that while Claimants could have undoubtedly performed the work, it is neither proper nor practicable to require the Carrier to have subdivided the poject to determine whether some of it could be handled by its own employes. In support of its theory the majority rely on a total of twelve Third Division awards, none of which fit the facts and circumstances found in Docket SG-8481. The awards cited by the majority held in favor of the carrier because the peformance of the work required special equipment and materials not possessed by carrier, or required special skills, or there was extreme hazard involved or involved other elements such as have been variously referred to as inherently existent exceptions to the scope rule. The majority was aware of but elected to ignore a superior number of awards of this and other Divisions on all fours with the facts and circumstances involved in the dispute covered by Docket SG-8481. Had the principles reaffirmed in these awards been duly considered by the majority this claim would have had to be sustained.

Furthermore, the majority's holding that it is neither proper nor practicable to require the Carrier to have subdivided the project to determine whether some of it could be handled by its own employes is completely wrong in light of Carrier's assertion that:

> "In December of 1953 the construction of the first half of the new bridge had reached a point where the installation of railroad signal equipment on the so-called new structure was possible. At this time Local 3 threatened to strike unless certain work on the new structure was assigned to them by the Carrier. * * * " (Emphasis ours)

thus disclosing that as late as December 1953, after the project was well along, it was the Carrier who had control of the allocation of the signal work—an unlikely situation if, as the majority would have it appear, the signal work in question was included in the contract as part and parcel of the entire bridge construction project. That disputed work is included in and becomes a part of a completed project is not necessarily the controlling factor in determining the rights of employes under their collective bargaining agreement. This long standing principle is clearly reaffirmed in awards cited by and in behalf of the Employes in the instant case but which the majority elected to ignore even though admitting that all dominant facts and evidence support the Employes.

It is apparent that the majority was primarily interested in excusing the action of a Carrier that lacked the intestinal fortitude to assume its contract commitments under an agreement duly made with a group of its own employes. The effect of Award 9335 is to destroy an agreement rather than interpret it in light of the facts as contemplated by the Railway Labor Act. Therefore, I dissent.

/s/ G. Orndorff
Labor Member