

Award No. 15827
Docket No. SG-15315

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the Brotherhood of Railroad Signalmen on the Southern Railway Company et al, that:

(a) On October 30, 1963, a contractor with his machine was used to perform signal work at or near East Flat Rock, N. C., in digging a trench for crossing signal installation, or for underground signal cable for crossing signals, in direct violation of the Signalmen's Agreement.

(b) Mr. J. E. Smith, Signal Maintainer, Biltmore, N. C., who was available at East Flat Rock on the date involved, October 30, 1963, be paid at his respective overtime rate of pay for a minimum of four (4) hours for the signal work done by the contractor on October 30, 1963, but not less than for all time worked by the contractor at East Flat Rock, N. C.

[Carrier's File: SG-19501]

EMPLOYEES' STATEMENT OF FACTS: The dispute, like numerous others arising on this property which have either been decided by this Division previously or are awaiting adjudication, involves signal work which Carrier contracted out to persons not covered by the Signalmen's Agreement. On October 30, 1963, an Assistant Track Supervisor for Carrier arranged to have a contractor dig with his backhoe machine a ditch, 37 feet in length, in which underground signal cable was installed by Signal Maintainers. The work performed by the contractor was limited to the digging of the ditch; the Maintainers on the job otherwise backfilled it. The overall project which created the need for doing the work was a rail relay program wherein ribbon rail was being laid in crossing signal territory. The insulated joints at the crossing at East Flat Rock, North Carolina, were relocated which caused the Maintainers to have to move their track wires.

The facts are not in dispute; the work was performed by an individual not covered by the Signalmen's Agreement. There is some disagreement relative to the amount of time which the contractor devoted to the job. Carrier says that he worked a total of 45 minutes; whereas, the Employees claim a minimum of 4 hours was used. Also, Carrier alleges that it was at the suggestion of one of the Maintainers working on the job that the Assistant Track Supervisor had

Signal Maintainer R. L. Savage, on whose assigned territory the work involved was being performed, was working with the welded rail laying gang on October 30, 1963. Mr. J. E. Smith, the signal maintainer assigned to the territory adjoining that of Mr. Savage, was instructed by the Signal and Electrical Supervisor to go to Flat Rock, N. C. and to protect the crossing at East Flat Rock in the absence of Mr. Savage while the pavement was being removed from the crossing and track work was being performed. Signal Maintainer Savage, after completing work with the rail laying gang, arrived at East Flat Rock and he and Signal Maintainer Smith performed all generally recognized signal work which they had a contract right to perform in connection with the automatic electrically operated and controlled flashing light crossing signal installation at that location.

Specifically, it was necessary that two insulated joints in the track on each side of the crossing be relocated as a result of the installation of the two new 84 foot long pieces of welded rail installed through the crossing. On the west side of the crossing, one insulated joint was moved 12 feet and the other 30 feet. On the east side of the crossing, one insulated joint was moved 3 feet and the other 36 feet. As customary, Signal Maintainers Savage and Smith assisted track forces in relocating the insulated joints.

As a result of the relocation of the insulated rail joints referred to next above, it was necessary that 37 feet of underground electric cable be installed between the existing underground electric cable and the relocated insulated rail joints to complete the track circuit arrangement for the crossing signal installation.

Mr. R. L. Savage, the signal maintainer on whose territory the work was performed, arranged with the track supervisor in charge of the track work to have the digging of the trench 37 feet long done by the backhoe machine owned, furnished and operated by the contractor engaged by the Maintenance of Way Department. The digging of the trench by backhoe machine consumed a total of 45 minutes.

Signal Maintainers Savage and Smith installed the new electric cable in the 37 foot long trench dug by the backhoe machine, electrically connected the new cable to the existing underground cable and to the rail at the new locations of the insulated joints, and backfilled the 37 foot long trench with dirt.

Claim here before the Board on behalf of Signal Maintainer J. E. Smith was subsequently presented to Carrier's Signal and Electrical Superintendent by the General Chairman and, being without basis and unsupported by the agreement, was declined as it was handled through the usual channels on the property. Copies of letters exchanged between the parties, identified as Carrier's Exhibits E through K, are attached hereto and made a part hereof.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 30, 1963, Claimant, a Signal Maintainer, was working with Signal Maintainer R. L. Savage, on the adjoining territory of the latter in connection with a welded rail laying operation. As a result of the relocation of certain insulated rail joints it was necessary that thirty-seven (37) feet of underground electric cable be installed between the existing underground electric cable and the relocated insulated rail joints. The Signal Maintainer (Savage) on whose territory the work was performed arranged with the track supervisor in charge of the track work to have the

digging of the thirty-seven (37) foot trench performed by a backhoe machine, furnished and operated by a Contractor engaged by Carrier's Maintenance of Way Department. Petitioner contends that Carrier violated the Scope Rule of the controlling Agreement when it permitted an outside Contractor's employe to perform the disputed work and seeks compensation at the overtime rate of pay for a minimum of four (4) hours on behalf of Claimant, who allegedly was available and capable of digging the trench involved in this dispute.

Carrier's defense is two-fold. In the first instance, Carrier reiterates its contention that the Scope Rule restricts the work of Signalmen to generally recognized signal work on "... electrically operated highway crossing protective devices and their appurtenances," and that such employes do not have a contractual right to perform all work on or in connection with the installation of such devices. Substantially the same question was considered by the Board in our Awards 15062, 13236 and 14371, and we cannot find such Awards either erroneous or palpably wrong.

The second defense offered by Carrier in this dispute is affirmative and arises out of the fact that the signal maintainer on whose territory the work was performed was not instructed by any officer of the Carrier to have the trench involved dug by machine, but personally arranged with the track supervisor in charge of the track work to have the digging of the trench done by the backhoe owned, furnished and operated by an independent contractor engaged by Carrier's Maintenance of Way Department. Claimant and Signal Maintainer Savage were both present when the disputed work was performed. Apparently, both stood by and watched while the backhoe machine performed the necessary digging. Both were on duty at the time and assigned to work together on the project which was thereafter completed by them.

Petitioner avers that Claimant did not waive his right to file a claim by acquiescence even though it concedes that a proper claim could not have been filed on behalf of the signal maintainer on whose territory the work was performed and who actually arranged for the performance of the work by an independent contractor. We cannot agree with Petitioner's analysis of the situation.

Claimant abviously acquiesced in the arrangement made by his fellow employe and accepted the benefits of the transaction in silence and without objection. It would be unconscionable under the circumstances to permit Claimant to maintain a position which is inconsistent with the position he took at the time the disputed work was performed. Acquiescence is conduct from which may be inferred assent. Under the doctrine of equitable estoppel a person may be precluded by his silence, when it was his duty to speak, from asserting a right which he otherwise would have had. Claimant here should have objected to the transaction at the time the disputed work was performed by an independent contractor instead of acquiescing in the arrangement. Under the peculiar circumstances of the case, we find that Claimant is precluded from benefiting from the violation of the Scope Rule of the Agreement. Therefore, the relief sought in this claim must be denied. Award 11451.

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 Contract was violated.

AWARD

Paragraph (a) of the Claim is sustained.

Paragraph (b) of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1967.

DISSENT TO AWARD 15827, DOCKET SG-15315

The Majority, consisting of the Referee and the Carrier Members, correctly found that the Agreement was violated. However, the Majority's denial of Part (b) of the Claim completely disregards the fact that the Claim was brought by one of the principals to the Agreement in an attempt to assure compliance by the other principal. Therefore, the individual, named by Petitioner as Claimant, a natural Claimant in this case, was as has been held many times, only incidental and of no concern to Carrier if there was a violation.

The manner in which the Majority arrived at its decision to deny the remedy is simply horse and buggy thinking in a jet age and to that extent I dissent.

G. Orndorff
Labor Member