

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30108
Docket No. SG-30426
94-3-92-3-436

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Kansas City Southern Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railway Co. (KCS):

Case No. 1

Claim on behalf of D.R. McKnight, G. McCoy and D.A. Newburn.

- a) Carrier violated the current Signalmen's Agreement, particularly the Scope of the Agreement. The Carrier hired a contracting crew from Ray Caughern, to bore and install a 4 inch pipe under road crossing at Mena, AR. The 4 inch pipe is used to contain signal cables, for the installation of highway crossing protection devices.
- b) Carrier should now be required to pay D.R. McKnight, D.A. Newburn and G. McCoy, at the pro rata rate, because of loss of work opportunity, for work performed by contractor boring road crossing at 7th St., Mena, AR, MP 379.9 on January 16 and 17, 1991.

Case No. 2

Claim on behalf of Signal Foreman C.H. Crowson, Signalman J.K. Davis, and Assistant Signalman L. Rhodes Jr.

- a) Carrier violated the current Signalman's Agreement, particularly the Scope of the agreement. The Carrier hired a contracting crew from Bossier City, LA, a Mr. David Strong, to bore and install 4 inch pipe under road crossing at LaPlace, LA. The 4 inch pipe is used to contain signal cables, for the installation of highway crossing protection devices.
- b) Carrier should now be required to pay Mr. Crowson, Mr. Davis, and Mr. Rhodes 10 hours pay, at the pro

rata rate. Because of loss of work opportunity, for work performed by contractor boring road crossing at Hwy, 44 LaPlace, LA on February 11, 1991, M.P. 840.1."

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 waived right of appearance at hearing thereon.

This case is the consolidation of two separate claims arising at Mena, Arkansas, and LaPlace, Louisiana. In the first claim, the Carrier utilized an outside contractor on January 16 and 17, 1991, to bore a hole and install a four inch pipe under the Seventh Street grade crossing at Mena. On February 11, 1991, the Carrier retained an outside contractor to bore a hole and install a four inch pipe under the Highway 44 road crossing at LaPlace.

In both instances, the pipe was installed to carry a signal cable for the operation of highway protection devices at the two grade crossings. In each claim, the Organization seeks, on behalf of various signal employees, pay for the time spent by the outside contractors to install the conduits beneath the roads.

At the onset, the Carrier urges this Board to summarily dismiss the claims because the Organization's Notice of Intent to File an Ex Parte Submission was filed with this Board after the expiration of the time limits on the property. We must overrule the Carrier's procedural objection. The record reflects that the highest Carrier officer denied the claim on August 21, 1991. Pursuant to the applicable agreement rule, the deadline for the Organization to file its Notice of Intent was nine months from the denial or May 21, 1992.

Inasmuch as the Organization filed its Notice of Intent on April 30, 1992, the filing was within the nine month time limitation. The record inexplicably shows that the Organization's General Chairman asked for and was granted an extension of time to

handle the case until March 1, 1992. The record, however, does not evince any explanation regarding this time extension and this Board cannot speculate on the purpose of such a time extension. Notwithstanding the unexplained and, perhaps unnecessary, extension, we must apply the rules of the Agreement and the Organization clearly complied with the relevant time limits. Thus, the Board will consider the merits of the claim.

The Scope Rule in the applicable agreement provides:

"This agreement governs the hours of service, rates of pay, and working conditions of all employees in the Signal Department below the grade of Supervisor (except clerical and engineering forces) performing the work generally recognized as signal work; which work shall include the construction, installation, maintenance, and repair of all signal equipment, such as signals (automatic or otherwise), interlocking plants, highway crossing protection devices, wayside train stop and control equipment, car retarder systems, centralized traffic control systems, detector equipment connected or through signal systems, including all their apparatus and appurtenances, signal shop work and all other work generally recognized as signal work.

Work shall also include the installation, maintenance and repair of hot bow, dragging equipment, high wide, slide and other wayside detector systems, and their appurtenances and appliances, the function of which is to inspect passing trains for defects.

Employees covered by this Agreement will install and maintain all circuit boards including future replacements which contain solid state design consisting of components technologically equivalent and similar in concept and design to those which are currently an integral part of the Carrier's signal systems.

Employees covered by the Agreement will be assigned the work of installation, testing, and inspecting of all equipment, including technological change in Carrier's signal systems. Carrier will provide necessary training for the employees assigned to such work.

The following classifications include all the employees of the Signal Department performing the work referred to under the heading of 'Scope'."

This Board concludes that the disputed work is expressly described in the Scope Rule. The Rule provides that agreement covered employees shall perform the "installation" of "highway crossing protection devices" and "their apparatus and appurtenances." The conduits placed under the two roads were used exclusively to carry signal circuits for grade crossing protection devices. The pipes served no useful purpose to the Carrier absent their appurtenant relation to the signal system and, thus, it is work expressly reserved to signalmen by the Scope Rule. Third Division Award 12697. Stated differently, the conduit was integral to the installation of highway protection devices.

The Carrier raises two defenses. Neither is applicable in this particular case.

First, the Carrier submits that since 1979, seventy-eight out of two hundred and eight of these buried conduits have been installed by persons other than signal forces including outside contractors and maintenance of way employes. While there is some doubt that the Carrier has proffered evidence to prove this purported past practice, any past practice cannot vary or alter the express terms of the Agreement. Since this Board has already adjudged that the disputed work is expressly described in the Scope Rule, the existence of any past practice is irrelevant.

Second, the Carrier points out that many, if not all, of these projects are state-funded. As part of the public works contract, the state or other governmental entity frequently requires that the disputed work be accomplished by a road contractor or a firm licensed by the governmental unit. For example, the Carrier related that the City of Beaumont, Texas, will not allow any construction worker to bore under a roadway unless the employee works for a company licensed by the City and thus, the Carrier lacks the control to assign the installation of a conduit to a signal construction gang. This Board need not address the Carrier's argument that a government regulation or a mandatory term in a government contract required it to use outside contractors at Mena and LaPlace because the Carrier did not prove that either constraint was imposed at these two locations. In other words, the Carrier failed to submit evidence into the record that a local government regulation or a state funded contract prohibited signal employees from performing the work or conversely, mandated that a licensed road contractor perform the work. Thus, the Board need not decide if the government regulations or the government contract would supersede the express language in the Scope Rule of the Agreement.

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A W A R D

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin / lw
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.