

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33226
Docket No. SG-34253
99-3-97-3-948

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Wheeling & Lake Erie Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Wheeling & Lake Erie Railway Company (W&LE):

Claim on behalf of J.D. Riedel, J.L. Karlosky, T.J. Cicconetti, and G.S. Ott for payment of 24 hours each at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when it used a contractor to perform covered track work in connection with a train derailment in Akron, Ohio, on August 19, 20 and 21, 1996, and deprived the Claimants of the opportunity to perform this work. General Chairman's File No. 231/961005. BRS File Case No. 10397-W&LE(M).”

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 were given due notice of hearing thereon.

The Claimants in this case were Maintenance of Way employees who were assigned to various positions in Carrier's track department. The situation involved in this dispute concerns the use of an independent contractor to perform certain work which the Organization alleges should have been performed by the Claimants inasmuch as the work was allegedly covered by the negotiated Scope Rule of the parties' Agreement.

The negotiated Scope Rule involved in this case reads as follows:

"RULE NO. 1 SCOPE RULE

This agreement governs the rates of pay, hours of service and working conditions of all employees engaged in the construction, maintenance, inspection, re pairing, and salvage of the following owned by the Railway:

- A. All structures, signs, tracks, roadbeds, rights of ways, road crossings, and their components on the road and in yards, including all track and switch appurtenances and related systems. As well as any other work generally recognized as maintenance of way or bridge and building work.
- B. Operating and maintaining roadway equipment and tools used to perform work covered by this Scope and delivery of carrier owned fuel to all roadway equipment and switch heaters.
- C. This shall not prevent the carrier from contracting services requiring special skills or equipment not available to the carrier i.e. ballast cleaner, Sperry rail defect detector, road asphalt equipment, etc.
- D. This rule shall not prohibit the contracting for removal or dismantling of appurtenances, devices and equipment on wholly abandoned rail lines or any part or sections sold and/or retired.

- E. This rule shall not prohibit the contracting for brush removal, painting, fencing, mowing or other maintenance of way work when mutually agreed by the Director of human Resources and the General Chairman, provided General Chairman is notified 15 days prior to letting said contract. The above 15 days notice shall not apply in an emergency."

The facts of record reveal that a derailment occurred on Carrier's property at Akron, Ohio. To clear the derailment, Carrier utilized not only the four Claimants named in this case but also utilized the services of two outside contractors to clear the derailment. The derailment clearing work was performed on August 19, 1996. The record indicates that the Claimants worked side-by-side with the independent contractors with each Claimant working as much as 14 hours on that date clearing the derailment. On August 20 and 21, 1996, one of the independent contractors who had worked on clearing the derailment on August 19 was utilized to perform certain pick-up and clearing work on privately-owned property adjacent to the derailment site.

The main thrust of the Organization's argument in this dispute appears to be directed toward the work performed by the independent contractor on August 20 and 21, 1996. It alleges that the work performed by the independent contractor was of a nature which is specifically covered by the language of the Scope Rule particularly the preamble paragraph along with paragraphs "A" and "E" of the Rule. It insists that work which accrues to certain employees under the terms of a Scope Rule cannot be arbitrarily taken away from such employees and be performed by others. The Organization also argues that the mere assertion of an emergency does not make it so. Additionally it insists that the work performed on the property not owned by the Carrier was nonetheless under the control of the Carrier and therefore should have been performed by the Claimants.

For its part, Carrier insists that on August 19 an emergency existed and the use of not only its own employees but also the services of two outside contractors was justified to clear the derailment. As for the work performed on August 20 and 21, 1996, by the independent contractor, Carrier argues that such work was performed on non-railroad owned property and therefore was not subject to the provisions of the Scope Rule.

There is no question but that a main line derailment is, by its very nature, an emergency situation which demands immediate attention. In this case, the derailment situation which existed on August 19 was an emergency and no Scope Rule violations occurred because of the use of the independent contractors to work along with the Claimants to clear the derailment.

As for the work performed by the independent contractor on August 20 and 21, 1996, the Board is controlled by the explicit language of the Scope Rule which specifically limits the work described therein to the performance of such work on property “. . . owned by the Railway.” Such was not the case in this instance. Therefore, the Scope Rule had no application to such work and the claims as presented have no basis in the agreement.

For the reasons stated, the claims in this case are denied in their entirety.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of April 1999.