Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33601
Docket No. SG-34377
99-3-98-3-3

The Third Division consisted of the regular members and in addition Referee Martin Henner when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of J. C. D'Abreau for payment of 44 hours at one and one-half times the Inspector rate, R. J. Emerson for payment of 36 hours at one and one-half times the Inspector rate, and P. R. Kellems for payment of 24 hours at one and one-half times the Inspector rate, account Carrier violated the current Signalmen's Agreement, particularly the Scope and Classification Rules, when it used management employees to perform covered work in connection with the testing of signal equipment on February 27, 28, and 29, and March 6, 1996. Carrier's File No. SG-917. General Chairman's File No. RM2900-28-1096. BRS File Case No. 10390-CR."

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 are Signal Department employees of the Carrier, who were assigned to Maintainer positions at the time this dispute arose. On various dates in November, 1996, they were involved in assisting Signal Inspectors performing 22c tests on the property.

The Organization asserts that the current Signalmen's Agreement was violated when the Carrier used three management/supervisory employees to install and test signal equipment in the Detroit, Michigan area. This installation and testing was performed on February 27, 28, and 29, and March 6, 1996.

The Organization maintains that this work violated the Scope and Classification Rules of the parties' Agreement. Employees represented by the Brotherhood of Railroad Signalmen were thus deprived of the opportunity to perform this installation and testing work, which was their right under the Agreement. As the work was testing of signal apparatus as required by the C&S Rules 27 and 31, this work qualified for pay at the Inspector pay-rate.

The installation and testing of the signal equipment was very extensive, covering four days and evidenced by approximately 50 pages of reports documenting the results of numerous tests and demonstrating in substantial detail that the equipment was properly installed and tested.

Under both the Carrier's and the Federal Railroad Administration's Rules, the documentation of the signal testing must be completed and signed by the employee who actually performed each test. The Organization relies on the records of these tests, completed and signed by managerial personnel as sufficient evidence that these tests were performed by management in violation of the Scope Rule.

As the Claimants were deprived of work to which they were entitled, the Organization asks that the claimants be compensated for the hours of work they were denied at the overtime rate of time and one half.

The Carrier has responded by denying that any violation of the Agreement occurred. It claims that all of the required tests of the signal equipment were performed by BRS covered employees under the supervision of management personnel. These

management personnel completed and properly signed the test certification documents as the signal tests had been performed under their supervision.

The Carrier also claims that all of the required testing had been completed by February 29, 1996, at which time the new signals were placed into service. As no signal work was performed on March 6, 1996, that claim is improper.

Objecting to the demand for compensation for loss, the Carrier asserts that the Claimants did not suffer as they were working during the period of these tests and lost no work or pay. The Carrier also objects that Claimants Emerson and Kellems did not hold Inspector positions during the period covered by the claim, and so payment to them at the Inspector's rate would be inappropriate. Furthermore, the Carrier notes that there is no provision in the parties' Agreement providing for payment at the punitive time and one half rate when no work is actually performed.

Because of the extensive record of testing reports completed and signed by the Supervisors - over 50 pages of detailed reports of the results of numerous tests - in light of the Federal Railroad Administration's and the Carrier's own requirement that these testing reports be signed by the employees who actually performed the tests, the Organization has presented sufficient evidence to make a prima facie claim that the C&S testing documented here was performed by the Carrier's supervisory personnel.

The Carrier has made claims that the actual signal testing work was performed by BRS covered employees and that its managerial employees simply completed and signed the test reports as the supervisors who oversaw the installation and testing. Such a claim, if supported by the evidence, would be adequate to defeat the Organization's claim.

However, the Carrier has failed to provide any evidence that would support its defense to the Organization's claim. Just stating its defense is not sufficient. In the same way that an Organization will sometimes see a claim denied because it has failed to produce sufficient evidence to support its claim, in this case it is the Carrier which has failed to offer evidence of refutation to the Organization's prima facie case. Given the Rules requirement, there was no explanation on the property of why the test reports were not signed by the Craft Members.

The Carrier maintains that even if supervisory employees did perform the signal testing work in question, there is no violation as the Classification Rule cited is not an exclusive grant of work to any class. We agree.

But the Organization does not rely on the Classification Rule. It is the Scope Rules that it cites for authority that the signal testing work done here is reserved for BRS covered employees. To that we must also agree.

The cases cited by the Organization show that as far back as Award 4828, issued in 1950, the rule was clear:

> "It will be conceded at the outset that all inspecting of signal apparatus in the field is not reserved by the Agreement. All supervisory officers are charged with varying amounts of inspection work which is inherent in their positions. But it does not include the inspection and testing necessary to the proper installation, maintenance and repair of the signal system"

See also Third Division Awards 18808, 31749.

The Carrier also protests that, as the Claimants were not monetarily aggrieved, they are not entitled to any compensation, if a violation did occur. But the only case cited by the Carrier in support of this assertion, Public Law Board No. 3775, Award 64, presents a very different set of facts and is not applicable here. In that case, the Board held that a technical violation occurred when the Carrier held Employee X in a position to train a Clerk who had been awarded a new post, rather than release Employee X to his regular assignment on the extra list. The Board found that, had the Carrier acted properly, it should then have resorted to the use of extra list employees for someone to train the new clerk, but in so doing, the Carrier would have wound up selecting the same extra help Employee X who it had improperly assigned the training tasks to. Thus, in this unique circumstances, where the proper employee fortuitously did the work, no loss was shown and no compensation was ordered.

The case before this Board is not a case where the proper employee was utilized - by a fluke - though the procedure was flawed. Here the testing reports were signed by non BRS covered workers.

The cases cited by the Organization are more directly on point. Just because the Claimants were fully employed on the days the work was diverted to non covered employees, the Carrier is not excused from being required to pay a claim based on the diverted work. In Third Division Award 29036, This Board wrote, in response to a similar argument that a claimant was fully employed and had also worked overtime:

> "The work herein was shown by probative evidence to have belonged to the employees. In this instance, that work was removed and performed by a Carrier official in violation of the Agreement. There is nothing the record to indicate that the Claimant could not have performed the work at another time or on an overtime basis. The record documents that the work was there to be performed, was in fact performed by the Assistant Roadmaster, and therefore a loss of work opportunity did occur. This is not a speculative claim. The Claimant is to be compensated at the pro-rata rate of pay."

The Organization also cites Second Division Award 11660 which said:

> "When work reserved to a particular craft is improperly assigned to individuals outside the Agreement, full employment of Claimant is not a bar to recovery of reparations. In Second Division Award 7504 we stated:
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> > 'To say that the claimant is not entitled to pay because, at a given moment he was under pay elsewhere would obviously give the Carrier a latitude of work assignment not sanctioned by the rules.'"

The Carrier also argues that, if the Claimants are to be paid, they should each be paid only at their own pay scale, two of whom are in lower paid classifications than Inspector. But the Carrier has not introduced any evidence to demonstrate that the C&S 27 tests may be performed by workers in the lower rated classifications. Failing that showing, we are left only with evidence showing that such tests are properly part of the Inspector Classification and pay rate.

However, the Carrier's objection to paying the Claimants at the punitive time and one-half rate is well taken. The Organization has introduced no evidence or argument as to why this Board should grant such a punitive sanction for time which has not even

been worked. Nor has the Organization cited provisions of the Agreement or cases showing that such an enhancement of the penalty would be allowable and appropriate in a case such as this.

Accordingly, a grant of the claim at the Inspector's straight time rate is more appropriate. Furthermore, as Claimant Emerson was on vacation on February 29, 1996, and was not available for service on that date, his claim for 36 hours shall be reduced by the number of hours ascribed to him for work on that day.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of November 1999.