

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36835
Docket No. SG-36429
04-3-00-3-689

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Railroad (KCS):

Claim on behalf of J. R. McCrary, Jr., G. Pennock, T. Breaux, and B. Stewart for payment of sixteen (16) hours each at their respective straight time rates when account Carrier violated the current Signalmen’s Agreement, particularly Rules 1 and 2 (Scope and Classification Rules) when Carrier utilized a contractor on September 19, 1999 to perform the covered work of constructing pads for installation of grade crossing signal equipment at various locations on Carrier’s property, and denied the Claimants the opportunity to perform this work. Carrier’s File No. K0600-5354. General Chairman’s File No. K9904601. BRS File Case No. 11432-KCS.”

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 Organization contends that an outside contractor was improperly used to construct pads for the installation of grade crossing signal equipment. The factual premise of the Organization's argument that the Carrier improperly assigned the work to the contractor is the assertion made on the property that "... the contractor did not just deliver material to the crossing, but actually constructed the signal pads with the material, performing work reserved to employees covered by the Signalmen's Agreement." The Carrier does not dispute that the contractor delivered the fill dirt, but states "[i]t is required in all cases, that the contractor 'knock down' the dirt to insure safe sight distances for motorists. The contractor in doing so, placed the dirt where needed."

Thus, there is a factual dispute. The Organization does not contest the ability of a contractor to deliver fill dirt. Here, the Organization contends that the contractor went further and actually constructed the pads. The Carrier asserts that the contractor merely delivered the dirt and knocked it down for safety reasons.

The burden is on the Organization to demonstrate the factual premise of its case. The Organization has not done so in this matter. After closely examining the record, which consists of letters from the parties without supporting statements from those who witnessed the delivery and what occurred after, we just cannot tell if the pads were constructed by the contractor as the Organization contends or if the dirt was merely delivered and knocked down for safety reasons as the Carrier contends. Because the Organization's factual premise is not sufficiently demonstrated, its argument must fail.

The December 23, 1997 letter from JaKay Signaling Inc. to the Highland Village Director of Public Works offered by the Organization does not change the result. That letter gives specific instructions from JaKay to the municipality concerning how the pads should be constructed with further instructions concerning who to call at the Carrier "... to get approval for your contractor to provide the fill material and place at the crossing prior to the signal installation." However, even

with that letter (which is not a direction for the contractor to construct the pads) we still do not know what actually happened when the fill was delivered. Was it formed into signal pads as the Organization asserts or was it just dumped and knocked down for safety reasons as the Carrier asserts? As stated supra, the burden is on the Organization to show us what actually happened. The parties' conflicting correspondence without supporting statements from those who observed what actually happened does not resolve the factual dispute.

The claim will therefore be denied.

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 28th day of January 2004.