

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36929
Docket No. SG-36220
04-3-00-3-427

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Paducah & Louisville Railway, Inc.)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Paducah & Louisville Railway (P&L):

Claim on behalf of M. A. Whitis and K. G. McGregor for payment of 74.625 hours each at the time and one-half rate. Account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when beginning on June 14, through June 30, 1999, Carrier permitted a non-covered employee to perform work covered under the Scope of the Signalmen's Agreement and deprived the Claimants of the opportunity to perform this work. BRS File Case No. 11404-P&L."

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 basic facts in this case are not in dispute. Beginning June 14 and continuing through June 30, 1999, the Carrier used a Maintenance of Way Department B&B employee to work with Signal Gang No. 411, performing signal system work between MP JK 140.9 and MP JK 165. The work in question included wiring signal masts, assembling ladders, delivering power switches, installing two power switches, installing underground cable, standing up signal masts and signal heads, hooking up cable and signal heads and cutting over at the C.T.C. Control Point at South Dawson.

Under date of July 21, 1999, the Organization filed the instant claim, reading, in pertinent part, as follows:

"The Paducah & Louisville Railway, Inc. allowed Mr. Brasher to do signal work a clear violation of the working agreement on the following dates and places:

First violation: From June 14, 1999 to June 19, 1999, Mr. Brasher worked in the signal gang wiring Signal masts, assembling ladders, delivering power switches to the job site and installing two power switch machines and head blocks, installing Electro Code Units from North Pond MP JK 140.9 to South West Yard MP JK 149.8, working the hours of, 40 hrs regular and 28 hrs overtime for a combined total hours worked of 68 hours.

Second violation: From June 21, 1999 to June 25, 1999, Mr. Brasher worked in the signal gang installing underground cable, standing up signal masts and signal heads, hooking up cable and signal heads for the C.T.C. Control Point at South Dawson, MP JK 165, working the hours of, 40 hrs regular and 5.25 hrs overtime for a combined total hours worked of 45.25 hours.

Third violation: From June 28, 1999 to June 30, 1999, Mr. Brasher worked in the signal gang installing power switch machine, hooking up cables and fully involved with the cutover of the C.T.C Control point at South Dawson, MP JK 165, working the hours of, 24 hrs

regular and 12 hrs overtime for a combined total hours worked of 36 hours.

The total hours worked for all violations are 149.25 hours divided by two. This equals 74.625 hours due Mr. Whitis and Mr. McGregor at there (sic) prevailing overtime rate of pay.

Monetary amounts due each employee are as follows:

Signal Foreman M. A. Whitis - overtime rate of pay \$29.45 x 74.625 equals \$2,197.71.

Signalman K. G. McGregor - overtime rate of pay \$27.26 x 74.625 equals \$2,034.28

Per our phone conversation on July 13, 1999, I requested a extension and was granted one until July 31, 1999, in order to submit the above claim due to still gathering information concerning the violations. Please advise when these amounts will be paid the claimants."

In its initial denial and throughout handling on the property, the Carrier merely reiterated the facts set forth in the claim letter but provided no reason at all for denying this claim; merely asserting "there is no basis for this claim." [Timeliness defenses interposed by Carrier in the mid-level appeal denial were met with an assertion by the General Chairman that the Carrier had granted a time extension. Thereafter, the procedural objection apparently was abandoned in handling before the Board].

Appendix 1 of the Scope Rule of the controlling Agreement specifically covers the construction and installation of all signals and signal systems, traffic, and C.T.C. control systems. In its written Submission to the Board, the Carrier appears to concede a Scope Rule violation on the merits, but argues only that monetary damages should not be awarded, as follows: "The Carrier does not dispute that a Maintenance of Way Employee performed some work normally reserved to Signal Department Employees. It is our position that all Signal Department Employees were fully employed and that no Signal Department Employee was deprived of any work."

The failure of the Carrier to contradict or refute the material facts specifically alleged in the claim filed by the General Chairman on July 21, 1999, leads us to conclude that the Organization carried its burden of proving a violation of Appendix 1 of the Scope Rule on the claim dates. The Board consistently has held that "it is a fundamental axiom of labor relations that material assertions made on the property by either party to a dispute and not refuted on the property by the other party must be accepted as established fact." See Third Division Awards 28459 and 30460. As to the appropriate remedy, Third Division precedent amply supports the Organization's position that employees deprived of the opportunity to perform work reserved to them under the Agreement are entitled to recover for such loss and that this type of claim is a proper device for policing the Agreement. See Third Division Awards 20633, 29232, and 32125. Based on all of the foregoing, we shall sustain the claim as presented.

AWARD

Claim sustained.

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 22nd day of March 2004.