

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36972
Docket No. SG-36227
04-3-00-3-446

The Third Division consisted of the regular members and in addition Referee Dana Edward 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 twenty-four (24) hours each at the time and one-half rate. Account Carrier violated the current Signalmen's Agreement, particularly Appendix 1 (Scope Rule) and the Letter of Understanding dated April 23, 1999, when on June 28 and 29, 1999 Carrier permitted outside contractor employees to dismantle grade crossing signals at the South and North End of Beach Creek and Opportunity Way in Greenville, KY and deprived the Claimants of the opportunity to perform this work. BRS File Case No. 11438-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 genesis of this claim is the undisputed fact that on June 28 and 29, 1999, three employees of L. T. Black Contractors were utilized by the Carrier to remove signal crossing protection equipment at the South and North End of Beach Creek and Opportunity Way at Greenville, Kentucky. That location was not one of the six on-property sites at which the Carrier bargained with the Organization for limited exceptions allowing the outside contractor to perform such work at specifically-described sites which otherwise was within the coverage of the Scope Rule of the P&L/BRS Agreement. We conclude that the Organization made out a prima facie case of a Scope Rule violation.

Throughout all levels of handling of this matter on the property, the Carrier denied the claim without ever providing any reason for the denial. Just as in a number of other claims handled in a similar way at or about the same time, the Carrier simply asserted: "[T]here is no basis for this claim."

In its written Submission to the Board, the Carrier alleged, for the first time in the handling of the case, that the portion of line on which the outside contractor was utilized to dismantle signal equipment had been abandoned on the authority of and with the approval of the Surface Transportation Board. In furtherance of that affirmative defense, the Carrier proffered de novo at the Board level, copies of documentation of the STB abandonment approval dating back to June 1998.

We must sustain the instant claim for the same reason we sustained the companion cases in which the Carrier failed to assert let alone offer proof of an affirmative defense in the face of the Organization's prima facie case until the claim was before the Board for arbitration. Even if, arguendo, these assertions were relevant and might have constituted a valid defense to the Organization's prima facie showing that the Carrier violated the cited Agreement provisions, we may not consider evidence and arguments advanced de novo at the Board level. For reasons set forth more fully in Third Division Awards 36929, 36930 and 36931, this claim is sustained.

Form 1
Page 3

Award No. 36972
Docket No. SG-36227
04-3-00-3-446

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 21st day of April 2004.