

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39361
Docket No. SG-38943
08-3-NRAB-00003-050408
(05-3-408)

The Third Division consisted of the regular members and in addition Referee Joyce M. Klein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railway (KCS):

Claim on behalf of L. D. Beisley, for two hours and forty minutes pay at the applicable overtime rate of pay plus Skill pay, due to the loss of work opportunity, and for seniority rights, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, Rule 2, Rule 10, Rule 12 and Rule 30, when on June 7, 2004, the Carrier wrongfully called a Gateway Western Railway (GWRR) Traveling Signal Maintainer to repair a highway crossing protection device on the Kansas City Southern Railway, located at Kansas Avenue, Kansas City, Missouri, Mile Post 2.54. DOT No. 329-740-T. Carrier’s File No. K0604-5901. General Chairman’s File No. 04-080-KCS-185. BRS File Case No. 13155-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.

On June 7, 2004, the Carrier called Signal Maintainer T. A. Hogan, headquartered in Grandview, Missouri, to respond to a trouble call involving a malfunctioning crossing protection device on the KCS at a main thoroughfare in downtown Kansas City, Missouri. When T. A. Hogan was unavailable, the Carrier called his backup, Signal Maintainer J. M. McDonald who was assigned on the adjacent territory and headquartered at Amsterdam, Missouri. When he was unavailable as well, the Carrier called Signal Maintainer B. A. Hartline, who was assigned on an adjacent seniority district, on the GWWR, headquartered at Odessa, Missouri, approximately 40 miles away. Signal Maintainer Hartline completed the repair within an hour.

The Claimant contends that Signal Maintainer Hartline, who has GWWR seniority, is not covered under the KCS Agreement and that the Claimant should have been called to make the repair. At the time of the trouble call, the Claimant had already worked his regular assignment and two hours of overtime and was located approximately 130 miles away.

The Organization relies upon the Scope Rule, as well as Rules covering Overtime Continuous with Assigned Hours, Calls and Seniority to argue that there is no basis for the assignment of work to an employee of a wholly owned subsidiary who does not hold seniority and does not fall under the Agreement. The Organization points out that the Claimant and his designated mark-off have been called to make repairs in this territory in the past. The Carrier asserts that the Organization did not meet its burden of proof of showing that the Carrier's action was prohibited, that the Claimant was not "available" because he had already worked ten hours and would be at the Hours of Service Act limit of 12 hours before he even reached the location of the trouble call and that the situation was emergent.

It is well settled that work within the coverage of the Agreement "may not be arbitrarily removed and assigned to others not within its coverage." Third Division

Award 13039. However, there is some question as to whether the Claimant could be available to make the repair in a reasonable amount of time. The Claimant had worked ten hours and needed to drive approximately 130 miles to respond to the trouble call, thus he would be at the 12 hour Hours of Service limit before arriving at the location of the trouble call. Although the Hours of Service Act permits a Signal Maintainer to work up to 16 hours in an emergency, the emergent nature of the trouble call required a response "without undue delay" under 49 CFR 234.207. The malfunctioning crossing protection device at a main thoroughfare in downtown Kansas City, Missouri, rendered this situation one with a significant impact on public safety that required under 49 CFR 234.207 that the repair be completed "without undue delay." Under these circumstances, the Carrier's determination to assign the trouble call to an employee who does not hold seniority on this territory is justified by the need to comply with 49 CFR 234.207.

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 October 2008.

Brotherhood of Railroad Signalman's Dissent to Third

Division Awards 39361, 39362 and 39282

Referee Joyce M. Klein

Future Railway Labor Act (RLA) arbitration boards should disregard all three of these Awards.

The contract claims in each of these cases arose under separate and distinct collective bargaining agreements (CBA). In all three Awards the National Railroad Adjustment Board (the Board) along with Referee Klein exceeded its jurisdiction by failing to interpret the applicable CBA. Instead, the Board ruled that the CBA was subject to being overridden by federal regulation or by language in a CBA that covers employees who work for other railroad companies.

The Board's failure to interpret the applicable CBA, and its misapplication of a federal regulation had the purpose and effect of amending the applicable CBA. The Board does not have jurisdiction to amend CBAs. The Awards thereby violated the RLA. The Awards should be vacated on judicial review or, if not, should be ignored by future RLA Boards.

Third Division Award 39361

A Kansas City Southern (KCS) railroad signalman represented by the Brotherhood of Railroad Signalmen (BRS) filed a claim against KCS under

the CBA between BRS and KCS. The claim concerned repair of a malfunctioning signal device located on the KCS. The repair had been performed by an employee of another railroad, Gateway Western Railway (GWR).

It was and is undisputed that signal work and signal workers on the KCS are covered by the BRS-KCS Agreement; and that signal work and signal workers on the GWR are covered by the CBA between BRS and GWR. Signal employees working under one railroad's CBA have no right to perform work on another railroad. It is also undisputed that no CBA, and no federal law or regulation, authorized or required the KCS to violate the BRS-KCS Agreement by assigning work to employees from another railroad.

Award 39361 purports to hold that the requirements of a federal rail safety regulation (Hours of Service) authorized KCS to violate the BRS-KCS Agreement. However, questions whether the RLA is overridden by another federal law are reserved to the courts, not the Board. For example, it took a U.S. Supreme Court decision to determine whether railroads could override CBAs when implementing railroad mergers authorized by the Interstate Commerce Commission (*Norfolk & Western Railway Co. v. American Train Dispatchers. Assn.*, 111 S.Ct. 1156 (1991)).

The RLA, 45 U.S.C. §152 First, requires railroads (and unions) to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to refrain from making changes in existing agreements except under RLA procedures, 45 U.S.C. §152 Seventh

and 156. It was beyond the Board's jurisdiction to rule that the federal safety regulation excused KCS from its contractual obligation to use only KCS employees to repair the KCS signal device at issue.

The Board also exceeded its jurisdiction by ruling (albeit implicitly) that the BRS-GWR Agreement permitted GWR employees to work on the KCS. The majority's decision to treat this case as a seniority district dispute instead of a dispute involving two separate and distinct CBAs is equivalent to combining provisions of these agreements without the parties bargaining for changes. The parties engaged the Board to interpret the BRS-KCS Agreement, not the BRS-GWR Agreement.

Third Division Award 39362

A KCS signalman represented by the BRS filed a claim against KCS under the BRS-KCS Agreement. The claim concerned repair of a malfunctioning signal device located on the KCS. The repair work had been performed by an employee of another railroad, MidSouth Rail (MSR).

It was, and is, undisputed that signal work and signal workers on the KCS are covered by the BRS-KCS Agreement; and that signal work and signal workers on the MSR are covered by the CBA between the BRS and MSR. The Board found, and the BRS does not dispute, that the MSR employee had retained seniority rights to *bid* on KCS *positions* under certain circumstances. The Board, however, wasn't engaged to interpret the BRS-

MSR Agreement. Its charge, and the limit of its jurisdiction, was to interpret the BRS-KCS Agreement.

This overreaching by the Board resulted in a finding that the KCS could cross over a MSR worker to handle an individual repair project on the KCS. This is tantamount to, and has the putative effect of, merging the seniority roster on the KCS (as controlled by the BRS-KCS Agreement) with the *seniority roster on the MSR*. This is nothing less than amending both CBAs and goes beyond the Board's jurisdiction.

Third Division Award 39282

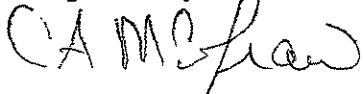
The BRS concurs in the result of this Award, which sustained a contract claim filed under the BRS-GWR Agreement by three BRS-represented GWR signalmen. The claim concerned the use of an employee of the KCS Railroad to provide vacation relief of a vacationing GWR employee.

The BRS strongly disagrees, however, with the Board's reasoning in arriving at a sustaining award. In this award the Board did not agree with Carrier's hypothetical argument that the KCS employee was needed in case there was trouble and could be used to repair this imaginary trouble in order to comply with a federal safety regulation.

However, the Board used the same faulty approach it would later use in Award 39361, namely, the erroneous concept that in some cases a carrier might unilaterally override a CBA by invoking a federal safety regulation. In

finding that such override was not permitted in Award 39382, the Board endorsed the idea that under different circumstances a signalman from one railroad might be assigned a work project on another railroad. This amounts to amendment of a CBA by an RLA board, which is beyond the Board's jurisdiction. Soon thereafter, as discussed above, the Board made exactly that mistake in Award 39361.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C.A. McGraw", written over the typed name.

C.A. McGraw

International Vice President BRS

Labor Member, NRAB