

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39362
Docket No. SG-38945
08-3-NRAB-00003-050410
(05-3-410)

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 F. D. West, for four hours 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 11, 2004, the Carrier wrongfully called a MidSouth Rail (MSR) Traveling Signal Maintainer to repair a tracklight between Red Junction M.P. L-561.2 and Wilson Alley M.P. L-559.5 on the Shreveport Terminal Subdivision on the Kansas City Southern Railroad. Carrier’s File No. K0604-5905. General Chairman’s File No. 04-083-KCS-185. BRS File Case No. 13157-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 11, 2004, Signal Maintainer Mitchell was unavailable for a trouble call concerning a signal malfunction within the limits of the Shreveport, Louisiana, terminal. Mitchell's designated mark off partner also was unavailable for the trouble call. Instead of calling the Claimant, C. L. Rose, a KCS Signal Maintainer who successfully bid a former MidSouth Signal Maintainer assignment headquartered at Minden, Louisiana, received the trouble call and repaired a flasher crossing in approximately four hours. Rose, who holds seniority on both the KCS and MSR, has frequently worked as Mitchell's de facto mark off partner in the past. Mitchell had instructed the call desk to call Rose if his designated mark off partner was unavailable.

The Organization seeks four hours of compensation at the applicable overtime rate for the Claimant, who it maintains should have been called to repair the flasher crossing. The Organization contends that there is no provision in either the KCS or MSR Agreement that would permit MSR signal employees to perform work covered by the KCS Agreement without an agreement of the parties to do so. The Organization claims that Rose is governed exclusively by the MSR Agreement and, therefore, is not eligible for work covered by the KCS Agreement. The Organization cites Rules covering overtime, calls (availability, coverage, and pay) and seniority and asserts that there is no provision in either the MSR or KCS Agreements permitting MSR signal employees to perform KCS work without an agreement to do so.

The Carrier asserts that the Organization failed to meet its burden of proof because none of the Rules it cites specifically address the order, priority, or rights to a trouble call for work on another Signal Maintainer's territory. The Carrier contends that Signal Maintainer Rose was called at Mitchell's behest and it cannot now be held liable for the actions of an employee.

The Carrier further relied on an October 26, 1999 Memorandum of Agreement governing the rights of employees of the KCS "including the former MidSouth (MS)." That Memorandum of Agreement provides that employees "accepting employment on the other railroad will establish a new seniority date" but will also "retain their original seniority date" and will continue to accrue seniority "on their original territory." Accordingly, Rose, though working on the MSR, retained and continued to accrue seniority on the KCS and thus retained his eligibility to respond to a call on the KCS. Additionally, at the time of the call, a long-standing de facto arrangement between Mitchell and Rose where Rose worked as Mitchell's de facto mark off partner when his designated mark off partner was unavailable, led the call desk to contact Rose for the disputed work. Although the Claimant may have a claim to the work, the employee called also held seniority on the KCS and also maintained a right to the work. There is no proof or Agreement language to establish that the Claimant was senior to the employee used or otherwise had a preferential right to the work. Under these circumstances, the claim is 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 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

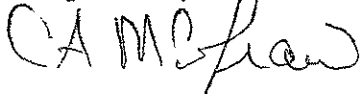
The BRS concurs in the result of this Award, which sustained a contract claim filed under the BRS-GWR Agreement by three BRS-represented GWR signalmen. The claim concerned the use of an employee of the KCS Railroad to provide vacation relief of a vacationing GWR employee.

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 printed name.

C.A. McGraw

International Vice President BRS

Labor Member, NRAB