

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39509
Docket No. SG-39063
09-3-NRAB-00003-050494
(05-3-494)**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of J. L. Juanillo, for 15 hours at his time and one-half rate of pay, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule and Rule 80, when it allowed a supervisor to perform Scope-covered work on June 12, 2004, at MP 516.90 on the Claimant’s assigned territory and deprived the Claimant of the opportunity to perform this work. Carrier’s File No. 1407151. General Chairman’s File No. UPGCW-SC-1054. BRS File Case No. 13175-UP.”

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 events giving rise to the instant dispute are as follows.

By letter dated June 12, 2004, the Organization alleged, in relevant part, as follows:

“On June 12, 2004 MP 516.90 FRA tests were done on Mr. Juanillo’s territory. RS&I Test forms were completed and signed by Jose Rubino (ARSA SUPERVISOR).

On June 12, 2004 when Mr. Rubino performed these tests, filled out FRA reports, and signed them, the carrier violated Scope Rule, Note 4, Page 4 ‘Persons holding Supervisory or official positions not covered by this agreement will not be required or permitted to perform work covered by this agreement except when no employee covered by this agreement is qualified to perform a particular job and in such instances will be accompanied by a signalman or signal maintainer. . . .’”

While not denying that testing and form completion tasks were indeed performed by Rubino, the Carrier none-the-less denied that such work violated the Agreement, contending that such work performed by Rubino was within the bounds of the Scope Rule, Note 4 as well as Rule 1(F). Rule 1(F) states, in relevant part:

“Signal Inspector: An employee assigned to and whose principal duties are to inspect and test systems, appurtenance and appliances covered by this agreement and to make relay and other inspections and tests required by the carrier. . . . This paragraph is not intended to prohibit inspections and tests made by supervisory personnel of the Signal Department to determine whether employees coming within the Scope of the agreement are properly installing or maintaining Signal Department apparatus, appliances, circuits, and appurtenances, or by manufacturers’ representatives, when accompanied by signal employee, to insure their equipment is operating as intended.”

In support of the Carrier's position that no violation of the Agreement occurred, the Carrier asserts that the work performed by Rubino was part of a new signal construction project on the Alhambra Subdivision, for which Rubino was in charge and responsible for. The Carrier noted during the on-property handling that while Signal Inspector A. L. Carter was the individual assigned to the project, on the date at issue, Carter was working on another project elsewhere, and thus unable to assist with the FRA testing and completion of the associated paperwork. The Carrier also noted that during the testing process, Rubino was accompanied by Signal Foreman Landeros.

Given the foregoing exchange, the question to be addressed by the Board is whether the language of the Scope Rule, Note 4, Rule 1(F) and Rule 80 prohibit Rubino from performing the work at issue.

As we begin our review of the Organization's arguments in this matter, we must first note that this is a contract interpretation case. Accordingly, it is well established that the Organization bears the burden of proving by a preponderance of the evidence that the Carrier is contractually restricted in its right to perform the work at issue. Given this well established principle, it is also well accepted that absent clear and unequivocal language to the contrary, the Carrier is free to assign its employees and otherwise run its business in the manner it deems most efficient and economical.

In reviewing the Rules at issue, the Board concludes that Rule 1(F) as relied upon by the Carrier does not apply to the given situation for two reasons. First, as we read Rule 1 (F) we are of the opinion that that portion of the Rule relied upon by the Carrier permits inspections and tests to be performed by supervisory personnel for the purpose of determining whether BRS-represented personnel "[a]re properly installing or maintaining Signal Department apparatus, appliances, circuits, and appurtenances. . . ." In other words, this language carves out an exception for the purpose of evaluating BRS personnel in the performance of their duties. Under the facts at hand, we find no indication that Rubino was performing an evaluation of any BRS-represented personnel. Second, we note that Rule 1(F) carves out an exception for "manufacturers' representatives" to insure that equipment is operating as intended. In the instant matter, we cannot conclude that Rubino was at any relevant

Form 1
Page 4

Award No. 39509
Docket No. SG-39063
09-3-NRAB-00003-050494
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time a "manufacturer's representative." For these reasons, Rule 1(F) has no application to the facts at issue.

Next, we must determine if the work performed by Rubino, under the unique circumstances at hand, was work that should have been performed by BRS-represented employees under the terms of the Agreement, including but not limited to Rule 80. In making our determination, the Board finds significant the undisputed fact that the work at issue was under the control and supervision of the Signal Construction Department and at the date and time associated with the instant claim, had not yet been turned over to the Signal Maintenance group, of which the Claimant is a part. As such, until such time as the work was turned over to the Claimant's Signal Maintenance group, it had not become work covered by the Scope Rule. Accordingly, neither the Organization nor the Claimant had the contractual right to lay claim to the work at issue.

Finally, given the basis of our denial of the instant claim as noted above, we need not determine the application of Note 4 under the circumstances presented. For the reasons noted and discussed above, we find no violation of the noted provisions of the Agreement, and accordingly, the claim must 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 2nd day of February 2009.

Labor Members Dissent
Third Division Award 39509
Docket No. SG – 39063
Referee: Dennis J. Campagna

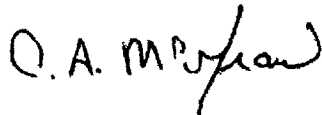
The Majority's findings are in conflict with common sense. There is no dispute that the Signal Supervisor performed work covered by the Scope Rule. The Majority started out on the right track by acknowledging that **"...the Board finds significant the undisputed fact that the work at issue was under the control and supervision of the Signal Construction Department."** This should have been the end of the story, but it is not. The majority came up with the unintelligent theory that the work performed by the supervisor had not been turned over to the Signal Maintenance Group; therefore, it had not become work covered by the Scope Rule.

This logic is about as asinine as saying that contractors can perform signal work and it does not come under the Scope Rule until they finish and leave the property. The majority ignored the fact that the Agreement clearly states that **"Persons holding Supervisory or official positions not covered by this agreement will not be required or permitted to perform work covered by this agreement..."**

At the onset the Board was ask a uncomplicated question. Can persons not covered by the agreement perform work covered by that agreement? The simple answer is **NO!**

The Award and Findings are palpably erroneous.

Respectfully submitted,



C.A. McGraw, Labor Member