

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29232
Docket No. MW-28668
92-3-89-3-19

The Third Division consisted of the regular members and in addition Referee William E. Fredenberger, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Signal Department forces to construct and back-fill retaining walls for berms approximately one mile west of the Sauk Trail road crossing on June 19, 24, 25 and 26, 1987 (System File BJ-8-87/UM-15-87).

(2) As a consequence of the aforesaid violation, the Bridge and Building Department employes listed below shall each be allowed pay at their respective time and one-half rates for the number of hours indicated below:

<u>Claimants</u>	<u>Hours Claimed</u>
J. Valek	thirty-two (32) hours
O. Mannarelli	thirty-two (32) hours
T. Legner	thirty-two (32) hours
M. Bachmann	twenty-four (24) hours
M. Clinton	twenty-four (24) hours
J. Quirk	eight (8) hours
B. Ruzich	eight (8) hours"

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

As Third Party in Interest, the Brotherhood of Railroad Signalmen were advised of the pendency of this dispute, but did not file a Submission with the Division.

On the Claim dates signal systems within the Old Sauk Trail Road crossing area located five miles west of Matteson, Illinois, were modified as part of the Carrier's single tracking of the main line east from Joliet,

Illinois, to Matteson, Illinois. B&B forces and signal forces worked together on the project. Signal forces participated in the construction of retaining walls or "berms" with railroad crossing timbers and ties which then were back-filled with dirt and stone. The Claim in this case followed.

The Carrier denied the Claim. The Organization appealed the denial to the Carrier's highest designated officer. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

The Organization argues that the work customarily, historically and traditionally has been performed by B&B forces and is contractually reserved to them by the Agreement. In support of its position, the Organization points to statements of four longtime B&B employees. The Carrier, on the other hand, maintains that B&B employees do not have exclusive right to the work. The Carrier alleges that there is a practice on the property of signal forces performing such work in connection with the principal work of their craft. Accordingly, urges the Carrier, the Agreement does not guarantee the work to B&B forces which renders the Claim invalid.

Our review of the record leads us to conclude that the Organization has the superior position on this point.

The statements of the four B&B employees establish, as the Organization alleges, that the work customarily, historically and traditionally has been performed by the B&B forces. Accordingly, the record establishes such a practice. By contrast, the record does not substantiate the practice alleged by the Carrier of signal forces performing the work. The Organization challenged the Carrier to produce proof of the practice. There was no evidentiary response to the Organization's challenge.

The Carrier did provide this Board with a memorandum of March 20, 1984, stating that the signal department has always built its own foundations for its equipment. However, the Organization objects to our consideration of that memorandum on the ground that the Carrier never made it available to the Organization during the on-property handling of the Claim. The record does not affirmatively establish that the memorandum was part of the on-property handling of the Claim. Accordingly, we are barred by applicable Board rules from considering the memorandum as evidence before this Board.

The Carrier maintains that the Claim seeks unsubstantiated, excessive hours of pay at improper rates and that Claimants are not proper. The Organization contends that the issue of whether Claimants were proper was not raised by the Carrier during the on-property handling of this Claim. Moreover, urges the Organization, Claimants are entitled to the compensation sought by the Claim even though they worked on the Claim dates and received compensation therefore because Claimants lost work opportunities when the Carrier wrongfully assigned the work to the signal forces. Moreover, the Organization urges, the Claim represents an attempt to police the collective bargaining Agreement and require the Carrier to follow its provisions.

Inasmuch as the issue of whether Claimants are proper was not raised during the on-property handling of the Claim applicable Board rules prohibit the Board from considering that argument. We agree with the Organization that Claimants are due compensation despite the fact they worked and received compensation on the Claim dates. Claimants in fact did lose work opportunities due to the Carrier's violation of the Agreement, and this type of Claim long has been viewed as a proper device to police the Agreement.


However, we must agree with the Carrier that the hours to which Claimants are entitled under the Claim should be those worked on the Claim dates by the signal forces. We believe there should be a joint check of Carrier records to ascertain those hours and we so order as part of the remedy in this case. We believe the Organization's Claim for overtime is without Agreement support.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of May 1992.