

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31749
Docket No. SG-31949
96-3-94-3-257

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (CONRAIL):

Claim on behalf of R.G. Pauley for payment of eight hours at one and one-half the Electronic Specialist's rate, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when it utilized a management employee to fill a vacant Electronic Specialist position and perform the work of that position on August 21, 1992. Carrier's File No. SG-569. General Chairman's File No. RM2445-52-593. BRS File Case No. 9335-CR."

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 or 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 fact situation in this dispute is clear and uncontroverted. Claimant was assigned as an Electronic Technician at Columbus, Ohio. His assignment was scheduled to work from 7:00 A.M. to 3:30 P.M., Monday through Friday. On Friday, August 21, 1992, a vacancy existed on a third shift (11:00 P.M. to 7:00 A.M.) Electronic Specialist position at Columbus, Ohio. Claimant has no seniority as an Electronic Specialist. To fill the vacancy on the Electronic Specialist position at Columbus, Ohio, Carrier utilized a Systems Department Supervisor headquartered at Pittsburgh, Pennsylvania.

The claim on behalf of the Electronic Technician initiated and progressed by the Organization on his behalf alleges that the use of the Supervisory employee to fill a vacancy on an agreement-covered position constituted a violation of the Signalmen's rules agreement. The Organization insists that the Carrier has an obligation to provide sufficient agreement-covered employees to meet the needs of the service and that the use of the Supervisor, who has no standing under the Signalmen's agreement, constitutes a violation which must be satisfied. The Organization points with favor to Third Division Awards 12374, 18808, 19268 and 20190 in support of its position that the use of a Supervisory employee to perform agreement-covered work creates a situation in which an agreement-covered employee is entitled to recompense.

The Carrier does not challenge the fact that a Supervisory employee was used to fill the agreement-covered vacancy but rather argues that this Claimant is not a "proper claimant" inasmuch as he has no seniority standing as an Electronic Specialist and would not have been called for the vacancy in any event. Carrier further states that the Organization "has not presented any evidence that supports its assertion that the Supervisor performed any work that is reserved to Electronic Specialists." It also alleges that the Organization has failed to point to any agreement language which supports any of its assertions. Carrier cites with favor the decisions rendered in Awards 13 and 24 of Special Board of Adjustment No. 1011 along with Award 64 of Public Law Board No. 3775 as well as Third Division Awards 19077 and 30742 in support of its argument relative to the "improper claimant" issue.

The Board has read with interest the citations of authority advanced by the parties in this dispute and has considered the several arguments advanced. Carrier's argument relative to the Organization's alleged failure to present evidence to support its contention that the Supervisor performed Electronic Specialist work is specious on its face. There is no disagreement between the parties that the Supervisor did, in fact, fill the full tour vacancy on the Electronic Specialist position. Carrier candidly states that it "instructed Systems Supervisor D. Dusette to fill the vacancy." By Carrier's own admission, the Supervisor performed the work of the Electronic Specialist position. Its argument in this regard is rejected.

Following a review of the Awards cited by Carrier in its defense of the "improper claimant" argument, it is clear that each of those Awards addressed a fact situation which is considerably different from that which exists in this case. Award 13, Special Board of Adjustment No. 1011 involved the use of furloughed craft employees instead of other regular assigned craft employees. Award 24, Special Board of Adjustment No. 1011 involved a situation in which a vacant craft position was blanked - not covered by an employee outside of the agreement. Award 64, Public Law Board No. 3775, as well as Third Division Awards 19077 and 30742, each involved the use of an agreement-covered employee to perform the disputed service in question. None of these Awards is of any assistance in our determinations in this situation. Rather, in this regard, the Board concurs with the opinion expressed in Third Division Award 20190 which held:

"This Board has noted on a number of occasions that the sole fact that another employee may have had a better right to a claim is of no concern to the Carrier, and does not relieve the Carrier of a violation of the Agreement when that right was not exercised. See, for example, Awards 19067 (Dugan), 18557 (Ritter) and 17801 (Kabaker)."

Carrier argues that the Electronic Specialist positions require highly trained employees. It insists that these positions have great responsibility and must be filled by qualified employees. It acknowledges in this case that "there were no Electronic Specialists available to work the third shift vacancy on August 21, 1992," therefore, it insists that it had the right to assign the Supervisor to do the necessary work.

While the Board agrees that the Carrier does have the right to determine its work force, the Board does not agree that the Carrier can, with impunity, ignore and otherwise violate the terms and conditions of the negotiated rules agreement which provides as follows:

"Appendix F

The following applies to Electronic Specialists:

E. It will be permissible to cover an Electronic Specialist's vacancy with an individual selected by the Company who is represented by the Brotherhood of Railroad Signalmen prior to assignment to the position of a qualified applicant or during temporary absences of regular assigned employees caused by injury, illness or other causes."

The Board is impressed with the reasoning and logic expressed in Third Division Award 12374 which held:

"A collective bargaining agreement is a joint undertaking of the parties with duties and responsibilities mutually assumed. Where one of the parties violates that Agreement a remedy necessarily must follow. To find that Carrier violated the Agreement and assess no penalty for that violation is an invitation to the Carrier to continue to refuse to observe its obligations. If Carrier's position is sustained it could continue to violate the Scope Rule and Article I of the Agreement with impunity as long as no signal employees were on furlough and all of them were actually at work. For economic or other reasons, Carrier could keep the Signalmen work force at a minimum and use employees not covered by the Signalmen's Agreement to perform signal work. No actual damages could ever be proved. This is not the intent of the parties nor the purpose of the Agreement.

While Carrier alone has the right to determine the size of the work force in any craft, it has a duty and obligation to keep available an adequate number of employees so that the terms of the Agreement are not breached. Carrier is obligated to have a sufficient number of available signalmen on its roster for its needs. If it fails to do so, it may not complain when a penalty is assessed for a contract violation."

Boards have often and regularly held that the use of individuals who have no standing under a negotiated rules agreement to perform work which is specifically covered by such rules agreement constitutes a violation of the negotiated rules agreement. The use of a supervisory employee to perform agreement-covered work is such a violation instance. Third Division Award 18808 so held and so do we.

On the basis of the evidence which exists in this case, the Board finds that Carrier did, in fact, violate the expressed conditions of the negotiated rules agreement. The named individual is, therefore, eligible to receive the recompense which is hereby assessed for the contract violation. The Claimant should, therefore, receive 8 hours pay but at the straight-time rate of the Electronic Specialist position.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of October 1996.