

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33518
Docket No. SG-33969
99-3-97-3-454**

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

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

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. A. Farmer for payment of two hours at the straight time rate (plus the skill differential), account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, when it used non-covered employees to work on communication equipment at East Conway Yard on October 5, 1995, and deprived the Claimant of the opportunity to perform this work.” Carrier’s File No. SG-884. General Chairman’s File No. RM2858-2-496. BRS File Case No. 10318-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 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.

As Third Party in Interest, the International Brotherhood of Electrical Workers was advised of the pendency of this dispute and chose to file a Submission with the Board.

Claimant worked October 5, 1995 for a total of twelve hours, eight hours' straight time and four hours at time and one half. On that same date, the record indicates that the Carrier assigned IBEW employees to work on the dispatcher line and foot pedal for the line at East Conway. The IBEW Radio Department employees are alleged to have performed Scope protected BRS work. The Organization alleges that for the assignment of work to those foreign to the Agreement was a violation and should be compensated. The Organization has requested two hours at current rate including skill adjustment.

Initially, the Carrier denied that the work was Scope protected and argued that the work was performed on leased lines. During the progression of this claim, the issues narrowed and the Carrier's position became firmly fixed on the fact that the Claimant had worked the maximum twelve hours permissible under the Hours of Service Act and therefore was unavailable for the work. That is the core issue at bar.

The Organization argues that the Hours of Service Act is irrelevant in that IBEW employees performed work on straight time that should have been assigned to the Claimant as part of his regularly performed duties. The Carrier maintains that since the Claimant had already performed all of the work he was permitted under the Hours of Service Act, he was not available to perform the work and not permitted additional compensation.

On the merits of this dispute, the Organization argues on property that the work accrued to the Claimant, that he was under pay, that it was assigned to others at the straight time rate, that it should have been a part of his regular assignment and was withheld by the Carrier "willfully." The Organization points to Awards that argue that when the work belongs to the employees and is given to others it is lost work opportunity and the Claimant is to be fully compensated for his loss (Third Division Award 29036; Second Division Award 11660).

The Carrier maintains that there is no justification for payment as the Claimant could not perform the work due to the Hours of Service Act. The Claimant was permitted to work only twelve hours per day and had worked that day eight hours at the straight time rate of pay and four hours at the overtime rate. As he was fully compensated and could not have worked more than his maximum allowable twelve hours, he was not due the requested two hours of this claim.

The Board has fully considered the instant case and the evidence and argument at bar. We have also carefully read all of the past Awards related thereto. While the issue of Hours of Service has been considered in past Awards, it has not been clearly resolved (Public Law Board No. 2268, Award 1; Third Division Award 30883). The facts of this case are not in dispute. The Claimant performed the maximum number of hours of service allowable under the Hours of Service Law on October 5, 1995 and was compensated accordingly. There is no dispute that he was restricted by law to work twelve hours and in fact, worked twelve hours. The Carrier asserts that he was therefore unavailable. The Organization argues that Radio Department employees performed the Claimant's work and he should now be paid for lost work opportunity.

While both parties have raised valid arguments to support their positions, the Board is persuaded by the evidence of record that the Organization's position must hold. The sole issue at bar is compensation. After full and careful review, the Board finds the following. While the Claimant was fully employed, work reserved to the craft and protected by the Scope of the Agreement was performed at the Carrier's direction in violation of the Agreement. The negotiated Agreement does not permit such assignment. The Carrier is obligated to instruct its employees and perform its business under the obligations of the negotiated Agreement, as well as within the constraints of law. It is to be expected that the Carrier will consider both in its operation and direction of its forces. Here, the Organization is seeking two hours compensation for work performed by strangers to the Agreement while the Claimant was performing work under the Hours of Service.

The Board notes that the Carrier provided no rational for its use of others to perform the Claimant's work. We note, that while the dispute was on the property, the Organization argued that:

"IBEW employees performed Mr. Farmers work on straight time. Which was the same time in which Mr. Farmer should have been used to perform the work. The communications work in question should have been part of Mr. Farmers regular assignment. The Carrier willfully withheld the work from Mr. Farmer."

There was no rebuttal and the dispute was thereafter filed with the Board. It appears to this Board that to maintain the integrity of the Agreement and in line with the fact that there is no evidence of record that the work could not have been performed either

by the Claimant during his regular hours (and within the Hours of Service restrictions), at another time, or on an overtime basis, the claim must be sustained. As there is no record on property disputing the requested skill differential, the Board will sustain the claim as presented.

AWARD

Claim sustained.

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 22nd day of September 1999.