Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36752
Docket No. SG-36637
03-3-01-3-170

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(CSX Transportation, Inc. (former Clinchfield
(Railroad Company)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation Co. (formerly Clinchfield):

Claim on behalf of Rodger G. Edwards and Lee E. Broyles for payment of 112 hours each at the time and one-half rate. Account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when on December 29, 1999 through January 5, 2000 Carrier allowed outside contractors to supply and operate portable lights used to watch for slides and aid in flagging at MPZ9. Carrier also violated the 1945 National Agreement when it failed to respond to the original claim within the specified time limits. This action deprived the Claimants of the opportunity to perform this work. Carrier's File No. 15 (00-0095). General Chairman's File No. mpz9. BRS File Case No. 11673-Clinchfield."

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 Organization filed the instant claim on behalf of the Claimants after the Carrier used an outside contractor to supply and operate portable lighting equipment during the period from December 29, 1999, through January 5, 2000. The Organization contends that this is covered work, and that the Carrier's Track Department used these lights to illuminate the area for potential slides and to aid in flagging at MP Z 9.0. The Carrier denied the claim, asserting that the lights were used to illuminate the area of a potential slide, and that no other work was performed.

The Organization contends that it has been an exclusive, system-wide practice for Signalmen to set up and maintain portable lighting equipment and associated electrical wiring and generators used for derailments and other work requiring such lighting, as in the instant case. The Organization maintains that the work at issue was on the Claimants' assigned territory and should have been performed by them.

The Organization maintains that the Carrier compounded this blatant violation when it failed to respond to the initial letter of claim, which was dated January 19, 2000. The Organization, after receiving no response, notified the Carrier on May 4, 2000, of its violation of the time limit and asked that the claim be allowed as presented. Accordingly to the Organization, the Carrier did not offer any evidence to support its assertion that it sent its initial denial dated March 13, 2000. The faxed copy of the denial was sent on May 12, 2000, well beyond the 60-day time limit. The Organization emphasizes that Boards have held that carriers are responsible for assuring that letters of denial are properly delivered to the appropriate Organization official within the applicable time limit. Moreover, the Board has consistently held that when a claim is not disallowed within the allotted time, it must be allowed as presented. The Carrier's failure to respond to the instant claim with 60 days requires that the claim be allowed as presented. The Organization asserts that this time limit is self-enforcing; when the Carrier fails to comply with it, the Carrier automatically defaults on the claim.

As for the substantive merits of the claim, the Organization argues that the Scope Rule covers the work in question. The language of the Scope Rule expressly reserves this type of work to BRS-represented employees, to the exclusion of all others. Based on this alone, a favorable decision is warranted. The Carrier failed to refute the Organization's assertions regarding the exclusive system-wide practice of Signalmen

setting up and maintaining portable lighting equipment and associated electrical wiring and generators used for derailments and other work requiring lighting. Because these assertions were not refuted by the Carrier, the Organization contends that they must be accepted as established fact.

The Organization further contends that established past practice exists in that such work has traditionally been performed by covered employees. The Organization maintains that this practice must continue to be applied unless the parties agree to make an exception or to change the practice. The Organization asserts that because it is an established practice that the type of work in question has been exclusively performed by BRS-represented employees, the work at issue should have been assigned to the Claimants. The Carrier violated this long-standing practice when it did not assign the work to the Claimants. The Organization emphasizes that the Carrier failed to submit any evidence to refute the existence of this past practice.

On the issue of remedy, the Organization points out that Boards have held that when employees are deprived of the opportunity to perform work reserved to them under the Agreement, the employees lose the wages they would have earned for performing the work, and they are entitled to recover for such loss. The Carrier should be required to compensate the Claimants for this loss.

The Organization ultimately contends that the claim should be sustained in its entirety.

The Carrier initially contends that there is no merit to the Organization's contentions that the claim must be paid as presented because it allegedly was not denied within the 60-day time limit. The Carrier emphasizes that within the 60-day limit the declination letter was sent to the General Chairman at the address he had provided on March 13, 2000. The Organization's contention that the Carrier was at fault, even though the General Chairman admittedly typed the wrong address, assumes too much. The Carrier argues that it cannot be faulted for relying on the address provided by the General Chairman.

As for the merits of this dispute, the Carrier points out that it hired an outside contractor to clear loose stone and rocks from a tunnel entrance. This work included supplying portable lights at the sight to watch for further slides. The Carrier emphasizes that it is not required to "piecemeal" a project. The Carrier maintains that the work of clearing the tunnel entrance was not signal work, nor was the ancillary work of monitoring and fueling lights at the site.

The Carrier argues that the Scope Rule does not expressly reserve the work of setting up, monitoring, and fueling portable lighting and generators, under any circumstances, to BRS-represented employees. The Carrier contends that the Organization failed to meet its burden of establishing that the work at issue has been assigned to covered employees pursuant to an exclusive, system-wide, historical practice. The Carrier maintains that there is no exclusive, system-wide, historical practice of assigning such work to Signalmen on the former Clinchfield Railroad. Moreover, the instant matter does not involve a dispute between crafts, but rather the question of whether a contractor may set up its own portable lighting and maintain its own generators.

The Carrier further asserts that even if the Organization had established the merits of the instant claim, it failed to establish any basis for paying each Claimant 112 hours because the contractor had only one employee working on each of the dates in question. The Carrier further argues that claiming the overtime rate of pay for work not performed is improper and excessive.

The Carrier ultimately contends that the claim should be denied in its entirety.

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit. The Carrier denied the claim within the required time limit. The Carrier simply had been provided with the wrong address by the General Chairman, so it appears that it was received late. However, we find no procedural violation and no reason to sustain the claim based on the argument.

With regard to the merits, we find that the Organization met its burden of proof that the Carrier violated the Scope Rule from December 29, 1999, through January 5, 2000, when it allowed outside contractors to supply and operate portable lights used to watch for slides and aid in flagging at MP Z 9.0. This case is strikingly similar to on-property Award 1 on Public Law Board No. 2268. In that Award, Referee Dana E. Eischen found that the operation and on-site maintenance of power generators and portable lighting systems at derailments sit within the Scope Rule. The Scope Rule covers " . . . construction, installation, repair, reconditioning, dismantling, inspecting, testing and maintenance, either in the shop or in the field. . . ." The Scope Rule further states that "no person other than those classified herein shall be permitted to perform any of the work described herein."

The record is clear that the Carrier in this case allowed outside contractors, to supply and operate portable lighting equipment to illuminate the area for potential slides and to aid in flagging at MP Z 9.0. Given the previous on-property Award and the language of the Scope Rule, we find that the Carrier violated the Agreement.

Once the Board has determined that there is sufficient evidence in the record to substantiate that the Carrier violated the Agreement, we next turn our attention to the remedy requested by the Organization. In this case, the Organization is seeking payment for two Claimants for 112 hours each at the time and one-half rate. The Board finds that remedy to be excessive. At most, the work here involved two Claimants for four days each, for a total of 64 hours. However, the records are not very clear as to the exact amount of time spent by the contractors performing the disputed work. Consequently, the Board will sustain the claim in part and order that it be remanded to the parties for a determination as to the exact number of hours actually spent by the contractors in performing the disputed work. If the parties are unable to reach an agreement, they may return to the Board for a final determination as to the number of hours to be paid to the two Claimants.

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 22nd day of October 2003.