

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37208
Docket No. SG-37757
04-3-03-3-113**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation, Inc. (CSXT):

CASE A

Claim on behalf of T. E. Lally, J. S. Garrett, H. L. Neighbors, Jr., T. L. Shields and R. C. Shumpert, for 30 hours each at their respective time and one-half rates of pay, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, when it used contractors to install a communications tower at Newnan, Georgia, Milepost XXB 39.8 on December 3, 10, and 11, 2002, and deprived the Claimants of the opportunity to perform this work. Carrier’s File No. 02-0067. General Chairman’s File No. AWP-03-11-02A. BRS File Case No. 12425-A&WP.

CASE B

Claim on behalf of T. E. Lally, J. S. Garrett, H. L. Neighbors, Jr., T. L. Shields and R. H. Mayfield, Jr., for 20 hours each at their respective time and one-half rates of pay, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, when it used contractors to install a communications tower at Chehaw, Alabama, Milepost XXB 135.6 on December 5 and 14, 2002, and deprived the Claimants of the opportunity to perform this work. Carrier’s File No. 02-0068. General Chairman’s File No. AWP-03-11-03A. BRS File Case No. 12426-A&WP.”

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 Claimants in these two cases were at all relevant times herein assigned to a gang in the Carrier's Signal Department. On December 3, 10, and 11, 2002 the Carrier utilized the services of an outside contractor, rather than the Claimants, to unload, assemble and erect a communications tower at Newnan, Georgia, and again, on December 5 and 14, 2002, to perform the same type of work at Chehaw, Alabama.

The record reflects that the parties' Scope Rule provides, in relevant part, that their Agreement "covers rates of pay, hours of service and working conditions of all employees . . . engaged in the work of construction, installation . . . of all . . . wayside or office equipment of communications facilities. . . ." The Scope Rule further provides that "(n)o employees other than those classified herein will be . . . permitted to perform any of the work covered by the scope of this agreement."

The Organization contends that the unloading, assembling, and erecting of a communications tower is the construction and installation of wayside communications facilities and thus, is covered by the Scope Rule and, pursuant to the second provision quoted above, reserved to bargaining unit employees. The Carrier, on the other hand, argues that the Scope Rule is not a reservation of work and that it has historically used contractors to perform this type of work. In addition, the parties disagree, in the event the claims are sustained, with regard to the appropriate remedy.

In our view the parties' Scope Rule is not merely, as the Carrier asserts, a Rule that simply governs the rates of pay, hours of service and working conditions of bargaining unit employees. We come to this view largely in light of the second

provision of the Scope Rule that provides, in addition to the language relied upon by the Carrier, that "no employees other than those classified herein will be . . . permitted to perform any of the work covered by the scope of this agreement." Thus, if one concludes that the work in question, the unloading, assembling and erecting of a communications tower, is the work of "construction (and) installation of . . . wayside and office equipment of communication facilities," a conclusion that we reach herein, that work is reserved to the bargaining unit. (For this reason, Third Division Award 32479, cited by the Carrier, is distinguishable.)

As noted above however, the Carrier also defends its action by claiming that it has historically used contractors to perform such work. If true, this could be a valid defense to the claim, however, as we review the record we find no evidence of such a practice. Rather, we find only the naked assertion of such by the Carrier and, consistent with long-standing precedent of the Board, such assertions are insufficient to meet one's burden of proof.

There remains then only the question of remedy. The Organization seeks a remedy for the Claimants at the overtime rate of time and one-half while the Carrier contends that only a straight time remedy is appropriate. We find, in accordance with Third Division precedent (e.g.s, Awards 6854 and 28990) that the remedy should be at the straight time rate.

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 28th day of September 2004.