

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39658
Docket No. SG-39338
09-3-NRAB-00003-060214
(06-3-214)**

The Third Division consisted of the regular members and in addition Referee Joyce M. Klein when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of R. L. McCargar, for three hours at his time and one-half rate of pay, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule (Note 3) and Rule 80, when track maintenance forces changed a rail at milepost 234.7 on February 14, 2005, and failed to notify the Claimant as required by the Agreement, causing a lost work opportunity. Carrier’s File No. 1421149. General Chairman’s File No. N scope 549. BRS File Case No. 13421-UP.”

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.

On February 14, 2005, Section Foreman L. Walton and his crew removed a bond while replacing a section of track at Milepost 234.7 which the Claimant asserts was Signal Maintainer work for which he was available but was not contacted. J. Biggerstaff, Manager of Track Maintenance and K. N. DeLaMotte both stated that the Claimant was called on the company radio, but did not respond.

The Organization contends that removal of a bond is protected work under the Scope Rule and the Carrier failed to contact the Claimant via cell phone or through the Signal Operations Center when Maintenance of Way employees changed out the rail on the Claimant's assigned territory in violation of Scope Rule (Note 3) and Rule 80. Note 3 provides:

"In changing or repairing old rail, when bond or track wires are removed while rail is in the track, the work will be performed by Signal Department employees. It is understood that the removal of bonds or track wires after rail is removed from track may be performed by other than Signal Department employees."

The Carrier asserts that the Claimant was called but did not respond via the company radio. The Claimant was responsible to make himself available to respond to trouble situations that occur on his territory. The Carrier contends that the Claimant was at fault for not answering his radio and thus is not entitled to overtime for work he did not perform. The Carrier argues that the Organization has not met its burden of proof that even if the Claimant had performed the work he would have done so during overtime hours. Additionally the Carrier asserts that there is an irreconcilable dispute of fact regarding whether the Claimant was contacted to perform the work.

The Board cannot determine from the record whether the Carrier failed to call the Claimant or whether the Claimant was called by the Carrier but did not respond to the call. Several Third Division Awards hold that claims centered upon an irreconcilable dispute of facts require dismissal. Under such circumstances, where

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there is an irreconcilable dispute of facts, the Board cannot resolve the dispute with finality. Accordingly, the Board must dismiss the claim.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of April 2009.