

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43950  
Docket No. SG-44671  
20-3-NRAB-00003-180065**

The Third Division consisted of the regular members and in addition Referee Paul Betts 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 B. Childs, R.S. Ortiz, D.J. Preciado, G.D. Salazar, A.C. Taylor and R.D. Wilson, for 276 hours each at their respective overtime rates of pay, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule and Rule 65, when from August 16, 23–25, and 29–30, 2016, September 7–9, 12–13, 20–23, and 26–27, 2016, and October 4–7, and 9–10, 2016, Carrier permitted contractors (Power Technologies) to install signal cables and signal racks used exclusively to power the signal system at every signal location on the Cima Subdivision from Milepost 236 to 311, thereby causing the Claimants a loss of work opportunity. Carrier's File No. 1672906. General Chairman's File No. W-SR-65-0001. BRS File Case No. 15722-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.

The International Brotherhood of Electrical Workers (IBEW), as a Third Party in Interest, was advised by the NRAB of the pendency of this dispute and chose to file an Ex Parte Submission with the Board.

In the instant claim, the Organization alleges that on August 16, 23-25, and 29-30, 2016, September 7-9, 12-13, 20-23, and 26-27, 2016, and October 4-7, and 9-10, 2016, the Carrier violated the Agreement when it permitted contractors to install signal cables and signal racks used exclusively to power the signal system at signal locations on the Cima Subdivision, thereby causing the Claimants a loss of work opportunity.

The Organization argues a) the Carrier committed a procedural violation of Rule 56 by failing to properly notify the Organization within the 60-day time limit. As a result, the claim must be allowed as presented, b) the Scope Rule specifically covers the claimed work, c) the Carrier's argument that the project was a mixed use project is unsubstantiated, d) the Carrier Manager's statements involve other claims and disputes over different work, making them irrelevant to the current claim, e) arbitral precedent has held that it is the current use of the cable which dictates the assignment of work, and f) the exclusivity argument raised by the Carrier is without merit, as this case involves work performed by an outside contractor, not another craft.

The Carrier argues a) the contractors performed no scope-covered work. The contractors installed commercial power transformers, ran commercial high voltage power lines, and set disconnect panels. Signal Department employees ran all lines from the disconnect panels to the Signal cabins and other Carrier equipment, b) there is a historical practice of using IBEW represented employees and/or contract forces for this type of work, c) this was a mixed use project that benefited multiple departments, including Telecommunications, d) arbitral precedent supports the Carrier's position, e) the Organization raised a jurisdictional dispute, and therefore bears a greater burden, f) the Organization failed to satisfy its burden of proof, and g) the procedural error claimed by the Organization did not result in any harm to the Organization.

The Third Party IBEW argues that the work at issue here is specifically identified in its Agreement with the carrier and is the same type of work that has historically been performed by IBEW Electricians.

Here, the Organization raised a procedural argument detailing specific time limits and notification requirements per Rule 56 of the Agreement. In relevant part, Rule 56 states the following:

**“...All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim be disallowed, the Carrier will, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance will be allowed as presented, but this will not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.” [Emphasis added]**

The Organization alleges the Carrier failed to notify the representative who filed the claim of the reason for disallowance within the 60-day time limit mandated by Rule 56. The Carrier acknowledges that the Carrier’s disallowance letter unintentionally did not include the email address of Vice General Chairman Rich (the Organization Representative who filed the claim). However, the Carrier argues the notification was timely, was provided to other Organization officials, including General Chairman McArthur, and did not cause any harm to the Organization. Furthermore, the Carrier argues that there was no showing that the Organization’s ability to set forth its appeal or post conference letter was impacted due to the clerical mistake.

Rule 56 time limits and notification requirements are clear and unambiguous. The Board does not have the authority to change or modify existing rules between the parties. Nor does the Board have the authority to create exceptions to existing rules. In the instant case, the Carrier failed to meet Rule 56 requirements by failing to notify the person who filed the claim (Vice General Chairman Rich) within the 60-day time limit. As such, the Board has no choice but to sustain the claim as presented. Per Rule 56, this Award is not to be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

**Although the Board may not have repeated every item of documentary evidence or testimony nor all of the arguments presented, we have considered all of the relevant evidence, testimony, and arguments presented in rendering this Award and Order.**

**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 5th day of March 2020.**

## **CARRIER MEMBERS' DISSENT**

to

### **THIRD DIVISION AWARD 43950 - DOCKET SG - 44671**

**(Referee Paul Betts)**

The Carrier respectfully dissents from the finding of the Third Division Award 180065 in favor of the Organization and sustaining a claim for 276 hours of pay at the overtime rate for six Signalmen (totaling approximately \$50,000). The Board did not even reach the merits of the case and instead found in favor of the Organization based solely a “hyper-technical” procedural error. In this case, the Carrier sent its reply to the Organization’s first level appeal to the e-mail address of a vice general chairman who had very recently left his post. The Carrier acknowledges that the reply should have been sent to the new vice general chairman who had sent in the appeal. Had this been the only recipient of that reply, the Carrier may not have disagreed with the finding in this award. However, that was NOT the case. The Carrier had also copied the General Chairman of this BRS Committee on its reply. The General Chairman is the officer who actually submitted the next level appeal on behalf of the BRS, and it was submitted timely – therefore, it is undisputed that no prejudicial harm resulted to the adjudication of this matter whatsoever by the Carrier’s harmless error. Without some modicum of a showing of prejudice to the Organization or the process by this error, the Board should have reached the merits of this case.

Erroneously, the Board likens this mistake that occurred here to that of a party flat out not providing a grievance or reply within CBA time limits at all. The Carrier agrees that transgression would be a fatal flaw. But that is not what happened here. The Carrier merely sent the reply to the wrong e-mail address while at the same time copying the General Chairman who would be providing the next letter to the Carrier in the appeal process anyway. This is not at all unlike the situation reviewed in PLB 6764, Award 175 in which the Carrier sent a notice of discipline for an employee to the wrong General Chairman following a hearing. Eventually, the correct General Chairman received a copy. In that case Neutral John Easley dismissed the Organization’s argument that this was a fatal defect because the parties’ discipline agreement required the Carrier to send the notice to the General Chairman within ten days. Neutral Easley held it was not a fatal flaw because all time limits were met, and “a clerical error made a mistake, something that is easily rectified without harm to the subsequent handling of the appeal process.” See also PLB 7064, Award 39 (Neutral

Binau) (No evidence sending wrong General Chairman copy of discipline notice affected the Claimant's right to appeal, therefore case decided on the merits). That is precisely what happened in this case – there was no harm to the appeal process whatsoever. The BRS filed its second level appeal within 60 days just as the agreement proscribes and did not even raise the issue in that appeal.

The Carrier points to the following additional awards as support for its position, which are but a sample of the body of arbitral precedent upholding the principle that for a procedural error to be fatal there must be some showing of prejudice to the other party: First Division Award No. 26664 (Neutral Benn); PLB 6302, Award 84 (Neutral Malin); PLB 4746, Award 178 (Neutral Simon); First Division Award 25438 (Neutral LaRocco); First Division Award 25966 (Neutral Ross); Second Division Award 07484 (Neutral Wallace); and SBA 235, Award 3282 (Neutral Lynch). For these reasons, the Carrier respectfully dissents.

*Beth Wilderman*  
Beth Wilderman

*Jeanie L. Arnold*  
Jeanie L. Arnold

March 5, 2020