

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44207
Docket No. SG-44789
20-3-NRAB-00003-180222**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of R.M. Harris, for \$45.47 compensation that Carrier improperly recovered from his pay, account Carrier violated the current Signalmen’s Agreement, particularly Rules 1 and 12, when on June 14, 2015[6], Carrier instructed the Claimant to provide transportation for contractors to their work locations via his assigned hy-rail vehicle, outside his regularly assigned hours, without properly compensating him. Carrier’s File No. K0616-6904. General Chairman’s File No. 16-123-KCS-185. BRS File Case No. 15742-KCS.”

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 Claimant is a Signal Maintainer with a tour of duty Monday through Friday, regular duty hours 7:00 AM - 4:00 PM.

On June 14, 2016, the Signal Supervisor assigned the Claimant Job # 805 for FRA testing and monthly inspections between MP 341 and MP 402 in District 3, the Claimant's designated territory. In addition to testing and inspections, the Supervisor instructed the Claimant to transport contractor personnel to MP 352 for installation of Positive Train Control (PTC) radio equipment by the contractor.

The Claimant transported contractor personnel for three (3) hours (2:00 PM - 5:00 PM). The Claimant notified his Supervisor that the work was compensable as two (2) hours of additional half time pay (regular duty hours 2:00 PM - 4:00 PM) and one (1) hour of overtime pay (post-regular duty hour 4:00 - 5:00 PM). The Claimant received payment under those terms.

On July 15, 2016, the Director - Signal Operations rescinded the overtime pay - - "overtime claimed has been reduced/declined account not supported by Agreement." The Director determined that the 4:00 PM - 5:00 PM post-regular duty hour was compensable as straight time pay because the Claimant is a monthly rated employee. The two (2) hours regular duty time - - 2:00 PM - 4:00 PM - - compensated as additional half time pay was not "reduced/declined" by the Director.

On September 12, 2016, the Organization filed a claim alleging a Rule 1 - Scope violation asserting that transporting contractor personnel is not signal work. The Claimant provided transport during an hour (4:00 PM - 5:00 PM) after the end of his regular duty time (4:00 PM). Under Rule 12(b) - Calls (Availability/Coverage and Pay), that hour qualifies for overtime pay. The claim was processed on-property, presented to the highest designated official for such matters, and discussed in conference without resolution. Following conference, the Organization referred the claim to the Board citing violations of Rule 1 - Scope and Rule 12 - Calls (Availability/Coverage and Pay).

According to the Carrier, the claim is procedurally defective because the on-property claim identifies a violation of Rule 1 - Scope whereas the claim referred to the Board identifies violations of Rule 1 - Scope and Rule 12 - Calls (Availability/Coverage and Pay). Since the Organization referred a claim to the Board which is different from the claim handled on-property, the referred claim must

be dismissed for lack of jurisdiction. As support for its position, the Carrier cites two (2) Third Division Awards.

Third Division Award 20456

“A plain reading of the Statement of Claim submitted to this Board and the claim that was originally filed makes it clear that a substantial variance exists between the two. The rules relied upon differ, the facts supporting the alleged violation differ, and the claims appear to have different underlying theories. We therefore conclude that the claim submitted to the Board, being substantially different from the claim filed and handled on the property, cannot be said to have been handled in the usual manner. Accordingly, we shall dismiss the claim.”

Third Division Award 21441

“... the claim as presented to the Board is not the same claim that was handled on the property and, consequently, there is no proper claim before the Board for its consideration. The Employees have the responsibility and burden to cite the rules and agreement language relied upon during handling on the property. This, of course, is a fundamental due process right of the other party, and where the rules are not cited, discussed, or in some way stated on the property, the omitted rules cannot be supplied for the first time in the submission of claim to this Board. It is the intent of the Railway Labor Act that issues in a dispute before this Board, shall have been framed by the parties in conference on the property.”

In rebuttal to the Carrier’s jurisdictional assertion, the Organization offers Third Division Award 10921 and Third Division Award 19573.

Third Division Award 10921

“The variance in the form of the Statement of Claim made on the property and made here is not of such substance as to mislead the Carrier as to the nature of the dispute or its possible liability thereunder.”

Third Division Award 19573

“Carrier next argues that the claim, as presented to the Board has been materially changed from the claim as handled on the property. Of course, if this were the case it would result in dismissal of the claim. However the Board has held that where Carrier has not been misled, and the issue is ‘substantially the same issue as originally raised’, the claim should be not dismissed. This view was expressed in Award No. 13229 as follows: [quote omitted].

* * * *

“The reason Carrier raises the question of change is not that claimant has changed the nature of his claim. It stems from the citation of Rules claimant alleges were violated in his submission to this Board and the lack of citation on the property. This, under some factual circumstances might be material variance. Under the facts of this case it is not.”

The Board recognizes the precedents in the four (4) awards and applies them to the evidence in this proceeding. Comparing the claim referred to the Board and the claim filed on-property shows no substantial variance between them as the facts and theory relied upon to establish the rules violations and requested remedy are the same. On-property correspondence confirms the parties discussed the Organization’s asserted rules violations. That is, the Carrier’s claim denial states “no violation of Rule 1 *or any other rule notated in the claim*” and the BRS appeal of the claim denial states the Claimant performed “work outside the scope of the Agreement” and “should have been compensated according to *Rule 12B, as specified in our initial claim.*” [Emphasis added.] Based on this correspondence, the Carrier was aware of the nature and reach of the claim involving a violation of Rule 1 - Scope as well as the dispute whether the Claimant’s compensation fell under Rule 12 - Calls or Rule 46 - Monthly Rated Employees. Thus, the Board finds the referred claim is substantially the same, if not identical to, the on-property claim. Since there is no substantial or material variance in the claims, the Carrier’s assertion that the Board lacks jurisdiction is set aside.

As for the merits of the claim, the record shows that the Claimant's Supervisor instructed him to transport contractor personnel to MP 352 for a PTC radio equipment installation. The Carrier asserts "transporting the contractor to MP 352 on June 14, 2016, was incidental to his regular duties and not a violation of Rule 1 - Scope" and the work was compensable for the Claimant, a monthly rated employee, as straight time pay under Rule 46 - Monthly Rated Employees:

"(b) Except as provided herein the monthly rate shall be for all work subject to Rule 1 of this Agreement on the position to which assigned during the first five days of the work week, Monday to Friday, inclusive."

The Organization asserts that transporting contractor personnel was an assignment outside the limits of work for the Claimant, a Signal Maintainer, and compensable as one (1) hour of overtime under Rule 12 - Calls, which states:

"(b) Signal Maintainers shall be assigned individual territories, and when required by the Railway to perform work outside the limits of their assigned territories during their regular assigned hours will be additionally compensated for such work on the minute basis at one half the straight time hourly rate, from the time notified until they return to their work location during their tour of duty, or home station after end of tour of duty. Time after end of tour of duty to be compensated for at the overtime rate. When Signal Maintainers are called by the Railway to perform work outside the limits of their assigned territories after regular hours of the work week and on Saturdays and designated holidays, the provisions of Rule 10 [overtime pay] will apply."

Rule 1 - Scope states "work generally recognized as signal work" is construction, installation, maintenance, and signal equipment repair. BRS asserts Rule 1 establishes the type of work performed by BRS, without any exceptions for incidental work, and the Supervisor's instruction to transport contractor personnel does not establish scope-covered work.

The "work generally recognized as signal work" in Rule 1 - Scope is refined by Rule 2 - Classification which sets forth a specific exception for a Signal Maintainer to perform incidental work:

“(f) SIGNAL MAINTAINER: An employee assigned to maintain a designated territory, to inspect, test, adjust, repair, clear trouble on, and maintain signal equipment including signal electronic equipment, all detector systems specified in Rule 1 of this agreement. He shall also perform installations incidental to the maintenance of his designated territory.”

Since the Claimant did not “perform installations incidental to the maintenance of his designated territory” during the 4:00 PM - 5:00 PM hour, the specific exception for incidental work in Rule 2 is not applicable. BRS states that the only assignment for the Claimant during the post-regular duty hour was contractor transport which is outside of Rule 1 - Scope. BRS notes the Carrier recognizes contractor transport is not scope-covered work because it acknowledged assigning this work to track supervisors and roadmasters.

The Carrier responds that its Rules, Standards & Instructions (RSI) state that a Signal Maintainer reports to and receives instructions from a Signal Supervisor and that supervisor “shall supervise all signal work performed on their territory by contractors or others who do not come under their direct charge.” Since the Claimant receives instructions from the Signal Supervisor, contractor transport is scope-covered work. As incidental work to his regular duties, the Claimant transported contractor personnel to MP 352, a signal location within the limits of his territory (MP 341 - MP 402). “It’s clear and unchallenged that the mileposts where the contractor employee was to install radios for PTC was within the claimant’s assigned territory and within the mileposts he was working on June 14, 2016.”

The Board finds that the RSI describe the work and duties assigned and directed by management officials. The Claimant complied with his supervisor’s instructions and transported contractor personnel to MP 352. Although the Carrier relies on the RSI for its assertion that contractor transport is scope-covered work, the Board finds the Rules, Standards & Instructions are not the sole determinant for “work generally recognized as signal work” in the negotiated agreement. The general description in Rule 1 - Scope is modified by the exception for incidental work tied to installations in Rule 2 - Classification. The Carrier asserts compliance with Rule 1 - Scope because the Claimant performed work “incidental to [his] regular duties” but the Carrier assigns this work to track supervisors and roadmasters or non-BRS

represented personnel. At no time did the Carrier invoke the exception in Rule 2 - Classification. Given these circumstances the Board finds contractor transport work is not the type of work restricted for assignment to and performance by only BRS personnel because the Carrier assigned the same work to non-represented BRS personnel.

The Board further finds a differing interpretation and application of Rule 12(b) by the Signal Supervisor and the Director - Signal Operations over the transport work performed by the Claimant. The Supervisor assigned the Claimant three (3) hours (2:00 PM - 5:00 PM) of transport work and received notice from the Claimant that the time was reported as compensable for two (2) hours at additional half time pay and one (1) hour at overtime pay under Rule 12(b). the Claimant received compensation under those terms. The Director determined that Rule 46 - Monthly Rated Employees applied, not Rule 12(b), to the one (1) hour post-duty hour. As for the two (2) hours of additional half time, it was not "reduced/declined" by the Director. Thus, the Claimant received compensation for two (2) hours under Rule 12(b).

In other words, Rule 12(b) covers some of the claimed hours but not all of the claimed hours for the same type of work performed by the Claimant. BRS pointed out this discrepancy in the interpretation and application of the rule to the Carrier when the claim was filed; the Carrier answered by relying on straight time pay in Rule 46 - Monthly Rated Employees and did not address the discrepancy. The Board construes the unexplained discrepancy unfavorably for the Carrier as an abuse of discretion in decision-making which, in this situation, resulted in an arbitrary decision to revoke overtime pay.

Given the discrepancy arising from the Carrier's uneven interpretation and application of Rule 46 - Monthly Rated Employees and Rule 12 - Calls for the work performed by the Claimant, the Board will sustain the claim on the basis that revoking overtime pay for the Claimant was an abuse of discretion and arbitrary decision.

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 30th day of September 2020.