Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39906
Docket No. SG-38150
09-3-NRAB-00003-040029
(04-3-29)

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of V. E. Jones, G. G. Tester and R. Blowers, for 24 hours each at their respective straight time rates, account Carrier violated the current Signalmen's Agreement, particularly Rule 1, the Scope Rule, when it used an outside contractor on or about November 19, 2002, to November 21, 2002 to dig ditches and install cable for the air compressor and generator at Tower 2, on the KCT, and deprived the Claimants of the opportunity to perform this work. Carrier's File No. 35 03 0015. General Chairman's File No. 03-003-BNSF-21-K. BRS File Case No. 12739-BNSF."

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.

At the time of the instant dispute, Claimants V. E. Jones, R. E. Blowers and G. G. Tester were headquartered at the Kansas City Terminal. During the period of November 19 through 21, 2002, the Carrier utilized a contractor to dig ditches and install the cable for air compressors and generators at Tower 2 on the KCT. The work occurred on territory governed by the former Atchison, Topeka, and Santa Fe (ATSF) Agreement. The Organization filed a claim on behalf of the Claimants for 24 hours each (eight hours per day for three days).

The Organization contends that it was improper for the Carrier to contract out the above-mentioned work, which is contractually reserved to the Organization.

According to the Organization, the Carrier had customarily assigned work of this nature to BRS-represented employees and it is consistent with the Scope Rule. The Organization contends that the Carrier's BRS-represented employees were fully qualified and capable of performing the designated work. The work done by the contractor is within the jurisdiction of the Organization and, therefore, the Claimants should have performed said work. The Organization argues that because the Claimants were denied the opportunity to perform the work, they should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that the relevant work does not belong to BRS-represented employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent involving these very same parties and the same issues has upheld the Carrier's position. The Carrier contends that the Claimants were former ATSF employees and, as such, the relevant Scope Rule was based on the former BNSF Scope Rule. The Carrier asserts that Third Division Award 37874 is determinative in this matter.

Special Board of Adjustment No. 1016, Award 150 framed the scope issue as follows:

> "In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in dispute to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor."

We carefully reviewed all evidence to ascertain whether the Organization proved that the involved work belongs to BRS-represented employees. We reviewed Third Division Award 37874. Therein the Board held:

> "As background, there is no dispute that the Carrier used the forces of an outside contractor at the Kansas City Terminal Tower 3 [from April 23, 2001 through May 2, 2001]. Specifically, the installation of a foundation and handrail for a back-up electrical generator is at the center of this dispute.
>
> The Organization asserts that the work performed by the outside contractor violates Rule 1, Scope, paragraphs (g) and (h).
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> * * *
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> The Organization argues that the work herein performed by outside contractors involved 'current generating systems' and the 'foundation support, concrete and form work' for the back-up generator. . . . It firmly denies the Carrier's position on the Scope Rule, the merged territories and the 'Note' to such merger.

The Carrier denies the violation, but moreover, states that the work is not encompassed by the new Scope Rule. The Carrier points out that the concrete foundation and handrail work performed was at a location covered by the former Santa Fe employees. The Signalmen of the former ATSF Railway did not have the exclusive right to do concrete work for the installation of generators. The new Scope Rule built from the former BN Scope Rule does not change those prior rights, as indicated in the Note to the revised Scope Rule.

* * *

In any Scope Rule dispute the burden of proof rests upon the Organization. It is the Organization that must demonstrate that the work performed was Agreement covered and reserved to the employees. In this instant case, the additional issue to be considered is the Note to the new Scope Rule. The burden of proof is to demonstrate that the language should be determinative as it is clear and applicable.

* * *

There is insufficient evidence of record for the Board to find that the Organization refuted the reasonableness of the Carrier's interpretation of this Note. There is no proof in this record that the Signal employees on the former ATSF, prior to December 31, 1996, did concrete work associated with the installation of generators. The Organization failed to present substantial evidence of probative value that this work was reserved to the Signal employees under the prior ATSF Scope Rule. It proved no specific and clear language, exclusive right, or strong practice that Signalmen at the Kansas City Terminal installed foundations for backup generators. . . .

Accordingly, the burden of proof has not been met. We conclude that the Organization failed to demonstrate with sufficient

probative evidence that this work was exclusive to Signalmen. The claim must be denied. . . ."

For the same reasons identified by the Board in Award 37874, we find that the Organization has been unable to prove that the work involved in this matter is either encompassed by the Scope Rule or that BRS-represented employees have customarily, traditionally and historically performed the disputed work.

Based on the record evidence, as well as the above-cited precedent, we cannot find that the work of digging ditches and installing cable for air compressors and generators is either encompassed within the plain language of the Scope Rule or that the work has historically and traditionally been performed by members of the Organization.

AWARD

Claim denied.

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 31st day of August 2009.