Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32389
Docket No. SG-31719
97-3-93-3-759

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Railroad (BN):

Claim on behalf of D.E. Malone, J.L. Winbigler, M.A. Addis, and M.X. Schneider for payment of 50 hours each at their respective time and one-half rates, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when it utilized non-signal employees to perform work covered by the Signalmen's Agreement. The work assigned to the other employees, beginning September 14, 1992, involved installation of power service equipment at a signal location at Bushnell, Illinois. Carrier's File No. SI 93-02-05B. General Chairman's File No. C-4-93. BRS File Case No. 9233-BN."

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.

As Third Party in Interest, the International Brotherhood of Electrical Workers was advised of the pendency of this dispute and chose to file a Submission with the Board.

The record in this case shows that Carrier authorized the installation of a high voltage (7200 volts) power line from a commercial power source to a signal substation at Bushnell, Illinois. This installation proceeded from the commercial power company source to a company-owned meter pole, through a high voltage disconnect switch and continued to a stepdown transformer located outside of the signal bungalow. At that point, the power line (now 220 volts) continued through a breaker box situated on the outside of the signal bungalow into the signal bungalow and coupled to a surge suppressor and a second circuit breaker box both of which were located inside of the signal bungalow.

Carrier contends that the power line installation work from the commercial power company source to and including the installation of the stepdown transformer was performed by Electricians represented by the International Brotherhood of Electrical Workers (I.B.E.W.). From that point, Carrier asserts that "BRS represented employees installed the cable from the disconnect on the transformer to the building which housed the signal equipment once the high voltage (7200 volts) was stepped down to the usable 220 volts AC needed by the signal system."

The Signalmen's Organization (B.R.S.) insists that ALL of the installation work here in question was performed entirely by Electricians represented by I.B.E.W. The B.R.S. states that "the Electrician also installed underground cable from the transformer to a breaker box on the outside of a signal equipment house and installed another breaker box inside the equipment house and installed the wiring between the two breaker boxes."

The interested Third Party, the I.B.E.W., stated that, "We installed the service feeders from the transformer to the service breaker panel main. The Signal Department then installed the branch circuits to there (sic) equipment. The electrical system up to the point of attachment at the service breaker panels mains (sic) is part of an electrical

distribution system. This is not part of the signal hut's service, that service starts on the load side of the service breaker panel."

The B.R.S. position is basically twofold. They insist that their Scope Rule, particularly Paragraph "C" thereof, specifically and clearly covers work on both high and low voltage lines which are installed solely in connection with a signal system. Paragraph "C" of the B.R.S. Scope Rule reads as follows:

> "C. High and low voltage signal lines, overhead and underground, including poles, cables, cross arms, wires, tie wires, insulators, guy wires, messenger cables, rings, and other fixtures and equipment used in connection therewith, conduits and conduit systems, transformers, arresters, and distributing blocks used in connection with the systems; devices, or equipment covered by this agreement; inside and outside wiring of all instrument houses, cases, panels, boards, as well as all cable, where used in connection with the systems, devices, and equipment covered by the scope of this agreement; track bonding, installation of all types and kinds of bonds, including lightning and static electricity bonding; lighting of all instrument houses, cases, panels, boards, etc., used in the systems and devices covered by the scope of this agreement, not including the general lighting of interlocking tower buildings, shop buildings and common headquarter buildings."

Secondly, they contend that on this property the Carrier has agreed that the work which forms the basis of this dispute from the meter pole to and including the installation within the signal bungalow is covered by the Signalmen's Scope Rule. They cite a formalized Letter of Understanding dated August 24, 1972, which reads, in pertinent part, as follows:

"August 24, 1972
File SI-1(d)

Mr. R.F. Richardson, General Chairman
Brotherhood of Railroad Signalmen
2001 West Central Avenue
Minot, North Dakota 58701

Mr. W.W. Lauer, General Chairman
Brotherhood of Railroad Signalmen
122 West Franklin Avenue
Monmouth, Illinois 61462

Mr. B.M. Swift, General Chairman
Brotherhood of Railroad Signalmen
Box 311
Redmond, Oregon 97756

Mr. W.A. Class, Jr., General Chairman
Brotherhood of Railroad Signalmen
1657 East Sherwood Avenue
St. Paul, Minnesota 55106

Gentlemen:

This will record several understandings reached in connection with new Signalmen's Agreement and Implementing Agreement No. 1.

* * *

12. The installation and maintenance of the necessary electric service to the disconnect below the meter is covered by the Scope of this agreement.

* * *

Very truly yours,

/s/ T.C. DeButts
Vice President

cc: Mr. J.T. Bass, V.P., BRS

AGREED TO
For the Brotherhood of Railroad
Signalmen

APPROVED

/s/ B.M. Swift
General Chairman

/s/ J.T. Bass
Vice President-BRS

/s/ W.A. Class, Jr.
General Chairman

/s/ Robert F. Richardson
General Chairman

/s/ W.W. Lauer
General Chairman"

Additionally, the B.R.S. points with favor to Second Division Award 13118 in which this same August 24, 1972 Letter of Understanding was used by Carrier to deny a claim of the I.B.E.W. involving circumstances of a nature similar to those found in this case in which Signalmen were, in fact, used to make necessary electrical installations in connection with a signal system operation "from the disconnect below the meter main to the crossing bungalow (equipment building) at Lemmon, South Dakota."

The Carrier's position addresses several issues which, they say, precludes support of the B.R.S. position. Carrier argues that the I.B.E.W. Scope Rule, specifically Rule 50(6)b, gives the I.B.E.W. the right to install "all high voltage power distribution lines, overhead and underground electrical service, transformers, meters, primary and secondary wiring including circuit breakers, ..." As for the B.R.S. reliance on Paragraph "C" of the Signalmen's Scope Rule, quoted supra, and the August 24, 1972 Letter of Understanding, Carrier asserts that neither of these instruments give Signalmen "the exclusive right to perform the installation of high voltage power lines and step down transformers." Carrier insists that the 1972 Letter of Understanding refers specifically to "the disconnect below the meter" and in this instance "there is a disconnect located below the substation" and "the high voltage power line and substation are located between this disconnect and the meter." Carrier additionally argues that Electricians have historically performed this type of high voltage installation work and that the Signalmen "had no previous experience of installing or maintaining a high

voltage (7200 VAC) system coupled with a step down transformer substation." Carrier offered no specific instances of such similar work performed by Electricians or evidence of the Signalmen's lack of expertise. Finally, Carrier argued that, in any event, the Claimants here involved were fully employed throughout the period of the claim and therefore suffered no actual monetary loss as a result of the work performed by the Electricians. Carrier made no reference to or comments on Second Division Award 13118.

For their part, the I.B.E.W. argued primarily on the efficacy and sanctity of their Scope Rule and the fact that the power line in question was a high voltage line and that work on such a power line required specialized training and expertise which the Electricians had and the Signalmen allegedly did not have. The I.B.E.W. pointed to no other similar situation in which Electricians were assigned exclusive jurisdiction over all high voltage lines in all circumstances. In response to the citation of Second Division Award 13118, the I.B.E.W. insisted that the decision in that case was predicated on the facts which existed in that particular case and should not be accorded any significance in this case.

There are several areas in this dispute which must be addressed by the Board in reaching a decision. First, there is the complete lack of reliable evidence to support or identify exactly who actually performed the installation work from the stepdown transformer to and into the signal bungalow. There are three separate versions on this one area. The Board has no possible way of knowing who actually performed what work at that juncture of the dispute.

Second, the 1972 Letter of Understanding, standing alone, is an Agreement between the Carrier and the Signalmen which is entitled to the same weight and consideration as the respective Scope Rules. It is clear that Carrier has in the past used this Letter of Understanding to its advantage in denying Electricians on this property their claim to certain work of power line installation as described in Second Division Award 13118. There the power line installation work occurred "from the disconnect below the meter main to the crossing bungalow." Such work was found under the terms of the 1972 Letter of Understanding to belong to Signalmen -- not Electricians. Here the installation work which occurred "from the disconnect below the meter main" was assigned by Carrier to Electricians apparently solely on the basis of the high voltage and the alleged absence of expertise of the Signalmen to handle such high voltage. While

Carrier has a right to determine qualifications of its employees, their affirmative defense position in this instance has not been supported by probative evidence. This Board has often held that the party who asserts an affirmative defense must prove it.

From the evidence of record in this particular case and from the 1972 agreed-upon Letter of Understanding, the Board is convinced that in the absence of a clear and convincing showing by Carrier that the Signalmen were not qualified to do the work in question, such work which occurred "from the disconnect below the meter main" to the signal bungalow belongs to Signalmen. This determination takes nothing away from the I.B.E.W. employees inasmuch as work of this nature and under the circumstances as found in this case was never theirs in the first place. Carrier had previously agreed with the Signalmen that "the installation and maintenance of the necessary electric service to the disconnect below the meter is covered by the Scope of this (B.R.S.) agreement." There is no evidence from either the Carrier or the I.B.E.W. in this record to suggest or prove that the 1972 Letter of Understanding has been modified or abrogated either by negotiation or by convincing past practice.

That brings us to the final determination which must be addressed in this case. That is the unchallenged fact that each of the Claimants was fully employed during the entire period of this claim. Reasonable minds have differed in their conclusions on this issue of full employment versus penalty enforcement of an Agreement violation. On the basis of the record as it exists in this particular case, and without expressing any opinion one way or the other on the long list of prior awards on both sides of this issue, the Board finds no basis in this instance on which to make a monetary award.

AWARD

Claim is disposed of 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) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of December 1997.