Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32722
Docket No. SG-34053
98-3-97-3-597

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 Railroad (KCS):

Claim on behalf of G. L. Harlon, D. J. Riggs, and B. J. Headrick for payment of 20 hours each at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when it used an outside contractor to install six power service poles for the signal system at highway crossings in Richardson, Carrolton, Dallas and Lewisville, Texas, during the week of April 15, 1996, and deprived the Claimants of the opportunity to perform this work. Carrier's File No. 013.31-525(3). General Chairman's File No. 96-30-01. BRS File Case No. 10341-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 applicable Scope Rule reads in pertinent part as follows:

> "This agreement governs the hours of service, rates of pay, and working conditions of all employees in the Signal Department below the grade of Supervisor . . . performing the work generally recognized as signal work; which work shall include the construction, installation, maintenance, and repair of all signal equipment, such as signals (automatic or otherwise), interlocking plants, highway crossing protection devices, wayside train stop and control equipment, car retarder systems, centralized traffic control systems, electric switch heaters, detector equipment connected to or through signal systems, including all their apparatus and appurtenances, signal shop work and all other work generally recognized as signal work; and it shall include the installation and replacement of solar power systems."

According to the Organization's Submission, the power service poles in question typically include an electric meter housing, a switch box with circuit breakers, and wiring to connect this equipment to the commercial power source on one end and the equipment that will be using the electric power on the other end.

The basis of the Organization's claim is that the Scope Rule clearly and unambiguously reserves to covered employees the work of installing the subject service poles. The Organization does not challenge the Carrier's right to have the service poles constructed by an outside contractor. The Organization has also cited several Third Division Awards in support of its position. Carrier, to the contrary, maintains that the disputed work is not reserved as claimed. It also cited prior Awards for support.

This Board has addressed reservation of work disputes many, many times. As a result, it is well settled that the Organization has the burden of proving, by either explicit Agreement language or by persuasive evidence of traditional and historic performance, that the work is reserved to its members. See, for example, Third Division Award 29331.

Our review of the subject Scope Rule does not reveal explicit language reserving the installation of service poles to covered employees. Rather, the Organization claims that service poles fall under the general reference to "appurtenances" found in the Rule.

Given the non-specific nature of the word "appurtenance," the Organization bears the burden of demonstrating that the employees have traditionally and historically performed the work in dispute. On this record, the only evidence of past performance, provided by the Carrier, shows that some 69 per cent of service pole installation (127 of 185 system installations) during the seven years preceding the claim has been performed by outside contractors without objection by the Organization. This evidence, in our view, does not demonstrate the requisite regularity, consistency and predominance in the performance of the disputed work to support a finding that covered employees have traditionally and historically performed it. Quite to the contrary, it is strong evidence that the parties have not regarded the installation of service poles to be the installation of an appurtenance to the various devices and equipment named in the Scope Rule.

Two additional considerations lead to the same conclusion. First, while the Scope Rule does not explicitly reserve the installation of service poles, it does go on to specifically reserve the installation and replacement of solar power systems. Logically, if the means by which the signal equipment receives electrical power is an appurtenance, as the Organization claims, then solar power systems would already have been included in the Scope Rule as such an appurtenance. Adding the separate solar power reference would be superfluous. But it is clear the parties did consider it to be meaningful language. This makes sense only if the parties did not previously regard the uninstalled power supply means to be an appurtenance. Accordingly, the inclusion of this reference strongly suggests that the parties did not regard an uninstalled service pole to be an appurtenance of the covered equipment.

Second, there is a logical inconsistency in the Organization's interpretation of the Scope Rule. If the uninstalled service pole is an appurtenance, as the Organization claims, then one would expect the Organization to also object to its construction by a contractor. The Scope Rule clearly pertains to the ". . . construction, installation, maintenance and repair of . . . appurtenances." Yet the Organization does not object to the construction of service poles by an outside contractor. This, too, is strong evidence that the parties did not regard an uninstalled service pole to be an appurtenance of covered devices and equipment.

On this record, for the foregoing reasons, we must find that the Organization has not satisfied its burden of proof to establish all of the requisite elements of a proper challenge to Carrier's action. The claim, therefore, must be denied.

Nothing in this Award should be construed as a determination that a service pole, once installed and connected to covered equipment, does not then become an appurtenance of that equipment. That issue was not before us on this record, and we have made no finding in that regard.

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 19th day of August 1998.

ORGANIZATION'S DISSENT TO
Third Division Award 32722
Referee: G. Wallin

The record indicates that the Carrier used a contractor to install power service poles at various highway-crossing locations. There was no dispute that the purpose of installing these poles was to provide electrical service to the crossing protection system.

The majority mistakenly concluded that solar power equipment was the only kind of external power equipment that was covered by the Agreement. Contrary to this assertion, the Scope Rule simply included the new technology of installing "Solar Power Systems." This cannot be considered an exclusion of other types of power systems. As noted in Third Division Award 30108, it recognized that the parties had amended the Scope Rule to include solar powered equipment. It is obvious that the inclusion of this new technology did not extinguish other types of power service.

Additionally, as noted in Second Division Award 31318 the Board addressed the language of the Scope Rule and held that the installation of electric service meter poles was reserved to Signalmen, wherein, it held that:" **We find that the electric power and distribution equipment, at issue in this case, was a appurtenance to the signal system.**"

As noted in the record of the handling the Carrier acknowledged that BRS had performed this work in the past, however, alleged that "In some areas meter poles have to be built and inspected by a licensed electrician...." The Organization correctly pointed out that the National Electric Code, 1993 Edition, published by the Institute of Electrical and Electronics Engineers, Inc. specifically exempted railroad installations used exclusively for signal and communication purposes.

Carrier mislead the Board by stating that 185 meter poles had been installed by contractors and that 69% of the meter poles had been supplied by a vendor since 1989. Contrary to the Carrier's pleadings, the record denotes that a majority of these meter poles were used to service different types of railroad facilities such as depots, yard offices, shops, etc." These installations were not subject to this instant dispute. The Organization recognized that installation of power service poles not used exclusively for crossing protection equipment are not subject to the BRS Agreement, however, "The installation of AC meter poles used for and part of the signal system have always been installed by covered employee's with the exception of the six in this instant case and two others that are addressed in a different claim."

The Organization recognized the prerogative of the carrier to purchase off-the-shelf equipment. However, advised the Board, that this instant dispute did not involve the purchase of pre-fabricated equipment, only the installation after it was purchased. For some illogical reason the Board held that this position supported Carrier's right to have contractors install this equipment after it was purchased. This makes about as much sense as allowing General Motors to operate the trains because they built them. This flawed logic goes beyond any type of reasonableness.

The majority confounded the issue by finding that the meter poles were not an appurtenance to the signal system, however, then stated that "Nothing in this Award should be construed as a determination that a service pole, once installed and connected to covered equipment, does not then become an appurtenance of that equipment."

It is obvious that the majority failed to understand the simplicity of this dispute and became befuddled. This instant dispute involved the installation of these service poles based on the rational that they were an appurtenance to the signal system. However, the majority mysteriously determined that "that issue was not before us on this record, and we have made no finding in that regard."

Contrary this absurd Award once the service poles came under the control of the Carrier, the equipment and work of installing them fell under the Signalman's Scope Rule.

Respectfully Submitted,

C.A. McGraw

C.A. McGraw, Labor Member