

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36747
Docket No. SG-36511
03-3-00-3-715

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Canadian National Railway (former Grand Trunk
(Western Railroad Incorporated)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of J. A. Karwoski, R. J. Desonia, W. N. Fowler, R. W. Caster, L. E. Reou, Jr., H. D. Combs, R. L. Johnson, and P. J. Gilgallon for payment of 40 hours each at the straight time rate. Account Carrier violated the current Signalmen’s Agreement, particularly Rule 1 (the Scope Rule) when during the week of August 30, 1999 Carrier utilized outside contractors to install underground conduit at several locations on the Flint subdivision. This action deprived the Claimants of the opportunity to perform this work. Carrier’s File No. 8390-1-120. General Chairman’s File No. 99-109-GTW. BRS File Case No. 11526-GTW.”

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 Organization filed the instant claim on behalf of the Claimants after the Carrier used an outside contractor to install underground conduit at 13 locations on the Flint Subdivision. The claim seeks 40 hours' pay, at the straight-time rate, for each Claimant as compensation for the loss of this work opportunity. The Carrier denied the claim, contending that the work was not covered under the Scope Rule and was not exclusive work of Signalmen.

The Organization contends that the work at issue, the installation of underground conduits for the signal system at various highway-railroad grade crossings during the week of August 30, 1999, is covered work. The Organization asserts that the Scope Rule covers the installation of highway crossing signal systems, so it is clear that the Carrier violated the Agreement when it diverted this work to a contractor.

The Organization maintains that the Scope Rule unambiguously provides that the installation of electrically operated highway warning devices is reserved to employees covered by the Agreement. The Organization emphasizes that the conduits are integral parts of the signal system they are used exclusively for the operation of the signal system and they serve no other useful purpose. The Organization argues that the Board has previously held that such work is covered by the Scope Rule and is reserved to covered employees. Because the Scope Rule reserves this kind of work to covered employees, the Carrier's use of outside forces to perform the work was in direct violation of the Agreement.

As for the Carrier's assertion that its use of an outside contractor was justified because special equipment was needed, with the implication that the Claimants did not have the equipment or expertise required to perform the work, the Organization contends that the record shows that the Carrier did have the necessary equipment. Moreover, the evidence also shows that the Claimants possessed the skills required for the work. The Organization points out that it was a

routine practice for Signal Gangs to install underground conduit for signal systems at highway crossings. The Carrier obviously had to have the necessary equipment available, and the employees had to have the requisite skills, because the employees have performed this same kind of work at other locations. The Organization argues that the Carrier's assertions cannot be reconciled with this record.

The Organization emphasizes that when employees are deprived of the opportunity to perform work reserved to them under the Agreement, they lose the wages they would have earned for doing the work, and they are entitled to recover for such a loss. The Organization asserts that the requested remedy is not only appropriate, but is required to protect the integrity of the Agreement. The Organization contends that if the Agreement is to have any meaning, the Carrier cannot be allowed to violate it with impunity. The Organization argues that a violation of the Agreement that improperly deprives employees of the opportunity to perform work requires that the employees be compensated. The Organization asserts that the Claimants had a contractual right to the work at issue, and they are entitled to recover for the loss of this work opportunity.

The Organization ultimately contends that the claim should be sustained in its entirety.

The Carrier argues that it did not violate the Scope Rule because the work at issue is not specifically, exclusively reserved to BRS-represented employees. The Carrier emphasizes that nothing in the Scope Rule, or in any other Rule in the parties' Agreement, reserves the work of directional boring under public highway crossings exclusively to its employees. The Carrier maintains that the work at issue is not "generally recognized" as work covered by the Agreement. The Carrier points out that the evidence demonstrates that it has been the past practice on the GTW to hire an outside firm to perform directional underground boring work under public highway crossings.

The Carrier contends that the Scope Rule is general in nature, and it does not reserve the disputed work to the BRS-represented employees. The Carrier points out that because the Scope Rule is general, the Organization bears the burden of proving that the disputed work has been ordinarily, generally, and traditionally performed by its members. The Carrier maintains that because the Organization

realized that it could not rely on Agreement language to show that the disputed work belonged to its members, the Organization alleged that the work ordinarily and historically had been performed by Carrier employees. The Carrier asserts that this attempt must fail because the Organization's assertions are inconsistent and unsubstantiated. The Carrier points out that the Organization asserted that the Carrier owns the equipment necessary to perform the work, yet it also argued that the Carrier easily could rent this equipment. The Carrier contends that neither assertion is factual and, the Organization failed to offer any evidence to support its assertions. The Carrier further argues that there is no basis for the Organization's contention that BRS-represented employees are qualified to operate the underground boring equipment. The Carrier points out that the Organization never identified the employees who are "qualified" to operate such equipment that the Carrier allegedly "owns" or "can easily rent."

The Carrier further asserts, that inasmuch as the Organization never acknowledged or responded to the evidence showing a past practice of contracting out the work at issue, the Organization acknowledged the fact of this practice as true. The Carrier argues that the work at issue previously has been performed by outside contractors without complaint from the Organization. The Carrier contends that the Organization cannot now properly contend that the Agreement gives its members the exclusive right to perform the work.

The Carrier maintains that the Organization has not met its burden of proof in this matter. The Organization has not substantiated its allegations, nor did it respond to the Carrier's evidence that it has been the practice for outside contractors to perform the work at issue. The Carrier asserts that the Organization falls far below the level of probative evidence necessary to support its case; the Organization has done nothing more than allege that the Carrier violated the Agreement. The Carrier contends that because the Organization failed to meet its burden of proof, the instant claim should be denied.

The Carrier also asserts that even if the Organization had established the merits of the instant claim, it failed to establish monetary damages to support the claim. The Carrier points out that all Claimants were fully employed, and no earnings were lost due to the contracting out of the disputed work. Moreover, the Organization has not denied that the Claimants who were assigned to the Pontiac

Signal Construction Gang would not have any claim to work performed on the Flint Subdivision, which is outside of their assigned work area. The Carrier contends that in the absence of a specific penalty provision in the Agreement, there is no basis for payment of any penalty compensation.

The Carrier ultimately contends that the claim should be denied in its entirety.

The Board reviewed the evidence and record in this case, and finds that the Organization failed to meet its burden of proof that the Carrier violated the Scope Rule when it utilized outside contractors to install underground conduit at several locations on the Flint Subdivision. It is fundamental that the Organization bears the burden of proof in cases of this kind. In this case, the Organization failed to prove that the Carrier had the necessary equipment and that the employees had the necessary skills to complete the work. Moreover, the Organization failed to rebut the Carrier's evidence that it had subcontracted work of this kind in the past.

Given the failure of the Organization to identify the equipment that the Carrier allegedly owned that could have been used to perform the work in question, and the employees who were capable of performing the work, the Board has no choice other than to deny the claim. The Organization failed to meet its burden of proof and, therefore, the claim must be denied.

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 22nd day of October 2003.