

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40212
Docket No. SG-38431
08-3-NRAB-00003-040368
(04-3-368)**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna 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 S. Chapman, P. K. Stapleton and C. B. Lee, for 16 hours each at the straight time rate, plus skill pay, account Carrier violated the Current Signalman’s Agreement, particularly Rule 1 (SCOPE) when on April 22, 2003, an outside contractor constructed a berm at M.P. 139.1 LS 0485, and another berm was constructed at approximately M.P. 86 LS 0485. The berms are used solely to accommodate new signal locations associated with siding extensions. Carrier’s File NO. 35 03 0068. General Chairman’s File No, 03-061-BNSF-133-T. BRS File Case No. 13010-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.

The relevant facts in this case are not in dispute.

On April 22, 2003, the Carrier utilized the services of a contractor to construct berms (dirt fills) at two locations. There is no dispute that the construction of these berms was solely for the purpose of supporting foundations for the installation of signal cases. The issue before the Board is whether the Carrier violated the Scope Rule (Rule 1) by using a contractor for this purpose.

By letter dated May 27, 2003, the Organization filed the instant claim. By letter dated July 2, 2003, the Carrier denied the claim, contending, as it has throughout the procedure, that the construction of dirt berms is not associated with the BNSF/BRS Agreement Rule 1 (SCOPE).

The current Scope Rule (Rule 1) reads, in relevant part, as follows:

“This agreement governs the rates of pay, hours of service and working conditions of all employees engaged in the construction, reconstruction, reconditioning, installation, reclaiming, maintenance, repair, inspection and tests, either in the signal shop, or in the field of the following:

- A. All automatic block signals and signal systems, . . .**
- B. All appurtenances, devices, and equipment used in connection with the systems cited in Paragraph A, regardless of where located and how operated, and devices covered by the scope of this agreement, as well as any other work generally recognized as signal work.**
- H. Carpenter, painting, welding, cutting, foundation support, concrete and form work of all classes in connection with installing, repairing, or maintaining any signal apparatus or devise. (Excluding the erection and maintenance of buildings.)”**

The Carrier denied the claim on the basis that the work at issue is not covered by the Scope Rule. In this regard, the Carrier contends that in order to show that the work is scope covered, the Organization must prove that this work has been exclusively performed by BRS-represented employees. The Carrier asserts that the Organization was unable to prove an exclusive right to such work. In addition, the Carrier relies upon two Awards where the Board denied claims filed by the Organization that were substantially identical to the claim now before the Board. Thus, in Third Division Award

20336, the Board concluded that the building of dirt fills for the placement of signal equipment was not work that could be considered an “appurtenance or appliance” as used in the Scope Rule at issue in that case. Similarly, in Third Division Award 20465 the Board in denying the claim noted in relevant part:

“Petitioner maintains that the “appurtenances and appliances” clause of their Scope Rule reserves unto Signalmen the work here at issue. Upon analysis of the Agreement language and prior Awards of this Division, we are constrained to disagree. We are unable to find a sufficient nexus to warrant placing dirt fills within the contractual category of appurtenances and appliances.”

In response, the Organization notes that a review of the foregoing Awards demonstrates that the Board relied upon a different Agreement and Scope Rule as then agreed upon by the BRS and the former Atchison, Topeka and Santa Fe Railway Company, and accordingly, these prior decisions do not provide conclusive guidance in the matter at hand.

Following a careful review of the positions of both parties during their on-property handling of this case, the Board finds in favor of the Claimants. In doing so, the Board first observes that the current Scope Rule is indeed substantially different from the one relied upon by the Board in Awards 20336 and 20465. While the terms “appurtenance and appliance” remain as a carryover from the prior Rule, the current Rule is much more inclusive, covering “foundation support, concrete and form work of all classes in connection with installing, repairing, or maintaining any signal apparatus or device.” In a more recent case decided by Public Law Board No. 5565, Award 12 and authored by Referee Eischen, the same Referee who authored Third Division Award 20465, the Public Law Board, in sustaining the claim before it, determined that the construction of a retaining wall built for the specific purpose of supporting and holding the earthen fill surrounding a signal, which the Board labeled as a “wall or berm,” could be fairly described as an “appurtenance” of the signal system. As such PLB 5565 determined that work of its construction was reserved for signal forces under the “[p]lain language of the NIRC/BRS Agreement Scope Rule.” As such, we find that the construction of a berm (dirt fill) for the sole purpose of supporting foundations used for the installation of signal cases can properly be considered as an “appurtenance.” Accordingly, the work at issue is covered under Rule 1.

In addressing the Carrier’s “exclusivity” argument, the Board holds that the Organization need not carry the burden of demonstrating that the work at issue has been

performed “exclusively” by BRS-represented forces because “[t]hat doctrine is not applicable to situations where work is contracted to an outside contractor. (See Third Division Award 25934 together with cases cited therein.) Accordingly, following a careful review of the statements furnished as part of the Organization’s on-property handling of this case, we are satisfied that the nature of the work at issue has been performed by BRS-represented forces for a sufficient period of time preceding the instant claim such that it can be said that such work has been customarily performed by BRS-represented forces.

Finally, as to the remedy, the Board finds that the fact that the Claimants were employed at the time outside forces performed the work at issue does not extinguish the right to relief because the Claimants lost additional work opportunities as a result of the Carrier’s violation of the Agreement. (See Third Division Award 32125).

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 21st day of December 2009.