

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40845
Docket No. SG-40839
11-3-NRAB-00003-090126**

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

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of M. A. Guidry and J. D. Randolph, for 8 hours each at their respective straight time rates of pay, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule and Rule 1, when it allowed employees not covered by the Signalmen’s Agreement to perform the Scope-covered work of testing radios at MP-558.0 through MP-611.0 on September 7, 2007, on the Beaumont Subdivision and denied the Claimants of the opportunity to perform this work. Carrier’s File No. 1487549. General Chairman’s File No. S7-UP142. BRS File Case No. 14161-UP.”

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 (IBEW) was advised of the pendency of this dispute, filed a Submission with the Board, and was present and participated in the Referee Hearing.

This claim involves the assignment of the testing of Microwave Data System (MDS) radios at several Control Points located on the former Missouri Pacific Railroad territory. It presents a jurisdictional dispute between the IBEW, whose members were assigned the disputed work, and the Organization, which relies upon the following provisions of its Scope Rule and Rule 1 to support its entitlement to perform the work in issue.

“SCOPE RULE

This agreement governs the rate of pay, hours of service and working conditions of employees in the Signal Department, who construct, install, test, inspect, maintain, or repair the following:

1. (b) Signals and signal systems. . . .
(d) centralized traffic control systems
(f) automatic train controlling or stopping systems. . . .
9. (b) If subsequent to the date of this agreement, a radio, radar, microwave, fiber optic or laser system is installed and its primary purpose and intent is the control of signal systems, employees subject to this agreement will install and maintain such systems, excluding automatic train control and automatic cab signal equipment on motive power or rolling stock.

NOTE 5: It is understood that this agreement is the result of the consolidation of several collective bargaining agreements with differences as to what work is performed by signal department

employees. It is not the intent of the parties signatory hereto to either assign to employees subject to this agreement work reserved to another craft or to assign to another craft work reserved to signal department employees.

RULE 1 - SENIORITY CLASS ONE

The following positions will fall under Security Class One:

* * *

Electronic Technician: An employee whose principal duties are the repair, testing and maintenance of electronic equipment on an assigned district, but who may work with a signal inspector or a signal maintainer." (See Appendix R)

The Organization argues that testing MDS radio signals (that replaced the code line at Control Points) whose primary purpose is to control the signal systems is work covered by its Scope Rule. It asserts that it is equipment used exclusively to transmit and receive information for the operation of the Centralized Traffic Control signal system, and Signal Department employees are entitled to perform it, because its purpose is determinative, citing Third Division Awards 5200, 8217, 11674, 19418, 19525; Second Division Award 6330 and Fourth Division Award 2641. The Organization contends that because the MDS radios are an integral part of the signal system, the work is specifically covered by its Scope Rule, and although no exclusivity of performance need be shown (Third Division Award 19898) it has done so, relying on Public Law Board No. 4716, Award 79, a holding it states governs this dispute. The Organization argues that the Agreement language must be applied as written (Third Division Awards 12632, 16573, 19695) and clearly gives this work - which includes radio technology - to its members, citing Third Division Awards 37710, 35008, 28651; Public Law Board No. 3622, Award 4; Public Law Board No. 5622, Award 51. Finally, the Organization distinguishes Public Law Board No. 4716, Award 86 as dealing with hot box detectors, not control points, as here involved.

The Carrier explains that this dispute deals with former Missouri Pacific territory, and notes that the Implementing Agreement merging it into the Union Pacific system states that the Organization will not deny another craft work covered by its Collective Bargaining Agreement. The Carrier contends that the IBEW has exclusively installed and tested MDS radios on this territory, and it is specifically included in IBEW Rule 4, Classification of Work and Qualifications, at (A)(5), (B)(4), and (C)(1). The Carrier notes that MDS radios replaced several key components of its communications network, and that the demarcation point is the RS 232 cable that connects the MDS radio to the signal system. It argues that the Organization failed to meet its heavy burden applicable to cases raising a jurisdictional dispute, because it did not show the exclusive past practice required, citing Third Division Awards 38087, 37850, 32646, 31930, 30444, 26257 and 12821. The Carrier asserts that Public Law Board No. 4716, Award 79 is distinguishable based upon the state of the record and proven use of the radio at the time, that Award 86 more closely sets forth the facts that are similar to the ones found in this case, and that the resolution of the issue in that case (which was adopted in Third Division Award 34044) is controlling and should be followed based upon the principle of stare decisis and its rationale explained in Second Division Award 9234; Third Division Award 29230 and Fourth Division Award 4855.

The IBEW contends that the testing of MDS radios is specifically covered by its Scope and Classification of Work Rules, which are specific and clear contract Rules as compared with the general Scope Rule found in the Organization's Agreement, citing Third Division Awards 22943, 20543, 11028 and Second Division Award 2898. Those Rules provide, in pertinent part:

"RULE 4 - CLASSIFICATION OF WORK AND QUALIFICATIONS (A) ELECTRONIC TECHNICIAN

(5) Electronic Technicians' work shall consist of building, installing, assembling, dismantling, inspecting, testing, adjusting, restoring and maintaining . . . electronic and radio communication equipment . . . centralized radio control equipment; radios used for two-way communication or control; microwave, multiplex and related equipment . . . EOT's MDS and ATC equipment. . . .

(B) SHOP TECHNICIAN

(4) Shop technicians work shall consist of inspecting, testing, adjusting, repairing . . . MDS radios. . . .

(C) INSTALLATION TECHNICIAN

(1) Installation Technicians shall be qualified and assigned to building, installing, repairing and maintaining . . . microwave and radio tower work. . . .”

The IBEW asserts that this work has been historically performed by IBEW-represented employees since the inception of this technology, pointing to more than 2,500 Control Points on the Missouri Pacific territory listed in the record as well as six employee statements attesting to the fact that this work belongs to, and has been performed by, IBEW Seniority District No. 4 employees. The IBEW notes that where contract language is found to be ambiguous, evidence of past practice prevails, relying on Second Division Awards 3873, 3646 and 1479. It explains that MDS radios are an integral part of the telecommunications network that provides radio communication between wayside Control Points and the communication microwave system, pointing to Third Division Awards 34044 and 40482, and are not exclusive to the signal system. The IBEW relies upon the holding in Public Law Board No. 4716, Award 86 that MDS radios replace key components of the telecommunications network, in support of its entitlement to the disputed work in this case.

A careful review of the extensive record convinces the Board that the Organization failed to meet its burden of proving a Scope Rule violation in this case. In order to do so under the language of its Agreement, it must establish that the MDS radio has as its primary purpose and intent, the control of signal systems, as set forth clearly in Paragraph 9(b) of the Scope Rule, or that, by historical practice, the disputed work of testing MDS radios at Control Points on this territory has been performed by BRS-represented employees. The record fails to show either of these facts. First, the Carrier and IBEW have explained in detail how the MDS radios in issue replace several key components of the communication network and are used to carry information other than for the operation and control of the signal system,

consistent with the finding in Public Law Board No. 4716, Award 86. They make clear that the demarcation point between the crafts is the RS 232 cable that connects the MDS radio to the signal system. While there is no dispute that MDS radios do carry information necessary for the control of the signal systems, the Organization failed to present proof that its primary purpose and intent is the control of signal systems rather than as a part of the broader communications network, or that the MDS radios were only transmitting signal information, which was a key basis for the holding in Public Law Board No. 4716, Award 79.

Second, the record reflects a substantial past practice of IBEW-represented employees performing MDS radio testing and repair work at Control Points on this territory. More than 2,500 occurrences were documented. This fact, coupled with the specific inclusion of MDS radios within the Classification of Work Rule of the IBEW Agreement, and the acknowledgement in Note 5 of the Organization's Scope Rule that the parties did not intend, when they consolidated Agreements, to assign work reserved to another craft to Signal Department employees, lead to the conclusion that the work in dispute is not covered by the Organization's Scope Rule. Thus, the Carrier's assignment of the testing of the MDS radios at the Control Points in this case to IBEW-represented employees did not violate the Organization's Scope Rule. See, Third Division Awards 34044, 30444 and Public Law Board No. 4716, Award 86.

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 11th day of January 2011.