Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41623
Docket No. SG-41560
13-3-NRAB-00003-110165

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(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 R. D. Morse, for 120 hours at the straight time rate of pay, including any overtime he lost, account Carrier violated the current Signalmen's Agreement, particularly Rules 5, 62, 65, and 80, when it failed to return the Claimant to service after receiving notification on August 21, 2009, that the Claimant's physician had released him to return to work without restrictions. Carrier held the Claimant out of service August 24-26, 2009, September 2-9, 2009, and September 16, 2009, without justification. Carrier's File No. 1527875. General Chairman's File No. S-5, 62, 65, 80-185. BRS File Case No. 14530-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.

The full scope of the issue herein is not relevant. The Organization's arguments that the Claimant had faxed a doctor's release to return to work without restrictions and was thereafter not properly and timely notified to return to his Signalman's position were annulled by subsequent occurrences. The Organization's arguments that the Carrier was fully responsible for the Claimant's lost work and that the Board has the right to consider the merits are not properly before us.

The Board's conclusions are based on the fact that the Claimant exercised his right to settle other issues with the Carrier. The Board reviewed that settlement agreement and finds within the penultimate statement that: ". . . Plaintiff and Union Pacific desire to settle fully and finally all claims, known or unknown, which Plaintiff has, may have or will have against Union Pacific, which were or could have been raised." Irrespective of the numerous arguments raised herein, the Board finds that this one phrase negates the rights of the Claimant and the Organization to consideration of this claim. The Board concludes that this claim is settled and, therefore, will not discuss the merits of the arguments raised by either side. The claim is dismissed.

AWARD

Claim dismissed.

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 24th day of April 2013.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41624
Docket No. SG-41573
13-3-NRAB-00003-110172

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(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. Toal, R. J. Davis and S. Dixon, 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 4, when it allowed contractors to perform boring for the sole purpose of crossing a signal cable at Mile Post 481.15 on September 25, 2009. Carrier's File No. 1527432. General Chairman's File No. S-SR, 4-1034. BRS File Case No. 14529-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.

The Organization asserts that the Carrier violated the Scope Rule and Rule 4, when it permitted an outside contractor to perform work belonging exclusively to BRS-represented employees on September 25, 2009. The exclusive work involved the installation of a conduit for signals; work that is Signalmen's work. Specifically, the Organization asserts that outside contractors on the Carrier's property were utilized to bore for the specific purpose of installing signal cables. The Scope Rule and Rule 4 state in pertinent part:

> "Scope:
>
> 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;
>
> 2. High tension or other line of the Signal Department, overhead or underground . . . wires or cables, pertaining to railroad signaling, interlocking, and other systems and devices listed in (1) above.
>
> Rule 4 – Earth Boring Machines
>
> When earth boring machine is used in signal department work, the following minimum force will be used; one signalman, two assistant signalmen, or two assistant signalman candidates."

Because the boring was used to lay underground wires or cables pertaining to railroad signaling, it was covered by the exact language, supra. The Organization asserts that to its knowledge, outside contractors have not been used to install signal cables that go to signal equipment. As proof the Organization presents both a signed statement attaching lists of boring performed by Signalmen at nearly 80 locations and numerous agreements to allow contractors to come onto the Carrier's property to perform scope-covered signal work. Further, with more than 60 employees working with the same boring machines (Rule 4) and trained to do this work across the entire system, there would be no need for the Carrier to seek additional agreements for outside contractors to perform this work if it did not belong to BRS-represented employees. As example, one agreement presented by the Carrier to the Organization on December 19, 2000 states in part:

> "In order to address the issue at hand, it was agreed the Organization would be willing to allow the Carrier to use employees not falling under the Scope of the current Collective Bargaining Agreement to perform temporary work. This work is described as "boring" at Bolsa and Bloomfield Roads between milepost 80.2 and 80.7 on the Coast Subdivision." (Emphasis added)

The Carrier argues that it did not violate either Rule. The use of outside contractors to perform boring has a long history of a mixed practice on this property. It does not dispute that Signalman have done this work, but only that it has also been done by contractors. Inasmuch as this is a general Scope Rule, the Organization must show that it is the practice of the Carrier to have this particular type of work performed by BRS-represented employees system-wide to the exclusion of all others. It cannot do so. This issue has been previously adjudicated by Third Division Award 39468, wherein the Board held that boring work is not scope-covered work. Further, that Award incorporated a spread sheet, which documented that since 1997, Carrier has contracted out boring on more than 116 occasions. The Carrier takes direct issue with the agreements reached, arguing that both parties "had a disagreement regarding the use of contractors to perform boring work." The Carrier argues that it entered into those agreements in an effort to avoid "fruitless claims" and does not always ask for an agreement, but simply contracts out the disputed work. Finally, the Carrier submitted a Manager's statement attesting that the work had to be completed in ten days and the Carrier did not have either the equipment or the manpower to do so. As for the equipment, the Carrier equates this dispute to that referred to in Third Division Award 34169, wherein "the presence of high pressure gas lines required equipment that the Carrier did not possess."

The burden of proof lies with the Organization to document that the work is scope protected. It is a very heavy burden to prove that the work exclusively belongs to BRS-represented employees on a system-wide basis. The Board notes that Third Division 39468 documents the same Rules and issues at bar. The Carrier notes in defense of that Award, the Organization raised the same issues. The Board notes that in that Award, as well as in the Organization's Dissent thereto, a lot of the issues raised pertain to the type of boring that was performed - earth boring, horizontal, or vertical boring. Rule 4 directly covers the manning of the earth boring machine when it is utilized. It does not prove system-wide exclusivity. The Scope Rule, Part (1) Sections (a) though (j) do not list "boring" (Third Division Award 24538).

The Board also notes that in this record the Carrier asserted that the reason for using outside contractors was that, "the presence of high pressure gas lines required equipment that the Carrier did not possess." There is no direct rebuttal from the Organization and it stands as fact. As similarly indicated in Third Division Award 34169:

> "Further, the Carrier maintains that it is not obliged to rent equipment it does not possess, nor is it obligated to incur the extra expense of training its employees in the use of equipment it does not own. Additionally, the Carrier contends that the task of boring is not reserved to Signal Department employees when it requires specialized equipment, not owned by the Carrier, that can evade utility lines under multiple tracks, thus avoiding potential dangers of installing conduit at the sites in question."

In short, there is a lack of proof for Scope inclusion. The Organization has a lack of proof that the agreements or evidence provided sufficiently prove system-wide exclusivity. Nor has the Organization proven that the boring work at issue in this claim is generally recognized as Signal work under these instant conditions. And it has not been denied that the equipment utilized to perform the instant work was not owned by the Carrier. Entitlement to the work of boring, not mentioned in Scope Section (1) and evidence that the type of work is exclusive by practice and system-wide is insufficiently documented when directly confronted with an established history of a mixed practice. Accordingly, 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 24th day of April 2013.