

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41625
Docket No. SG-41579
13-3-NRAB-00003-110216**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 S. G. Thurmond, K. N. Delfs, C. K. Whitaker, and J. S. Marlowe for all hours at their respective straight time rates of pay and overtime rates of pay, that the Claimants would have been compensated to perform this work, account Carrier violated the Scope Rule and Rules 4 and 80 when it used a contractor to perform directional bores resulting in a lost work opportunity for the Claimants. Carrier’s File No. 1530271. General Chairman’s File No. UPGCW-SCOPE-1657. BRS File Case No. 14518-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 raised both procedural and merits issues. On procedure, the Organization argues by letter dated November 20, 2010, that the Carrier violated Rule 69 (Claims and Grievances) in failing to comply with the Side Letter dated December 8, 2009, altering the process of grievance response. The Side Letter allowed appeals after the first level to be submitted by email. The Organization argues that the Carrier failed to email its response in a timely manner.

On merits, the Organization asserts that the Carrier violated the Scope Rule, as well as Rules 4 and 80, when it permitted planned bids to contractors who began work on December 3, 2009. There was no emergency. The contractor performed directional boring. There were two boring gangs in the Zone where the contractor was working with four men doing the job. The contractor worked on the Nogales Subdivision until December 13, 2009, performing work belonging exclusively to BRS-represented employees. The exclusive work involved the installation of signal cables and conduits underground; work that is Signalmen's work under the Scope of the Agreement. Specifically, the Organization asserts that outside contractors have never been used without seeking permission through an agreement with the Organization to come onto the Carrier's property to perform boring of related signal work. 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 lines 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 for this work. As proof the Organization presents both a signed statement attaching lists of boring at nearly 80 locations done by Signalmen 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 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 the cited 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 performed by contractors. Because 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 documenting that since 1997, the 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 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 boring crew was not available to complete the work within the needed time frame. Additionally, the Manager stated that “in my close to 20 year experience as Signalman, Foreman, and now manager of Signal Maintenance, I know the carrier has contracted this work in other areas in the past.”

Having fully reviewed the on-property record, the Board is compelled to find that the Carrier violated the time limits of the parties' Agreement. The Organization

supplied evidence that it appealed the claim on April 6, 2010. The Organization documented that the Carrier's denial was dated June 8, 2010. After asserting that the 60-day time limit was exceeded by three days, the Board finds no Carrier denial. It stands as fact. Accordingly, the claim must be sustained on procedural grounds without reaching the merits. The Claimants are to be compensated as provided for in the facts at bar and the terms of the Agreement.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of April 2013.