

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41627
Docket No. SG-41609
13-3-NRAB-00003-110123

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 E. R. Johnson and F. Rios, for four hours each at the straight-time rate of pay, account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule and Rule 4 when on August 21, 2009, Carrier used an outside contractor instead of the Claimants to bore in signal cable for a highway crossing signal, located at M.P. 11.02 on the Harvard Subdivision at Norwood Park, denying the Claimants the opportunity to perform this work. Carrier’s File No. 1526747. General Chairman’s File No. UPGC-SR, 4-046. BRS File Case No. 14439-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 the 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 were utilized to bore for the specific purpose of signal cables on the Carrier's property. 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;

1(e). Highway crossing warning systems and devices

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 to install signal cables that go to signal equipment. As proof the Organization presents both a signed statement attaching lists of boring done 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 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 done 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 Signalmen 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 more than 116 times. 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 “these types of fictitious and 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 that the “Carrier did not have the equipment necessary to safely and accurately complete this project.” As for the equipment, the Carrier equates this dispute to that adjudicated by 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 system-wide. The Board notes that Third Division 39468 documents the same Rules and issues at bar. The Carrier notes in defense of that Award that 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 deal with 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) through (j) do not list “boring” (Third Division Award 24538).

The Board also notes that in this record the Carrier asserted that the reason for utilizing outside contractors was that, “the Carrier did not have the equipment necessary to safely and accurately complete this project.” (Third Division Award 34169) The Organization refuted the Carrier’s contention arguing that the Carrier does have the equipment and trained employees. Additionally, even with high pressure gas lines, BRS-represented employees have performed the work in this same area without problems.

The Board notes a strong practice shown by the Organization. However, there is a lack of proof for Scope Rule inclusion. The Organization lacks proof that the agreements or evidence provided sufficiently prove system-wide exclusivity. Nor has the Organization proven that the boring in question is generally recognized as signal work under these instant conditions. Entitlement to the work of boring, not mentioned in Scope Section (1) and evidence of a practice of boring did not persuasively refute the Carrier’s evidence. The Organization’s assertions that boring as in this case at bar 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.