Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41630
Docket No. SG-41712
13-3-NRAB-00003-110336

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 M. A. Toal, R. J. Davis and P. C. Montgomery, 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 installing signal cable at Mile Post 9.4 on the East Belt Subdivision on February 17, 2010. Carrier's File No. 1535508. General Chairman's File No. S-SR, 4-1061. BRS File Case No. 14601-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 February 17, 2010. The exclusive work involved the performance of directional boring to be used for the installation of a signal cable on the East Belt Subdivision at M.P. 9.4. Specifically, the Organization asserts that outside contractors were utilized to perform boring on the Carrier's property while well-trained and qualified employees were not utilized for work exclusively belonging to BRS-represented employees. 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(b) Signals and signal systems including inoperative signals and train order signals, automatic cab signal equipment excluding portions on motive power and rolling stock.

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.

12. All other work generally recognized as signal work, performed in the field or signal shops . . .

13. This agreement will include the appurtenances and apparatus of the systems and devices referred to herein.

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. Because the purpose of this work was exclusively for the signal system, it is Signalmen's work (Third Division Awards 19525, 20540 and 30108). 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 Rule signal work. Further, with more than 60 employees working with the same boring machines (Rule 4) and trained to perform 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 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 made these agreements so as to avoid "fruitless claims" and does not always ask for an agreement, but simply contracts out the disputed work.

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 is exclusively belongs to BRS-represented employees system-wide. The Board notes that Third Division Award 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 involve what type of boring 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).

In short, 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 at dispute in this claim is generally recognized as signal work under these instant conditions. The Carrier stated: "As in Award 34169, the presence of high pressure gas lines required equipment the Carrier did not possess." It has not been denied that the equipment used to perform the work in dispute was not owned by the Carrier. Entitlement to the work of boring, which was not mentioned in Scope Section (1) and evidence of wide scale boring presented by the Organization did not refute the Carrier's evidence. Assertions 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.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41636
Docket No. MW-41348
13-3-NRAB-00003-100144

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
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(Union Pacific Railroad Company (former Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier headquartered System Rail Gang 9116 at Englewood Yard in Houston, Texas and failed and refused to afford the employes assigned to System Rail Gang 9116 (A. Hildreth, et al.) the on-line meal and lodging per diem and the weekend travel allowance beginning January 16, 2007 and continuing (System File MW-07-36/1470897 MPR).

(2) As a consequence of the violations referred to in Part (1) above, the employes assigned to System Rail Gang 9116 (A. Hildreth, et al.) at Englewood Yard in Houston, Texas shall now be compensated for their per diem allowance and their respective weekend travel allowance beginning January 16, 2007 and continuing."

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.

This claim protests the Carrier's January, 2007 bulletin regarding System Rail Gang (SRG) 9116 with fixed headquarters at Englewood Yard in Houston, Texas, and raises the issue of whether the Carrier can bulletin to the system seniority roster a fixed headquarter gang, or whether the Agreement requires that SRGs be assigned as "on-line," with its employees receiving per diem and travel allowance payments. The lengthy record contains evidence with respect to the bargaining history involving the Memoranda of Agreement dealing with SRGs in 1951, 1963 and 1983, and the 1997 Implementing Agreement replacing Agreements on other merged properties, as well as integrating seniority lists covering employees spread over a ten territory jurisdiction, into the April 1, 1975 Missouri Pacific (MP) Agreement, which was updated in the current July 1, 2000 Agreement.

The claim, which was filed on February 6 and amended on March 7, 2007, was initially denied on March 29, 2007. Thereafter, it was appealed on May 16 and again denied on July 11, 2007. It was subsequently appealed after conference on September 24, 2007. After mutual extensions of time granted to the Organization to file the claim with the Board, by letter dated December 14, 2009, the Organization submitted additional evidence in support of its argument that there was a consistent, well known, and binding 50-year past practice supporting the fact that SRGs have always been bulletined as mobile (camp cars/on-line) gangs, and the employees covered by the provisions for lodging and meals (or per diem in lieu of) and weekend travel expense, in the form of two declarations from Southwest Region Vice President Roger Sanchez (representing former SP-E employees) and MP General Chairman Bill Palmer (both involved in the negotiations for the 1997 Implementing Agreement with UP Director of Labor Relations Wayne Naro, where the operation of SRGs under the 1975 MP Agreement was discussed in depth) as well as statements from approximately 47 SRG employees and 62 sample SPG bulletins spanning the time period between 1983 and 2001. The Notice of Intent was filed with the Board on January 28, 2010. The Carrier sent a one page letter responding to the Organization's December 14 evidence on February 8, 2010, which the Organization asserts is untimely and not properly before the Board, relying on Third Division Award 30127.

The Organization argues that the Carrier's decision to headquarter positions on SRG 9116 in Houston, Texas, and deny employees on-line per diem and weekend travel allowance pursuant to Rules 36(b)(1) and (2) and 37(a)(1) and (2) is a clear repudiation of the terms and conditions of employment set forth in the controlling Agreement language and more than 50 years of past practice. It notes that SRGs draw employees from a massive ten state system through a system seniority roster, and that these employees travel over that expanse of territory, far from their homes, installing rail. The Organization points to the language negotiated in each of the National Agreements for the provision of lodging (camp car/motels) and meals or per diem in lieu of such expenses, as represented by Rules 36(b)(1) and (2) (Travel Time - Bunk Cars or Trailers) and 37(a)(1) and (2) (Travel Allowance) under the current 2000 Agreement as representative of benefits negotiated for system gangs working away from home and headquartered on-line, and the meeting of the minds of the parties with respect to providing those benefits.

The Organization, acknowledging that there is no explicit language with respect to headquarters for SRGs in Rule 3 which governs them, relies upon evidence establishing a clear, unambiguous, consistent past practice showing that all SRGs have been bulletined as mobile (camp car/on line) gangs for more than 50 years, with minor more recent exceptions objected to by the Organization and rebulletined by the Carrier, in support of its argument that such a practice creates an unwritten agreement provision that has the same force and effect as a written provision, and is binding on the Carrier, citing Special Board of Adjustment (Truck Panel Fabrication Dispute) (Wallin, 2001) and Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299 (1989). It notes that the practice of providing meal, lodging and travels benefits to SRG employees clarifies the intent of the language of the Agreement with respect to whom these benefits were negotiated for. The Organization contends that it makes no sense to bulletin a position with a fixed headquarters to people on the system seniority roster, who may be required to travel thousands of miles to work at that headquarters location, and then deny them any benefits for such travel and work time away from home. It also asserts that the 2000 Agreement updated the 1975 MP Agreement by including items negotiated in the Memoranda in the interim, and did not change any prior practice with respect to the operation of the SPGs, which were not "in conflict" with the Agreement under the language of Rule 58.

The Organization also relies upon the statements of Palmer and Sanchez concerning discussions that took place during the negotiations for the Implementing

Agreement with respect to the operation of SRGs under the MP Agreement, and statements made by Naro that SRGs were mobile gangs provided with meals and lodging or per diem in lieu thereof, to further prove the mutual understanding of the parties during negotiations with respect to this issue. Again relying on the declaration of Palmer, the Organization sets forth what occurred as a result of its objection to the Carrier's attempt to establish a headquartered system gang in Houston in 2005, where Union President Simpson led a delegation of officials to meet with Naro, resulting in the Carrier's abolishment of the SRG positions and the subsequent re-bulletining of the position to local Division forces, as evidence that it objected to any attempt on the Carrier's part to change the long-standing past practice of bulletining SRGs as mobile gangs. It asserts that the record supports the payment of the Rule 36 and 37 contractual benefits to the employees of SRG 9116, who were denied any compensation for meals, lodging or travel expense, due solely to the Carrier's impermissible and unprecedented bulletining of these positions with fixed headquarters in Houston, Texas.

The Carrier contends that the Organization failed to meet its burden of proving a violation of the Agreement in this case, noting that there is no Agreement support for paying the Claimants on-line expenses when they were assigned to a position with a permanent headquarters. It first points out that this dispute is governed by the 2000 National Agreement which, according to Rule 58, supersedes all rules, practices and working conditions in conflict therewith. . ," asserting that any provisions from the 1951, 1963 and 1983 Memoranda, and the 1975 MP Agreement not incorporated in the 2000 Agreement have no force and effect. The Carrier notes that the parties specifically negotiated in Rule 5, governing System Bridge gangs, that the positions were to be bulletined exclusively on-line, but, despite the fact that the same experienced negotiators were involved, no similar restriction is contained in Rule 3 governing SRGs.

The Carrier also argues that the Organization failed to establish an exclusive, system-wide past practice of bulletining SRGs only as on-line gangs, giving examples of three recent cases where fixed headquarters were established for positions open to bid to system seniority roster employees. It notes that the Claimants voluntarily bid and accepted positions on SRG 9116 knowing it was headquartered in Houston, Texas, and without the on-line expenses they seek through this claim, and asserts that the record is devoid of any specific information that they incurred any such expenses. The Carrier states that there is no restriction in the 2000 Agreement on its management prerogative to use its forces as it deems

most beneficial to the efficient operation of its business, or to establish headquartered gangs open for bid to employees on the system seniority roster, as it did in this case. The Carrier notes that, since the filing of the instant claim, the parties have negotiated a separate agreement effective January 1, 2011, providing that system and zone gangs are to be headquartered as "on line" gangs. It contends that such agreement would not have been necessary if the 2000 Agreement had contained such a provision covering SRGs, as alleged by the Organization.

A careful review of the record evidence convinces the Board that the Organization met its burden of proving an established past practice of bulletining SRGs as "on-line" gangs. The declaration of Palmer, bulletins and statements of SRG employees spanning decades, statements made during negotiations for the Implementing Agreement, as well as the absence of any indication by the Carrier during negotiations for the 2000 Agreement that it intended to change such practice, all support the conclusion that the Carrier understood that the practice of SRGs operating as mobile gangs entitled to the meals, lodging (or per diem) and travel allowances applicable to employees working on-line continued into the current Agreement unchanged. This is also seen by the undisputed continuation of this practice for at least five years after the 2000 Agreement took effect. Under such circumstances, the Board is unable to accept the Carrier' position that Rule 58 did away with this practice solely because language concerning the headquarters of SRGs was not specifically negotiated into Rule 3. The binding past practice was just that, a long-established practice that became an unwritten term of the Agreement, in the absence of specific language to the contrary. See, Consolidated Rail Corp. v. Railway Labor Executives Ass'n, supra; Special Board of Adjustment (Truck Panel Fabrication Dispute), supra.

With respect to the requested remedy, as noted by the Carrier, the parties have negotiated a subsequent Agreement setting forth, in writing, that system and zone gangs are to be headquartered "on-line" effective January 1, 2011. While this fact alone does not negate the validity of the past practice previously in existence that forms the basis for a finding of a violation of the Agreement in this case, it does bring an end to any potential liability. The Rule 36(b) per diem allowance is to help defray expenses for lodging and meals of on-line employees working away from home, and the Rule 37 travel allowance is compensation for miles actually traveled to return home at the end of each workweek. These provisions should have been applied to the Claimants while they were working on SRG 9116. Because the record does not contain any information concerning whether any expenses or travel were

actually incurred by the employees on SRG 9116 encompassed within the claim, the matter is remanded to the parties for a joint record check with respect to the amount of expenses and travel incurred by the Claimants while working on SRG 9116 and the duration. The Claimants shall be compensated accordingly.

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.