

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 42765
Docket No. SG-42620
17-3-NRAB-00003-140335

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Railroad Company

STATEMENT OF CLAIM:

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

Claim on behalf of D.W. Smith, W.L. Smith, and J. Vincent, for 160 hours each at their pro-rata rate of pay, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when on November 29, 2012 through December 21, 2012, it allowed an outside contractor to perform work generally recognized as signal work and thereby cause the Claimants lost work opportunities. Carrier's File No. Union Railroad 2013-1. General Chairman's File No. UR-CONT-03. BRS File Case No. 15000-Union."

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 Scope Rule claim protests the use of contractor employees to install CCTV cameras and magnetic swipe card readers on the Carrier property, a project initiated by parent company US Steel (USS) to provide enhanced security and access control across its property. The applicable portions of the Scope Rule, effective January 1, 1955, and the Memorandum of Understanding (MOU) effective October 1, 1950 appear below.

RULE No. 1 - Scope

“(a)This agreement governs rate of pay, hours of service and working conditions of employees engaged in the construction, repair, reconditioning, inspection, testing and maintenance of all signals, interlocking plants, centralized traffic control systems, car retarder systems, highway crossing protection signals, bonding of track for signal and interlocking purposes, and such other work as has been generally recognized as Signal Department work on the Union Railroad.

(b) This scope rule is predicated upon conditions and practices which have been in effect on this property. It is not intended to give the signalmen under this agreement the exclusive right to any additional work nor is it intended to take away from signal forces covered by this agreement any work which they have heretofore generally performed, as covered by the Memorandum Agreement dated October 1, 1950.

* * * * *

MOU- October 1, 1950

It is the intent of the scope rule and it is understood and agreed by both parties that the railroad may continue to employ outside contractors or use employees not coming within the scope of this agreement to perform any of the work set out in the scope rule, consistent with the established practice on this railroad. The performance of any work by contractors, or employees not coming within the scope of this agreement, as set out in the scope

rule, will not entitle any Signal Department employee to any additional or penalty payment.”

The issue arising from this claim is whether the disputed work is “generally recognized as Signal Department work” and what is “the established practice on this railroad” for its performance. In its claim correspondence, the Organization contended that there is a long-standing practice for employees historically and exclusively performing this time of work (time clock and CCTV and associated equipment) which must be integrated with the Carrier existing communication systems. It asserts that network connections (phone, data, fiber optic) have been exclusively installed by employees, as well as production and security cameras, and the fact that the work was done at the behest of USS does not release the Carrier from its obligations under the Agreement. The Organization seeks monetary relief for the lost work opportunity for Claimants, relying on Third Division Award 32125; PLB No. 7693, Cases 23, 24, 25.

The Organization noted that Carrier has payroll codes associated with this type of work, attaching the code sheet (containing Code #205 as CCTV), as well as five employee statements (including the three Claimants) indicating that both the installation and maintenance and repair of CCTV equipment and time clocks have been historically and exclusively performed by Carrier Electronic Technicians since at least 2000. Claimant Doug Smith noted his certification and specialized schooling to perform CCTV work, indicating that he was the one sent to retrieve information from, maintain, and replay recordings from the cameras and card readers installed by contractor employees, and he was directed to instruct management on how to access the DVR to obtain replays without him. Smith’s second statement indicates that he has knowledge of the location of all cameras on Carrier’s property and their fields of view.

Carrier’s denials on the property asserted that this was a USS turn-key project fully controlled by USS, and was designed by them to provide enhanced security and access control throughout their property, and had nothing to do with timekeeping. It pointed out that it assigned employees to participate in the substructure and construction phase, including installing fiber optics, and used them to the full extent they had been used in providing network connections in similar type installations in the past. The Carrier argued that allowing internal employees to understand the intricacies of the system would restrict the system’s integrity and the security it was designed to provide. It stressed the fact that the

MOU recognized its right to employ contractors consistent with established practice, which included installing and maintaining computer systems, and that the closed loop security system was owned, monitored and maintained by USS. The Carrier also took issue with the Organization's attempt to gain a penalty payment for the Claimants, who were fully employed during this time period, and did not suffer any monetary loss. In its submission for the first time, the Carrier also asserted that, in order to properly execute the manufacturer's warranty, the CCTV and card reader equipment had to be installed by properly licensed and qualified technicians provided by the vendor. The Organization objected to consideration of this new argument.

The Board has carefully considered the record and finds that the Organization sustained its initial burden of proving that the type of work involved in this case - installation of CCTV cameras and magnetic swipe card readers - falls within the "work generally recognized as Signal Department work" and "heretofore generally performed" by employees on this railroad contained in the Scope Rule, and "consistent with established practice on this railroad." This finding is primarily based upon the documentary evidence provided by the Organization concerning the exclusive prior performance of this type of work by employees on the property for at least 11 years and the fact that the Carrier recognized CCTV work as a category of work for payroll purposes. While magnetic swipe cards were not shown to have been used on this property in the past, other time recording equipment has been included with employee work.

The Carrier raised a number of affirmative defenses to the claim, including that it had no control over the project, employees were assigned to perform network connections which is the extent of their past practice in this area, there were insufficient skilled or licensed employees to perform the required work, and warranties required vendor installed licensed technicians. As noted, the warranty argument is a new argument not raised on the property and will not be considered by the Board. Additionally, once the Organization met its initial burden of showing a Scope Rule violation through past practice, the burden of persuasion shifted to the Carrier to present evidence to rebut the Organization's proof, and substantiate its affirmative defenses. See, Third Division Awards 18447, 20107. Unfortunately, assertions alone do not meet such burden. The Carrier presented no documentary evidence in any form whatsoever, to support its asserted positions. Therefore, the Organization's claim must be sustained.

With respect to the requested remedy of pay for fully employed Claimants, while there is no doubt that Carriers have been held liable for contracting out employee work due to the loss of work opportunity, regardless of whether the employees had a provable loss of earnings during the relevant time period, See, e.g. Third Division Award 32125, the language of the applicable Scope Rules in those cases were quite different from Rule No. 1 and the MOU in this case, which do not require prior notice of intent to contract and a duty to conference the issue. Rather, the MOU makes clear that the parties understand Carrier's right to employ outside contractors "consistent with established practice," and states: "The performance of any work by contractors, or employees not coming within the scope of this agreement, as set out in the scope rule, will not entitle any Signal Department employee to any additional or penalty payment."

Since the Board has found that the Carrier did not meet its burden of showing either that it had no control over the contracting or performance of the disputed work, or that the contracting was consistent with past practice, we do not believe that monetary relief would be in the form of a "penalty" payment. However, since the Claimants were fully employed during the time period the contractor employees performed the disputed work, there is no doubt that it would be "additional" payment to them for work not performed. The parties have cited no cases concerning the appropriate remedy for Scope Rule violations under the language of this Agreement. To the best of our recollection, the initial Scope Rule violation cases under the notice and conferencing language found in other agreements, did not provide for monetary relief, which was a remedy developed over time for repeated violations occurring under the same language. The absence of precedent on this property, and the particular language of the MOU in this case, leads the Board to deny the requested monetary relief in this case. Should Carrier continue to engage in similar proven violations, monetary relief may well become appropriate, even under this Agreement language. The Carrier shall cease and desist from contracting out work on its property that violates the Scope Rule and MOU.

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 25th day of September 2017.