Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31053
Docket No. SG-30100
95-3-91-3-545

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Norfolk and Western Railway Company:

Claim filed on behalf of Mr. T.M. Ellis, Signal Electronic Specialist, Bellevue, Ohio, Western Region East; assigned hours 7:30 am to 4:00 pm Monday through Saturday, rest day Sunday that:

(A) The Carrier violated the rules of the Signalmen's Agreement, in particular the Scope Rule and Rule 100, when on 8/14/90, 8/21/90, 8/22/90, 8/23/90, 8/27/90, 8/28/90, 8/29/90, 8/30/90 and continuing the carrier permitted or required communication employees Mr. H. Kraus and Mr. J. Reynolds to perform signal work at Vermillion, Ohio and Willoughby, Ohio. The communication employees installed and are now maintaining, repairing and testing Automatic Car Identification Systems at Vermillion and Willoughby, Ohio.

(B) The carrier should now pay Mr. T.M. Ellis 128 hours at the time and one half rate for the violation of work already performed as cited in part (A) and 4 hours at the time and one half rate for each week this violation continues.

(C) This claim is filed as a continuing claim in accordance with Rule 700." Carrier file SG-BLVE-90-7. GC File SG-BLVE-90-7. BRS Case No. 8440.N&W.

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.

On September 27, 1990, the Organization filed a claim on behalf of the Bellevue, Ohio, Signal Electronic Specialist charging that the Carrier improperly assigned certain work, which was allegedly covered by the scope of the applicable Agreement, to communication employees represented by the International Brotherhood of Electrical Workers (IBEW). More specifically, the claim alleges that the communication employees installed, maintained, tested and repaired a wayside identification system on various dates between August 14 and 30, 1990, at Vermillion and Willoughby, Ohio. Claimant seeks 128 hours at the overtime rate of pay. He also seeks what is apparently a four hour per week penalty payment for a continuing violation.

Most of the pertinent facts are not in dispute. Sometime in 1988, the Carrier began the installation of an Automatic Equipment Identification System at various locations on the property. This system identifies rolling stock via wayside devices so the Carrier knows the location of equipment moving across its property. Each piece of moving rail equipment has an identification tag which is a radio sensitive-reflective transponder. The transponder receives radio waves emitted from a trackside transmitter/receiver and bounces the waves back to the trackside equipment to be decoded with a microprocessor. The information is then conveyed by telephone line and modem to a central facility to keep track of the location of all rail equipment on the Carrier's system.

The Automatic Equipment Identification system (AEI) replaced the obsolete Automatic Car Identification system (ACI). The ACI system involved the use of a wayside optical scanner which, using a high intensity light source, read a light reflective bar code on equipment as the equipment passed by the scanner. The information was processed in housed wayside circuits and the information was then sent via modem and telephone line to a central location. The

Carrier points out that the ACI no longer conforms to industry standards.

The Carrier asserts that the AEI was first installed 21 months before this claim arose at other locations without protest from the Organization. Communications employees represented by the IBEW, Carrier supervisors and manufacturers' technicians installed the wayside equipment. Contrarily, the Organization submits that it filed claims at other locations, but held those claims in abeyance pending the outcome of this case.

The claim alleges that the work in dispute, that is, the installation, maintenance and testing of the trackside AEI devices, is exclusively reserved to the craft and class of signal employees per Rule 1. Rules 1(a) and 1(c) provide:

"BRS - SCOPE RULE

> This agreement governs the rates of pay, hours of service and working conditions of employees engaged in the construction, reconstruction, reconditioning, installation, maintenance, repair, inspection and tests, either in the Signal Shops, or in the field of the following:
>
> (a) Traffic and C.T.C. control systems; interlocking plants and interlocking systems; wayside train stop and train control equipment and devices; car retarders and car retarder systems; highway crossing protective devices and their appurtenances; Automatic Car Identification Systems and other signal electronic equipment; hot box detector and recorder equipment; bonding or grounding of tracks for signal or static explosion preventive purposes and all signals and signal systems. [Emphasis added.]
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> * * *
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> (c) Signal appurtenances and devices, instrument cases and housings, carpentering, painting, concreting and form work, switch heaters, digging and back filling, pipe lines and connections, cranks, compensators, foundations and supports used in connection with the systems and devices outlined in paragraph (a) hereof."

The Board determined that the International Brotherhood of Electrical Workers may have a third party interest in this case pursuant to Section 3 First (j) of the Railway Labor Act, as

amended. The Board notified the IBEW of its potential third party interest in correspondence dated January 9, 1992. The IBEW filed a third party Submission with the Board and appeared before the Board, as did representatives of the Petitioner and the Respondent.

The Organization argues that the AEI system performs exactly the same function as the former ACI system. The purpose of both systems is to identify locomotives, rail cars and other on track equipment. Although the new system utilizes radio frequency energy scanning in lieu of optical scanning, a change in the method of technology does not operate to remove the disputed work from the Scope Rule inasmuch as the Scope Rule expressly refers to automatic car identification systems. The Organization submits that the IBEW cannot have any claim to the work because there is no reference to ACI, AEI or rolling stock identification systems in its Classification of Work Rule.

The Carrier raises two primary defenses. First, the Carrier asserts that AEI is distinct from ACI and the totally new AEI technology is not subject to the Scope Rule. The AEI technology was not even discovered, the Carrier asserts, until long after the Scope Rule was negotiated. The Carrier further avers that there is absolutely no connection between ACI and AEI, since the former is obsolete and was totally scrapped. Second, the Carrier submits that AEI is not a signal system but rather, is a radio based system. The Carrier explained that AEI merely gathers information, a function unassociated with the safe and efficient movement of trains which is the traditional purpose of a signal system. The Carrier alleged that AEI was a communication system as opposed to a signal system.

The IBEW essentially endorses the Carrier's position herein. The IBEW submitted statements from communication employees attesting that only employees represented by IBEW have been involved in the installation of AEI equipment at various locations on the property.

This Board finds that Rule 1(a) of the applicable Agreement expressly covers the work in dispute. Rule 1(a) plainly and unambiguously mentions "Automatic Car Identification Systems." The plural word "Systems" signifies that the negotiators of the scope rule contemplated that there might be more than one type of Automatic Car Identification process, system or technology.

While the Carrier attempts to characterize AEI as a separate system from ACI, the two systems perform identical functions. Both systems also used a wayside track device to identify passing equipment. When construing the Scope Rule, the purpose of the

equipment controls over the methodology used to accomplish the purpose. (Third Division Award 8217.) In addition, a change in the technology or methodology for performing a particular function does not mean that the work, itself, changes (Fourth Division Award 4635.) The mere fact that radio waves are an integral part of AEI while light waves were the instrumental part of ACI, does not necessarily remove work from the scope of the Agreement especially where the new system replaces the old, obsolete system. The technological advancement from optical scanners to radio waves does not remove the work from the scope of the Agreement because a technological advancement does not create new work, but merely replaces old signal work. Public Law Board No. 3622, Award 4. The overall purpose of the system is to identify moving rail equipment. In addition, Rule 1(c) refers to appurtenances and devices in connection with the "systems and devices outlined in paragraph (a) hereof" which strongly suggests that the appurtenances and devices can be electric, electronic, mechanical, electro-mechanical, so long as the device is an integral part of a car identification system.

On another property, a Public Law Board found that, to some extent, the maintenance of an AEI system belongs to the Signalmen's craft even though the Scope Rule on that property did not expressly refer to automatic car identification systems. Public Law Board No. 4716, Award 62. The Board observed with approval that the Carrier had used a signal construction gang to install AEI. Thus, Award 62 lends support to the Organization's claim herein.

Where the disputed work is expressly referenced in the Scope Rule, the Organization need not show exclusivity in the performance of the disputed work.

This Board emphasizes that the work covered by the Scope Rule involves the installation, maintenance, testing and repair of on-sight wayside radio transmitter/receiver devices and their appurtenances and not the external communication link to the central location. As was true with the prior ACI system, the communication link is work outside the ambit of Rule 1(a).

The amount claimed is excessive. This Board awards Claimant a call for each specified claim date. With regard to the continuing aspect of the claim, we decline to award Claimant the requested penalty payment because he did not offer any proof that the installation, testing, maintenance and repair of the AEI wayside devices on his territory consumed four hours per week on a continuing basis.

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 1st day of September 1995.

SERIAL NO. 373

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 31053

DOCKET NO. SG-30100

NAME OF ORGANIZATION: (Brotherhood of Railroad Signalmen

NAME OF CARRIER: (Norfolk and Western Railway Company

After the Board issued Third Division Award 31053, the International Brotherhood of Electrical Workers (IBEW), the interested third party herein, initiated an action in federal court to set aside the Award pursuant to Section Three, First (q) of the Railway Labor Act. *International Brotherhood of Electrical Workers v. Norfolk and Western Railway Company and Brotherhood of Railroad Signalmen*, No. 95 cv 7267 (U.S.D.C. N.D. Ill.); 45 U.S.C. § 153, First (q).

The court simultaneously denied the IBEW's motion for judgment on the pleadings to set aside the Award and Norfolk and Western Railway Company's (NW) motion in its favor. Instead, the court remanded the Award to the Board to clarify its prior decision. More specifically, the court held that the Award failed to manifest that the Board reviewed, considered and interpreted the terms of the IBEW - NW collective bargaining Agreement. The court found that the Award was predicated entirely on an interpretation of the provisions of the BRS - NW collective bargaining Agreement. In sum, the court directed the Board to "mesh" the provisions of the IBEW - NW Agreement with the BRS - NW Agreement. See also *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railway Company*, 768 F.2d 914 (7th Cir. 1985).

On remand, the Carrier, the Organization (BRS), and the IBEW filed Submissions with the Board.

The Organization petitions the Board to affirm its prior findings and to clarify that the Board gave appropriate consideration to the provisions of the IBEW - NW Agreement.

Although the Carrier vigorously disagrees with the result in Award 31053, it nonetheless submits that the Award is final and binding under the Railway Labor Act. This finality principle, the Carrier declares, is essential to maintaining stability and predictability in labor - management relations. Otherwise, the party that did not prevail before the Board would always seek relief in court which sabotages the parties' preferred method (arbitration) for resolving minor disputes under the Railway Labor Act.

The IBEW contends that Award 31053 is erroneous and thus, must be vacated. The IBEW's arguments are exactly the same as those raised in its original Submission albeit, with some embellishment. The IBEW further urges the Board to issue a ruling reversing its decision and hold that the disputed work belongs to the class and craft of communication employees represented by the IBEW.

Although Award 31053 did not articulate the Board's interpretation of the IBEW - NW Agreement with semantical precision, the Board considered and interpreted the IBEW - NW Agreement in harmony with Rules 1(a) and 1(b) of the BRS - NW Agreement. In the following paragraphs, the Board will quote the relevant provisions of the IBEW - NW Agreement and then show how those provisions were considered and interpreted in its original decision.

The Classification of Work Rule in the IBEW - NW Agreement reads:

"THIS AGREEMENT SHALL COVER ELECTRICAL WORKERS IN THE SIGNALS AND COMMUNICATIONS DEPARTMENT ON THE NORFOLK AND WESTERN RAILWAY SYSTEM AND SHALL INCLUDE ALL ELECTRICAL MEANS OF COMMUNICATIONS, ALL ELECTRICAL EQUIPMENT SO USED, INCLUDING, BUT NOT LIMITED TO, TELEPHONE, TELETYPE, RADAR AND MICROWAVE OR ANY OTHER ELECTRICAL MEANS OF COMMUNICATIONS AND ALL OTHER WORK GENERALLY

RECOGNIZED AS COMMUNICATIONS WORK, ON NORFOLK AND WESTERN SYSTEM EQUIPMENT. EXISTING DIVISION OF WORK BETWEEN ELECTRICAL WORKERS AND SIGNAL EMPLOYEES WILL CONTINUE."

In addition, the IBEW relied on Supplement No. 11 of the IBEW - NW Agreement which provides:

> "On A.C.I. systems Electrical Workers will install, inspect, test, adjust, repair and maintain all teletype, communications lines, wire line pole installations, interfaces (Modems) utilized to link A.C.I. equipment to physical communications lines, power supplies (except where existing power sources are more readily available from existing signal lines), all communications equipment located in or on decoder buildings, and all electrical wiring in connection with the above equipment.
>
> The parties recognize that the installation and maintenance of track circuits and wheel detectors, as well as the cable connecting these installations to a terminal box is work properly accruing to the Signal Craft.
>
> This agreement shall become effective December 11, 1973, and it shall remain in effect until changed or modified in accordance with provisions of the Railway Labor Act."

Before addressing the IBEW - NW Agreement, the starting point for the Board's analysis was the Scope Rule in the BRS - NW Agreement. If the BRS Scope Rule did not cover the work in dispute, it would have been unnecessary for us to proceed with further contract interpretations. As stated in our original decision, Rule 1(a) of the BRS - NW Agreement expressly includes automatic car identification systems. This express contract clause vests the disputed work with the class and craft of signal employees unless there is a superseding provision in the IBEW Classification of Work Rule. To the contrary, the IBEW Classification of Work Rule does not even mention automatic car identification systems. The IBEW Classification of Work Rule broadly refers to"electrical means of communications" and "work generally recognized as

communications work." In essence, the IBEW Classification of Work Rule is general so that it operates only to protect work traditionally and historically performed by communication employees. To demonstrate that the disputed work fell within its Classification of Work Rule, the IBEW would have to proffer evidence of a past practice that communication employees performed the disputed work. As will be discussed in the ensuing paragraphs, the IBEW did not prove any such past practice. Therefore, the express allusion to the disputed work in the BRS Scope Rule is controlling.

As it did in its original presentation to the Board, the IBEW, on remand, stresses that communication employees performed the installation of AEI equipment on this property since the advent of AEI in approximately 1990. The IBEW argues that this assignment of work constitutes a past practice evincing that the Carrier and IBEW recognized that the disputed work was properly characterized as communication work within the ambit of the IBEW Classification of Work Rule. However, as the Board related in its original decision, the past practice actually supports the BRS' claim as opposed to the IBEW's position. The IBEW failed to proffer any evidence that communication employees performed the disputed work prior to 1990. The fact that they performed work subsequent to 1990 is merely the mis-assignment of work that was a continuing violation of the BRS - NW Agreement. On the other hand, the BRS came forward with evidence showing that signal employees had performed the disputed work under the former automatic car identification system. A mis-assignment of work is not a past practice. Rather, a past practice develops over a long period of time. On this property, the Organization demonstrated that signal employees installed the former equipment identification systems and so, the past practice does not support the IBEW's position.

Because the IBEW did not have evidence of a true past practice and consequently, the disputed work did not fall within its Classification of Work Rule, the IBEW argued that the work was covered by Supplement No. 11 of the IBEW - NW Agreement.

Supplement No. 11 of the IBEW - NW Agreement does refer to automatic car identification systems but, Supplement No. 11 does not cover wayside devices. The Board applied the relevant provisions of Supplement No. 11 in harmony with the BRS Scope Rule. As specified in the second paragraph of Supplement No. 11, the IBEW and NW acknowledged that certain work along the right-of-way properly accrues to

employees in the signal craft. In the penultimate paragraph of our decision, the Board described the interface between wayside equipment and the communication system, that is, the external link. The Board drew the demarcation of work between signal employees and communication employees with regard to AEI. To accomplish this, the Board interpreted and applied the provisions of Supplement No. 11. Therefore, the original decision meshed the BRS - NW Scope Rule with the Classification of Work Rule and Supplement No. 11 of the IBEW - NW Agreement.

For the above stated reasons, the Board affirms its original decision and Award in this case.

Referee John B. LaRocco who sat with the Division as a neutral member when Award 31053 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of December 1998.