

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44820
Docket No. SG-46469
23-3-NRAB-00003-200979**

The Third Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(CSX TRANSPORTATION, INC.**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation (formerly Baltimore & Ohio):

Claim on behalf of M.T. Appel, J.L. Eagle, III, D.P. Sweitzer and J.R. Van Meter, for 16 hours each at their respective straight time rate of pay and 4 hours each at their respective over time rate; account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, when on May 15 and 16, 2019, Carrier assigned contractor Excavating Associates to perform scope-covered work of installing conduit between the signal house and signal, at Martinsburg C.P. BA 99.7, resulting in loss of work opportunity for the Claimants. Carrier’s File No. 19-38827. General Chairman’s File No. 19-26-SC. BRS File Case No. 16361-B&O. NMB Code No. 102.”

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 case involves a claimed violation of the applicable Scope Rule, when the Carrier allegedly assigned a contractor to install conduit in connection with signal cable being moved for installation of a new platform at the Amtrak station at Martinsburg, West Virginia, work which the Organization contends is reserved to its members.

The Organization submitted the instant claim on June 30, 2019, contending that the Carrier violated the Scope Rule when it permitted an outside contractor to install conduit from a signal house to a signal for signal cable, so that a new platform could be built at the station. The claim requested payment of 16 hours straight time and 4 hours overtime for each of four named Claimants, based on the amount of time four contractor employees took to perform the work.

The Carrier denied the claim, stating that the project was not performed by a contractor for the Carrier, but rather it was facilitated by Amtrak in connection with improvements being made for Amtrak. It stated that the work was being conducted by, for, and/or at the request of Amtrak and its authorized contractors, and that it was not a Carrier-sponsored project. It added that Amtrak installed the conduit through the platform, and that it requested Carrier forces complete the necessary work of excavating outside the platform limits, laying in all cables, and making necessary connections and tests in order to retire the existing signal cables.

The Organization submitted an appeal, stating that the Carrier allowed Amtrak to do work within the coverage of the applicable agreement. It noted that the General Chairman was at the location on the second day of excavation work and that he photographed the contractors performing the work in question. It also stated that a trackman was providing on track safety for the contractors. The Organization asserted that it is the Carrier's burden to prove an affirmative defense, and it alleged that the contractors were performing scope-covered work while Carrier forces were being reduced.

The Carrier denied the appeal, again maintaining that no violation of the cited agreement had been established. It again stated that the work in question was led by Amtrak and its contractors and that it had not played a part in the project, citing among other things an email from its Assistant Chief Engineer as support. It attached an additional statement from a Director of Construction, which provided more detail

regarding the work in question, and which stated that the conduit in question was all within the boundaries of the Amtrak passenger platform construction project.

The parties discussed the matter in conference, maintaining their respective positions. The matter now comes to us for resolution.

The parties' positions before us are essentially the same as those set forth in the on-property handling described above. The Organization maintains its stance that the work in question is covered by the applicable Scope Rule, which specifically references "signal department conduits, wires and cables, overhead or underground." It states that the conduit in question was put in place for future signal cables from a signal house to a signal, and that this clearly put the claimed work within the Scope Rule. The Organization avers that the agreement in question is clear and unambiguous, and that it reserves the right to the Claimants to install any component, appurtenances, and apparatus of the signal system, and that the purpose of the conduit installation here was replacing signal cables. It asserts that there is no indication the work in question was not on Carrier property, and that the Carrier was not justified in hiring the contractors to perform the work.

The Organization cites multiple awards, including one addressing conduit used exclusively for signal circuits, which have held that if the purpose of work is exclusively for the signal system, it is signalmen's work. It states that the work in question is likewise for the purpose of the signal system, and that it was reserved to signalmen. The Organization states that the Carrier's "no cost, no benefit" argument is an affirmative defense. It argues that the Carrier bears the burden of proving such a defense, and it asserts that the Carrier failed to meet that burden. The Organization contends that there is no reason that the Carrier could not have assigned the Claimants to perform the work, and it urges that the claim be sustained.

The Carrier, on the other hand, maintains its position that no violation of the cited agreement has been established. It reiterates its contention that the project was at the Amtrak station, which was not owned by the Carrier, citing the statements of the Assistant Chief Engineer and the Director of Signal Construction to that effect. It asserts that those statements establish that the project was adjacent to Carrier track, but on Amtrak property, that the project was under Amtrak's direction and control, and that the Carrier had no control over the project itself. The Carrier asserted that the Organization had admitted in its claim that the platform in question was on Amtrak's property when it alleged that the work involved "installation of a new platform at Amtrak Station."

The Carrier cites multiple awards for the principle that work not done at the direction of, for the benefit of, or within the Carrier's control is not scope covered work. It states that this principle is applicable regardless of whether the Carrier owns the land in question if the Carrier does not have control over the project. The Carrier asserts that the facts are not in dispute here, as the Organization has admitted the work was done at the direction of Amtrak and not the Carrier. It concludes that the claim therefore must be denied.

We have carefully reviewed the record, including the correspondence, attachments, and citations of authority, and we agree with the Organization that installation of conduit for signal cable falls within the coverage of the Scope Rule. The agreement clearly includes such work. It is therefore apparent that the determinative issue before us is whether the work in question falls within the "no cost, no benefit" exception to a Scope Rule claim.

On this point, we believe that the Carrier has adequately established that the exception is applicable. There is no question that the work was associated with construction of a loading platform for Amtrak, not for the Carrier. The claim itself specifically states that the work involved "installation of a new platform at the Amtrak Station." The statements submitted by the Assistant Chief Engineer and Director of Construction are consistent with that assertion, providing additional detail to confirm that the work was not initiated by the Carrier, and that the conduit was only installed because of the platform work.

We find that the record thus is sufficient to establish that if the platform construction work had not been initiated, there would have been no need to install the conduit under it. While the Carrier may have had input into the project, we do not believe that factor establishes that it had control or that it acted to avoid its obligations under the agreement. See, Third Division Award No. 29672. Numerous awards have held that "where work is not performed at Carrier's instigation, nor under its control, it is not performed at its expense or exclusively for its benefit," a Scope Rule violation is not established. Third Division Award No. 31013. We find that those factors have been demonstrated here, so we therefore must deny the claim.

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 21st day of December 2022.