Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44919
Docket No. SG-47163
23-3-NRAB-00003-210842

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

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

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 K.J. Adams, O. Banda, W.A. Bear, Jr., B. Bennett, J.P. Driskill, S. Perez, J. Posada, R. Threadgill, M.R. Vaughn and C.C. White, Jr., for 5900 hours at their respective rate of pay divided equally among the Claimants and continuing until the contractor is removed or work is complete; account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule and Rule 65, when on June 8, 2020, it assigned a contractor R.J. Corman to install trunking for signal cables in Englewood Yard at Mile Post 357 on the Houston Subdivision, thereby causing the Claimants a loss of work opportunity. Carrier's File No. 1740720, General Chairman's File No. S-SR,65-59, BRS File Case No. 4622, NMB Code No. 312 - Contract Rules: Scope."

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.

At the time this dispute arose, the Claimants were assigned to the Carrier's Signal Department with daily tasks that involved installing all signal appurtenances. On June 8, 2020, the Carrier permitted an outside contractor crew, R.J. Corman, consisting of ten employees, to dig and install trunking for the purpose of new signal cables to re-wire signal equipment at Englewood Yard at Mile Post 357 on the Houston Subdivision.

In a letter dated August 5, 2020, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated September 30, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that the Carrier violated the Scope Rule in the parties' Agreement. The Organization contends that the language of the Scope Rule is simple and clear and reserves the right to the Claimants to install any component, appurtenances, and apparatus of the signal system. The Organization contends that the trunking for the purpose of new signal cable pertains exclusively to signal. The Scope Rule provides,

> **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:**
>
> *******
>
> **2. High tension or other lines of the Signal Department, overhead or underground, poles and fixtures, conduits, transformers, arrestors and distributing blocks, track bonding, wires or cables, pertaining to railroad signaling, interlocking, and other systems and devices listed in (1) above.**
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> *******
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> **NOTE 5: It is understood that this agreement is the result of the consolidation of several collective bargaining agreements with differences as to what work is performed by signal department employees. It is not the intent of the parties signatory hereto to either assign to employees subject to this agreement work reserved to another craft or to assign to another craft work reserved to signal department employees.**

The Organization contends that while the Carrier asserts that this was a mixed-use project, it offered no evidence that anything other than signal cables were in the

trunking. The Organization contends that the Carrier has also failed to present any correspondence from another craft contending that the work in dispute belongs to them. The Organization contends that since the Carrier has assigned this work to an outside contractor, it is not a jurisdictional dispute, and the Organization need not show that the work exclusively belongs to its members.

The Organization contends that numerous Boards have held that if the purpose of the work is exclusively for the signal system, it is Signalmen's work. The Organization contends that the record shows that the digging, trunking, and installation of cables and power cable was used for Signal Department purposes, particularly powering every apparatus associated in the signal bungalow.

The Organization contends that the Claimants have suffered a lost work opportunity, and so they should be granted compensation.

The Carrier contends that the Organization has not met its burden of proving that excavating dirt and setting trunking channels is work that only its members may perform. The Carrier contends that the Organization has not demonstrated that the work is solely reserved to Signal Department employees. The Carrier contends that numerous Boards have found that where the work is a mixed-use project, the Organization's members may not exclude others from performing it.

The Carrier contends that the installation of trunking is not scope-covered work, in that once the project was finalized, the trunking channels would house both Signal and Telecom cables and wires. The project would benefit both departments. The Carrier contends that the trunking channels are installed by contract forces who did not handle, install, or connect cables or fiber lines.

The Carrier contends that the Organization has not satisfied the heightened level of proof necessary in a jurisdictional dispute. The Carrier contends that it was not a violation of the Agreement to use contractors to perform this work. The Carrier contends that this dispute has already been decided in its favor. *See, e.g.*, Third Division Awards 43178, 43179, 43437 and 43445. The Carrier contends that the "trunking channel" installation is no different than the contracting associated with "boring" channels.

Having reviewed the entire record, the Board finds that the Organization has failed to meet its burden of proving a violation of the parties' Agreement. The evidence shows that the benefit of the project of installing trunking was for the signal

and communication departments. Thus, it was a mixed-use project. A number of awards on this property have already held that "the Carrier is not prohibited from hiring a subcontractor to perform a trunking project which is not solely designed for signal use and which will house different types of cable lines used by different departments." Third Division Award 43152. *See also,* Third Division Awards 39468, 40421, 41620, 41624, 41627, and 41630.

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 April 2023.

LABOR MEMBER'S DISSENTING OPINION TO NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION AWARD NO. 44919

(Referee Kathryn A. VanDagens)

The Majority's findings are erroneous and failed to apply the agreement language as written. As noted in the Award, Rule 3, was the governing agreement provision and provides:

The National Railroad Adjustment Board (NRAB) has uniformly recognized the subject matter of these agreements involve property rights valuable to the employees that embrace the entire agreement and that any limitation on these rights must be expressly stated within an exception therein. Third Division Award No. 906 recognized that this principle was "…established on this Board…," holding in pertinent part:

> "The Carrier stresses the fact that the agreement applies to 'Employes' and contends that when the work is given to persons not employes there is nothing for the agreement to operate on. This contention has frequently been made in the past, and has been overruled by a series of decisions holding, that agreements of the sort which come before this Board contain an implied term that, in the absence of express or mutually understood exceptions, work of the character covered by the Scope of an agreement cannot be assigned to persons not subject to the agreement. Thus, it has consistently been held that, barring such exceptions, work cannot be taken from under an agreement and 'farmed out' or assigned by contract or otherwise to outside agencies. See Awards 180, 323, 360, 364, 521, 602 (Applying to this Carrier), 615 and 757 of this Division and, among others on the First Division, No. 351. The theory of these decisions has most fully been expressed in the last-named decision."

The inclusion of the work in the scope itself fully reserves that work to those covered by it as an implication of law and its existence prohibits the Carrier from farming out such work to those not covered by the agreement. The Scope Rule in Note 5 states that the intent is no to "assign another craft work reserved to signal department employees." The Scope Rule involved in this case was specific and covers the work that was farmed out, as noted under Scope Rule, Paragraph 2.[1]

The record established that this work has been performed by signal department employees for over 50 years and the trunking, which is a conduit, contained only cables that were appurtenances to and essential to the function of the signal system. Substantial evidence in the form of photographs, blueprints, statements, and historical documents was provided to make the prima facie case, shifting the burden to Carrier.

Upon the burden shift, Carrier used the shotgun approach in throwing out several assertions in a think-tank fashion hoping to erode the Scope Rule of the Agreement. To the detriment of the

[1] As noted on Page No. 2 of the Award, "High tension or other lines of the Signal Department, overhead or underground, poles and fixtures, **conduits**, transformers, arrestors and distributing blocks, track bonding, wires or cables, pertaining to railroad signaling, interlocking, and other systems and devices listed in (1) above." **(Emphasis added)**

arbitral process under the Railway Labor Act (RLA), the Majority allowed hyperbole and unsupported assertions from a single Carrier Manager to be its guiding star in the decision. The statement was the only "evidence" provided by Carrier to refute the agreement language and documents showing the work and trunking was only for signal cables. The NRAB has long recognized that unsupported assertions and self-serving declarations do not meet the burden for Carrier's defense. Third Division Award No. 15444, held:

> "…when Petitioner made a prima facie case, as it did, the burden of going forward with the evidence shifted to Carrier. The unsupported assertions of Carrier did not satisfy its burden. In civil matters when a party has in its peculiar control evidence of probative value which it fails to adduce it can be presumed that if such evidence was adduced it would be unfavorable to that party."

Similarly, Third Division Award No. 17051, held:

> "Carrier alleged that there was not a sufficient number of employes available and those available worked as much as possible and, therefore, suffered no loss. The Carrier is raising an affirmative defense, and has the burden to prove such defense by competent evidence. This the Carrier failed to do. Mere assertions, self-serving declarations and general statements are of no real probative value to this Board. The fact Claimants were working where Carrier had assigned them does not make them unavailable. (Awards 15497, et al.)"

Notwithstanding the lack of probative value to the unsupported statement, the record contained substantial evidence refuting each claim. Carrier Manger's statement is quoted below:

> "The trunking in Endlewood yard will house signal cables along with fiber optic cable that belongs to the communication department and power cable. There will be communications equipment in every house in the yard which makes the power a shared facility as well. This trunking will not be exclusively used for signal cables."[2]

The blueprints for the cables and locations were provided which showed all cables as part of and essential to the signal system.[3] No evidence was provided showing what alleged communication equipment was involved nor how any of the cable in the trunking were used for any purpose other than the signal system. The alleged mixed-use project was not established by evidence in the record and removed the applicability of this arbitrary opinion. The awards referenced by the Majority had separate fact patterns and held no precedential value in the case at hand; of note, the majority of the awards, other than Third Division Award No. 43152, dealt with different work in which some cases involved specialized equipment and separate arguments. In Third Division Award No. 43152, it was determined on the facts developed in that case which differed entirely from this case.

Based on the Manager's statement and the Majority's decision using the word "will" rather than "does" indicates that the Majority was persuaded by the idea of possible future use of the trunking.

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[2] Page No. 103 of Organization's Submission
[3] Page Nos. 45–50 and 90–92 of Organization's Submission

This basis was improper fundamentally in the fact that the alleged future use was demonstrably false, as the Organization put pictures into the record showing the trunking only housed signal cable 6 months after the project and at 8 months after the project the orange conduit for the fiber optic cable was installed by signal forces and was **outside** of the trunking. [4]

In a broader sense, the future use argument as a whole is without merit. The NRAB has recognized future use as irrelevant in analyzing a case, the foundation of the analysis is the current use and record before it.

Third Division Award No. 43174 held:

> "The Carrier contends that at some point in the future, it may have some telecom use here, but, at the present time, this work was signalmen work and should have been reserved to the signalmen employees."

Additionally, Third Division Award No. 43398 held:

> "The Carrier contends that the eventual advent of the PTC system, whose communications will be carried over the fiber optic cable, makes the work more similar to communications forces than BRS-represented forces. The Carrier makes legitimate arguments, but what will happen in the future remains speculative and will need to be dealt with the time comes. The schematics in the record establish that the only data being transmitted between the signal houses at issue was signal data. The work was originally under the jurisdiction of BRS. The cables continue to transmit and receive only signal data. Accordingly, the work continues to fall under the jurisdiction of signal forces."

In Third Division Award No. 37710, it was noted:

> "Nowhere on the property does the Carrier state that it currently does any of the above. The Organization directly challenged the Carrier which offered no rebuttal. The Organization stated that:
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> > '. . . the only purpose of the equipment mentioned in the claim was for signal use. It is performing no other function at the current time, and what its potential use may be makes no difference.'
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> The Board finds Third Division Award 35008 on point with this dispute. Given the evidence in this record, we must find that this work belongs to Signalmen because it is only installed for signal use and it remains so, until that use has changed. As it stands, the claim must be sustained."

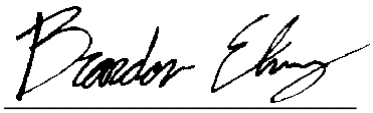
Moreover, the concept of future as a basis for a decision without any probative evidence creates a nearly impossible hurdle for the Organization to properly enforce and uphold the language of the Scope Rule. When Boards give credence to this hypothetical theory it removes the appellate review of evidence provided and allows ideas and concepts outside the record, possibly outside reality, to

[4] Page Nos. 94–100 of Organization's Submission

govern the process which is wholly improper and outside the jurisdiction of the Board. Such finding are based on possibility rather than interpreting agreement language and analysis of facts.

Decisions of the board based on created concepts outside of the record developed, such as this one, serve to erode the provisions of the agreement rather than fulfill the duty of the Board to enforce the agreement. When Boards entertain unsupported assertions and novel hypothetical concepts they are aiding Carriers in their effort to gain through arbitration that which they have not attained at the bargaining table. The NRAB has long recognized its role under Section 6 of the RLA to resolve minor disputes and their obligation to take care not to infringe on the responsibility of the parties to negotiate in good-faith under Section 3 of the RLA to make changes to the agreement. See Third Division Award Nos. 12246, 17665, and 21061.

This decision serves to allow contracting out of signal work to occur despite the clear prohibition against this in the agreement. The failure to apply proper review of evidence and the standard of proof while allowing theories outside the record to guide serve to frustrate the arbitral process and agreement enforcement while encouraging continued violations into the future under the guise of interpretation and precedent. For the foregoing reasons, the Organization must vigorously dissent to the Majority's findings and lack of proper appellate review.



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