

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44928
Docket No. SG-47191
23-3-NRAB-00003-220094**

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 J.A. Austin, J.L. Crawford, G.A. Motyka, J.B. Parker and D.L. Russell, for 360 hours divided equally among the Claimants at their respective rates of pay and continuing until the contractor is no longer performing scope covered work; account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, when it assigned a contractor Reinhold Electric to plow in 3/2 power cable for signal equipment beginning on September 17, 2020, at CP 331.40 thru CP 332.76 on the Del Rio Subdivision, thereby causing the Claimants a loss of work opportunity. Carrier’s File No. 1743892, General Chairman’s File No. S-SR-89, BRS File Case No. 4627, 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 September 17, 2020, the Carrier assigned an outside contractor, Reinhold Electric, to plow in 3/2 signal power cable from CP 331.40 through CP 332.76 on the Del Rio Subdivision. The cable was installed to provide power to the signal cabins.

In a letter dated October 2, 2020, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated November 24, 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 has 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 plowing and the installation of cable for the purpose of new signal cables exclusively pertains 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.

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 it provided evidence dating back to 1967 demonstrating that Signal employees have installed power cables and associated

equipment from the power feed to the signal equipment, utilizing equipment that the Carrier owns or has rented. The Organization contends that the Carrier assured the Signal employees that the Scope Rule would be applied at Mile Post 24.12 on the Little Rock Subdivision for the same type of work.

The Organization contends that the Board has held that if the purpose of the work is exclusively for the Signal System, it is Signalmen's work. The Organization contends that the Carrier has failed to present evidence to support its affirmative defense that the power cable was for dual use. The Organization contends that the Carrier has a contractual obligation to apply the Agreement as written and not assign Scope-covered work to individuals not covered by the Agreement.

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

The Carrier contends that the contractors from Reinhold Electric Company install high voltage distribution lines at the location and run commercial power cables to a riser and disconnect box. This work occurred near Milepost 331.4 – 332.76 on the Del Rio Subdivision. The Signal employees are responsible for installing the cable from the disconnect box to the signal house. The Carrier contends that it provided a statement from Signal Director Mike Choate that the disputed work was not solely for signal use, and that this work has historically been performed by IBEW employees and contractors.

The Carrier contends that the Organization failed to prove that its members have exclusive right to perform work that was not for the sole use and benefit of the Signal department. In this project, the contractors supplied commercial AC power from the source to Signal equipment. All Signal specific cables were handled/connected by the Claimants. The Carrier contends that the contract employees did not perform any scope-covered work.

The Carrier contends that the Organization has not satisfied the heightened level of proof needed 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.

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 high voltage distribution

lines at the location, and running commercial power cables to a riser and disconnect box was for the signal and communication departments. Thus, it was a mixed-use project. The Carrier does not violate the Agreement when it subcontracts work that is not Scope-covered and there is no past practice of assigning it exclusively to the Signal employees.

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. 44928**

(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 'Employees' and contends that when the work is given to persons not employees 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 power cables were essential to the function of the signal system. The Majority recognized this fact in stating, "The cable was installed to provide power to the signal cabins." Substantial evidence in the form of photographs, statements, and historical documents was provided to make the prima facie case, shifting the burden to Carrier.²

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**)

² Page Nos. 35-51 and 91-99 of the Organization's Submission

Upon the burden shift, Carrier made the unsubstantiated allegation that the power cable would be for multiple departments. The only “evidence” submitted by Carrier was manager statements from other claims concerning different location and fact patterns. 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.” **(Emphasis added)**

Similarly, Third Division Award No. 17051, held:

“Carrier alleged that there was not a sufficient number of employees 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.)”

Carrier made the unsupported assertion that this was a mixed-use project and that there was allegedly communication equipment that would be using the power from the signal cable. No evidence was provided showing what alleged communication equipment was involved nor how any of the power cable served 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 fanciful opinion.

The Majority’s findings that this was a mixed-use project required it to base its decision on assumptions rather than facts to govern in its appellate review. Assuming arguendo that there was some form of communications equipment in a location, the power, signal house, and communication equipment would not exist if not for the signal system. The application of mixed-use as a scapegoat for evading clear language in the Scope Rule is misplaced and wholly arbitrary. Moreover, the application of mixed-use is used as a mechanism to circumvent the agreement rather than enter good faith discussions. The lack of parameters on this “argument” creates a simple means in which to avoid the agreement provisions. If a project is serving the signal system but the inclusion of a single piece of equipment completely removes the application of the scope from the clear purpose of the project, it has placed an unwarranted burden and unidentifiable hurdle for which the Organization must overcome despite clear agreement language.

Decisions of the board based on hypothetical concepts without evidence in the record 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 as their basis for a decision, 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.

A handwritten signature in black ink, reading "Brandon Elvey", written over a horizontal line.

Brandon Elvey
Labor Member

A handwritten signature in black ink, reading "Zachary C. Voegel", written over a horizontal line.

Zachary C. Voegel
Labor Member