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

Award No. 45319
Docket No. MW-48090
24-3-NRAB-00003-230654

The Third Division consisted of the regular members and in addition Referee Melinda Gordon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference
(Northeast Illinois Regional Commuter Railroad (Corporation (NIRCRC d/b/a METRA)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement on April 23, 2022, when it assigned three (3) junior Track Subdepartment employes identified as Track Foreman S. Garcia, Jr., Trackman J. Avila and Trackman P. Ceja, who were members of Track Gang #206, to perform Bridge and Building (B&B) Water Service overtime work in connection with the removal of a drainage pipe at the 80th Avenue grade crossing in Tinley Park, Illinois, instead of assigning B&B Subdepartment Water Service Foreman J. Johnston, Water Service Mechanic/ Driver S. Zavala and Water Service Mechanic/Driver N. Hernandez, thereto (System File RS-2218RI-019/8-2022-35 NRC).

(2) The claim*, as presented by Robert J. Shanahan, Jr., by letter dated June 7, 2022, shall now be allowed as presented because the claim's appeal was not disallowed by the highest officer designated by the Carrier to handle appeals, Ms. R. Abudayyeh, in accordance with Rule 33."

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.

The underlying monetary claim concerns an alleged violation of Rule 18 of the Agreement. Prior to addressing the overtime provisions of Rule 18, the Organization raises a procedural argument regarding the Carrier's alleged violation of Rule 33, Time Limit on Claims and Grievances. Rule 33 of the parties CBA provides a specific mechanism for the filing of claims and grievances. The Organization asserts that the claim in the instant matter must be upheld because the Carrier's highest designated officer ("HDO") did not determine the claim on appeal.

RULE 33, Time Limit on Claims and Grievances, provides as follows:

> **(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shalt not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.**
>
> **(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken with sixty (60) days from receipt of the notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the**

parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), above, pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine (9) months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group, or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) months period referred to herein.

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(f) This Agreement is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Carrier.

Pursuant to the procedures outlined in Rule 33, the Organization's claim was filed, denied, and appealed. Based on the Carrier's letter dated June 2, 2022, notifying the Organization that Ms. R. Abudayyeh was serving as the Carrier's HDO, the Organization filed its appeal with Ms. R. Abudayyeh. Instead of HDO Ms. R. Abudayyeh, deciding the appeal, S. Dutka denied the Organization's appeal by letter dated October 25, 2022.

The Organization submits that based on the Carrier's June 2, 2022, designation letter, only Ms. R. Abudayyeh, as HDO, was authorized by the Carrier to reply to the claim. As a result, the claim must be granted.

The Carrier argues that it is within its discretion to determine who it designates to respond to disputes. The Carrier asserts that Rule 33 only requires that a claim be

filed with the Carrier HDO but does not mandate the HDO's response to the claim. S. Dutka timely and properly denied the Organization's claim.

It is undisputed that it is within the Carrier's authority to designate the HDO. The Carrier's June 2, 2022, designation letter identified Ms. R. Abudayyeh as the Carrier's HDO for appeal purposes. Rule 33 (c) and (f) specifically refer to timelines stemming from an appeal to and decision from the HDO, deeming the HDO the ultimate authority in appeal cases. As a result, the appropriate designated officer of the Carrier failed to disallow the claim, and the claim must be allowed as presented.

As previously stated in Board Award 22710:

> **We have reviewed the authority submitted by the parties. The great weight of authority supports the position of the Organization that the Carrier committed a procedural error when an official other than the one designated to receive and process the claims responded to the claims. [1]**

For all the foregoing reasons, the claim is sustained.

AWARD

Claim sustained.

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 23rd day of September 2024.

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[1] ***See also*** **Awards 11374, 17696, 18002, 22710, 23943.**

CARRIER MEMBER'S DISSENT
TO
Third Division Award 45318
Third Division Award 45319
(Referee M. Gordon)

In its Awards, the Majority has effectively rewritten the Parties' grievance handling language and placed a new restriction upon the Carrier which was never negotiated between the Parties. This is not just a routine error of interpretation – it reflects an unlawful application of Majority's idiosyncratic sense of industrial justice and a failure of the Board to rationally interpret and apply the terms of the Parties' agreements, as it is statutorily required to do. Moreover, the Majority's decision fails to engage in any meaningful way with the Carrier's central arguments and thereby betrays the fundamental duty of an arbitration panel to justify, in rational terms, the grounds for its award.

As a threshold matter, the meaning of the relevant language in the Parties' Agreements is not really in dispute here. Everyone agrees that the Carrier has full discretion to designate which of its officers will handle disputes on its behalf. Rule 33 of the Parties' Agreement does not mandate that any particular person, title, or officer of the Carrier respond to claim appeals submitted by the Organization. Appeals are responded to by "the highest officer designated by the Carrier to handle such disputes," and the Carrier is not restricted by the Agreement from designating anyone it chooses. Rule 33 does not bind the Carrier to any notification procedures, and does not restrict the Carrier from changing its designation whenever it choses, or as often as it chooses. Even the Board Majority seems to accept that obvious proposition.

The Majority veers into absurdity, however, when it applies that Rule to the facts of this case. Referee Gordon points to a June 2, 2022 letter as proof that Ms. Abudayyeh was the "Highest Designated Officer," and therefore the only Carrier Officer allowed to deny appeals. However, as the Carrier explained – and as the record clearly shows – that letter does *not* state that Ms. Abudayyeh is the only Carrier officer authorized to respond to grievances. Rather, it says only that appeals "should be submitted" to her. This letter therefore does not reflect any promise by the Carrier that responses to any submitted appeal would be written and signed by Ms. Abudayyeh. And how does the Majority respond to that point? It just ignores it, blithely asserting that the letter "identified Ms. Abudayyeh" as the HDO despite the fact that is not so.

It gets worse. The *unrebutted* record evidence clearly established that the Carrier has regularly responded to appeals through various staff members in the Labor Relations Department who were not formally designated as the "HDO." The Carrier provided sixty (60) examples dating back to 2016 where a Labor Relations Officer other than the HDO denied a claim appeal without dispute from the Organization. I authored forty (40) of these denials, to which the Organization took no exception until my appeal denial in this case. Indeed, in its claims handling correspondence, the Organization itself confirmed that it has been standard practice on the property for staff members in the Labor Relations Department other than the HDO to deny claims:

> *After a review of prior files, including some referenced in the Carrier's letter March 25, 2024, it is clear that prior to Ms. Dutka's brief career with the Carrier,* ***the usual practice*** *has been to have the Highest Designated Officer (HDO) respond to appeals taken to the highest officer designated by the Carrier, or* ***absent an HDO response, the Carrier has assigned others to respond on behalf of the HDO as is designated within the Carrier's denial.***

In other words, it is and was undisputed that Labor Relations staff who have never been formally designated as HDO can and do deny appeals under Rule 33(c). The Majority, once again, just ignored this point, which, parenthetically, distinguishes this case from the sort of situations addressed in other awards cited by the Organization.

It is also worth highlighting the practical import of the Majority's decision in this case. The Majority is saying, in essence, that the Carrier has defaulted – and therefore will have to pay significant claims – because it did not include a line in the appeal denial stating that the denial was being issued "on behalf of" the HDO. There is obviously no substantive significance to that; it is the functional equivalent of complaining that a letter is invalid because it has an electronic signature instead of a wet signature.

In that regard, it is ironic that the Organization itself argued – in response to one of the Carrier's other points – that "[t]he procedural issues raised on the property reflect nothing more than an immature game of 'gotcha' that certainly is not conducive to positive labor relations." The Majority's decision to sustain the claims because a timely appeal denial was supposedly not signed by the right person is the height of hyper-technical game-playing. This sort of outcome will only further incentivize reliance on similar procedural arguments. The Organization may find that what goes around, comes around.

As for the Majority's decision in this case, it is, in sum, wholly unjustified, contrary to the weight of authority, and therefore completely lacking in precedential force. Awards under the Railway Labor Act (RLA) are insulated from judicial review because there is a bedrock assumption that arbitrators will do their job in a competent and forthright manner. Where, as here, a panel fails to adequately address or respond to one side's core arguments, it not only undermines the validity and persuasive power of the particular award at issue – it also violates the underlying bargain of the RLA and erodes the faith of both carriers and unions in the fairness of the arbitral process itself.

For these reasons, I must dissent.

Sylwia Dutka
Carrier Member