

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37795
Docket No. SG37867
06-3-03-3-208

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe (BNSF):

Claim on behalf of D. L. Jackson and K. M. Meyer for 59.1 hours each at their prevailing overtime rate of pay, including skill pay, account Carrier violated Rule 1, (Scope) when it allowed track forces from Brookfield, MO., who are not covered by the Signalmen’s Agreement to re-fuel generators that signal department employees distributed to various signal locations to supply backup power for charging batteries for the operation of the signal system between MP 62.9 and MP 166.3. The violation occurred beginning February 1, 2002 through February 8, 2002. Carrier’s File No. 35 02 0035. General Chairman’s File No. 02-029-BNSF-103-C. BRS File Case No. 12554-BNSF.”

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.

There is no dispute on the facts. A major storm blanketed Missouri, and severely affected the Carrier's operations. The storm began on February 1, 2002. It was severe enough to have caused a major power outage from MP 62.9 to MP 166.3. Not only was the track without power, but Signalmen worked hours cutting brush to clear pole lines, clearing snow from switches, walking trains over broken rail and other non signal covered activities.

During the storm, signal forces installed generators to provide the power necessary to properly run the signal system and to charge the battery back-up systems. During the period from February 1 to February 8, 2002, the Carrier allowed maintenance forces to refuel the generators by pouring gasoline into the generators. The Carrier referred to the situation as "an extreme signal emergency with vital systems in jeopardy caused by extensive storm damage."

The Organization argues that the work belonged to the BRS-represented employees under the Scope of the Agreement. It maintained that the ice storm was over and to permit non-Agreement employees to continue to perform Scope covered work for a full week was a violation of the Agreement.

The Carrier argued that the actual refueling was not exclusive to the Signal craft. It further argues that given the length of the power outages, it became necessary to refuel the generators. It does not deny that non-Agreement personnel, as well as Signalmen were used to refuel the generators. The Carrier maintains that this was not scope protected work and others have routinely performed this work. It further points out that the work took only a few minutes and the request for payment to the Claimants is excessive.

The Board finds that the generators were installed to provide power to the signal system. As such, they are covered under the Scope Rule of the Agreement as an appurtenance. The record evidence indicates that the work of refueling belonged to the employees because the generators were a device attached to the signal system.

In an emergency, the Board would provide a great deal of leeway for the Carrier to safely respond, including the use of non-Agreement personnel. Once the generators were installed to the signal systems to assure power, the emergency was

over. Throughout this week, the Carrier's use of non-Agreement personnel to fuel the generators was a violation of the Scope Rule of the Agreement.

The Organization is the moving party. It is required to prove all elements of its claim. It appears from the record that the emergency was over after the generators were installed. The Organization points to the fact that during the time in dispute, numerous signal employees were available and not used. It states:

"The ice storm had already happened and the generators had all been installed and fueled by Agreement covered signal employees. It was then, after all systems were functioning properly, that the Carrier officers made a decision to use non-Agreement covered employees to re-fuel the generators. This continued for eight (8) days, even though during the whole time, numerous signal employees were readily available."

Having found that the Carrier violated the Agreement, the remaining issue for the Board to determine is the penalty to be assessed. As for remedy, the Carrier disputed the Organization's claim. The Organization lists the hours worked by the Foreman and Truck Driver for each of the eight days and finds that time to be 59.1 hours. The Board cannot agree. This figure does not reflect the record. The Carrier's argument that refueling each generator took three to five minutes and therein that the time was *de minimus*. This was not refuted.

The Board, therefore, finds no support for the penalty aspect of the claim. The Organization failed to demonstrate that the work performed during the storm cleanup and the extended emergency was sufficient to support a monetary remedy. The Organization has not demonstrated the number of times non-Agreement personnel refilled tanks or that this action was a flagrant abuse by the Carrier, rather than under the duress of an emergency. Nor has it established evidence of lost earnings to the Claimants. Finding no evidence to prove anything other than a *de minimus* loss, the request for a monetary penalty under these instant circumstances is denied.

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 31st day of May 2006.