

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40837
Docket No. SG-40592
11-3-NRAB-00003-080421

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

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

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 C. J. Bowling, E. L. Conaway, T. R. Dolan, III, A. A. Eickbush, T. C. Evans, A. D. Goff, G. A. Graham, L. R. Hagmann, W. E. Jenkins, R. L. Jepsen, J. W. Launer, D. D. Munson, E. Nichols, M. L. Peace, A. J. Petersen, B. A. Polkinghome, R. W. Rogge, D. E. Ruhl, M. H. Schaefer, M. A. Smith, M. W. Speakman, M. R. Stewart, T. L. Van Buren, Jr., R. L. Wenzel and R. J. Ziegler, for seven 12-hour days at their respective overtime rates of pay for the time lost between January 1, 2007 and January 7, 2007, plus 1,186 additional hours worked by non-covered employees from January 8, 2007 through January 15, 2007 to be divided equally among these Claimants. In addition, Carrier should also compensate Claimants M. J. Lenihan, for 24 hours, T. S. Grudzinsky, for 28 hours, W. J. Cox, for 22 hours, G. H. Reiss, for 21 hours, M. W. Albrecht, for 18 hours, J. C. Soden, for 23 hours, S. D. Dewey, for 34 hours, R. A. Keck, for 39 hours, S. A. Behnk, for 26 hours, B. J. Keith, for 26 hours, K. L. Crisman, for 22 hours, T. M. Feeney, for 31 hours, J. M. O'Connor, for 12 hours for the remaining time they had available to perform this service, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule and Rule 80, when it allowed employees not covered by the Signalmen's Agreement to perform the Scope-covered work of maintaining 280 generators from January 1, 2007 through January 15, 2007 on the Columbus, Kearney and Marysville Subdivisions and denied the

Claimants the opportunity to perform this work. Carrier's File No. 1472608. General Chairman's File No. N Scope 658. BRS File Case No. 14001-UP."

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.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employees (BMWE) was advised of the pendency of this dispute, but chose not to file a Submission with the Board.

A winter ice storm hit areas of Nebraska and Kansas on December 30 and 31, 2006, cutting commercial power to certain locations. Signal Department employees worked around the clock distributing, installing and fueling some 280 portable generators to furnish alternative power to charge the batteries to permit operation of the signal system over a 150 mile area in central Nebraska. This claim, filed on behalf of the employees of six different Signal Gangs, protests the continued refueling of those back-up generators by BMWE-represented employees assigned by the Carrier during the first two weeks of January, after trains began running on signal aspects on January 1, 2007. The Organization relies upon the following provisions of its Scope Rule to support its entitlement to perform the work in issue.

"SCOPE RULE

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:

1. (a) Interlocking plants and interlocking systems
(b) Signals and signal systems. . . .
(d) centralized traffic control systems
(e) highway crossing warning systems and devices

* * *

3. Storage battery plants with charging outfits and switchboard equipment, sub-station and current generating systems, compressed air plants and compressed air pipe mains and distributing systems as used for the operation of such railroad signaling, interlocking, and other systems and devices listed in (1) above. (This only applies to Signal Department electric or air lines within such systems and up to the necessary service connections).

* * *

12. All other work generally recognized as signal work, performed in the field or signal shops. The classifications enumerated in Rule 1 include all the employees of the Signal Department performing work referred to under the heading of 'Scope.'
13. This agreement will include the appurtenances and apparatus of the systems and devices referred to herein."

The Organization argues that these generators (1) were used solely for the operation of signal equipment and devices (2) were directly connected to the signal system and were appurtenances thereto and (3) their refueling constitutes maintenance which is specifically covered by the Scope Rule, citing Third Division Award 37795. It notes that because the purpose of these generators was to provide power to operate the signal system, the work of installing and maintaining them is reserved to BRS-represented employees under the Agreement and must be preserved, relying on Third Division Awards 19525, 19418, 13039 and 5200; Fourth Division Award 2641. It clarifies that it is not seeking the work of fueling all generators, just those that are part of the signal system. The Organization contends that the emergency which existed on December 30 and 31, 2006, was no longer in

existence after January 1, 2007, when the generators were installed and trains began running on signal aspects, and that the Carrier's flexibility with respect to work assignments necessitated by the emergency did not continue through the following two weeks, when it chose to assign the refueling of generators to lower paid BMW-represented employees while cutting the hours of work for Signal employees back to normal levels, citing Third Division Award 30022. It points to the fact that the Hours of Service Act permits Carrier to work Signal employees up to 16 hours in a 24-hour period during an emergency, which it defines as ending when the signal system is restored to service. The Organization notes that, while the Carrier asserts that the emergency continued, it stopped working Signal employees up to 16 hours after January 1, 2007, but permitted BMW-represented employees to work around the clock.

The Organization furnished many statements from Signal employees stating that they were the ones who installed and refueled generators used to power the signal systems during past emergency conditions over the years, as well as statements from BMW Local Chairmen indicating that BMW-represented employees had not been used to refuel and maintain signal system generators during emergency conditions prior to January 1, 2007, and that such work was always left to the Signal Department. The Organization asserts that it has proven a past practice of Signalmen installing and maintaining generators during power outages, which lends support to its argument that the intent of the phrase "current generating systems" in the Scope Rule is to encompass the type of work in dispute in this case, relying on Third Division Awards 13229, 28214, and 31424. Finally, the Organization argues that there was a clear loss of work opportunity for the Claimants in this case, which supports monetary relief despite the argument that many employees were fully employed, citing Third Division Awards 14371, 20311, 20633, and 27982.

The Carrier first contends that refueling generators is not scope-covered work, noting that the Organization fails to consider the qualifying language at the end of paragraph three limiting the work to electric or air lines within the signal system and up to the necessary service connections. It notes that portable generators are replacements for commercial power sitting outside the signal system, beyond the demarcation point, and are not appurtenances to that system. Second, the Carrier asserts that refueling these portable generators is not maintenance work as it was intended within the scope of the Agreement, which lists signal devices and systems in paragraph one which involve craft expertise, because no expertise is

involved in pouring fuel into a generator, much like filling up a gas tank in a car. Because the disputed work is not specifically included within the Scope Rule, the Carrier asserts that the Organization must show exclusivity of performance, citing Third Division Awards 32646, 31930, 28789, 26257, and 12821, which is a burden it cannot meet because these generators are normally used in emergency storm situations when the Carrier has assigned numerous different craft employees to these tasks, and their past response to an emergency call is insufficient to meet the burden of proving exclusivity.

Third, the Carrier argues that this was an emergency situation, where it is given broad latitude in assigning work, citing Third Division Awards 37529 and 36982. It asserts that the emergency does not end when portable generators begin to power the signal system, but only when commercial power is restored to the area, because these generators are emergency equipment themselves. Finally, the Carrier contends that none of the Claimants suffered a loss of income as a result of the assignment of the refueling to BMWE-represented employees. It lists each signal gang and summarizes the situation of the employees, including many who live outside Nebraska, were on vacation, were performing other duties elsewhere (including Gang 2686 on a derailment casualty project in Montpelier, Idaho, and Gang 8398 on crossing projects in Rock Springs, Wyoming) or who were contacted and did not respond, asserting that all of them were unavailable to refuel generators and that it is unreasonable to expect it to use distant employees in these circumstances. The Carrier submitted time records to support its contention that the second list of Claimants had all worked the maximum number of hours permitted by the Hours of Service Act during the claim period, making them also unavailable to perform the work in issue. Thus, the Carrier contends that no additional compensation is due to any of the Claimants, relying on Third Division Awards 23578 and 28843.

A careful review of the record convinces the Board that the Organization met its burden of proving a Scope Rule violation in this case, but failed to establish the facts necessary to support its requested remedy. Regardless of whether the portable generator work in dispute is covered under the Scope Rule, it is clear that the Carrier was permitted great latitude in assigning work to various craft employees available to deal with the emergency situation that existed as a result of the storm of December 30 and 31, 2006. See, Third Division Awards 37529 and 36982. The fact that it chose to use Signalmen to deliver, install and fuel the 280 portable generators to get the signal system operating during this emergency, when it could have used

other forces or contractors, indicates that it was relying on the expertise of Signalmen to make the appropriate connections and that it recognized their training with respect to the operation of its signal system, as well as their experience from past performance of similar work. However, the Board is unable to accept the Carrier's assertion that the emergency continued to exist for an additional two-week period after the signal system was operational using portable generators as a back-up power source. The Carrier failed to meet its burden of proving the continuation of the emergency by asserting that it only ends when commercial power is restored (a date not established on the record). As noted by the Organization, the Hours of Service Act defines an emergency as ending when the signal system is restored to service, which occurred sometime on January 1 with the use of back-up generator power. The fact that the Carrier no longer chose to use Signalmen up to their 16 hours permitted by the Act in emergencies after January 1 supports our conclusion that the refueling assignments made during the claim period were not the result of an emergency. See, Third Division Award 36982 dealing with a two-day emergency period, and Third Division Award 37795, finding that once the generators were installed to the signal system to assure power, the emergency was over.

With respect to the issue of whether the work of refueling portable generators is encompassed within paragraph three of the Scope Rule as "current generating systems . . . for the operation of such railroad signaling," "other work generally recognized as signal work" under paragraph 12, or as an "appurtenance" under paragraph 13, there is no dispute that these portable generators were attached to, and used solely for, providing back-up power to the signal system. The Organization made clear that it was not claiming entitlement to the work of installing or maintaining all generators used on the Carrier's property, but only those specifically used in the operation of the signal system. While the Carrier contends that the maintenance of signal systems contained in the Scope Rule was not intended to encompass work such as the refueling in issue, which could be accomplished without any specialized knowledge or expertise, the fact remains that refueling is one aspect of maintaining the generators in working order to ensure continuation of the operation of the signal system. While it may not take specific expertise, the failure to properly fuel the generators would require further maintenance efforts requiring the special skills of the Signal Department. We conclude that the work in dispute is maintenance work encompassed within the Scope Rule.

Even if these portable generators are not specifically referenced in the Scope Rule, or were not intended to be covered as “current generating systems” as argued by the Carrier, we find that the Organization established an historical practice of Signalmen installing and maintaining generators that provide power to operate the signal system during power outages or other circumstances. Aside from letters from numerous Signal Department employees, the BMW Local President submitted a statement indicating that his members have never been asked to help the Signal Department maintain generators to power signal equipment before this incident, and, to his knowledge, Signalmen have always maintained their own equipment during past ice storms or other situations requiring the use of generators. Thus, we find that the Organization sustained its burden of proving scope coverage of the refueling work in issue. This case is distinguishable from the situation in Public Law Board No. 7270, Award 1, dealing with the Carrier’s contracting out for the installation of permanent generators as back-up power to the signal system in a non-emergency situation where the IBEW claimed scope-coverage, there was no historical practice with respect to permanent, rather than portable generators, and the demarcation line between the IBEW and Signalmen was an issue. Additionally, we find Third Division Award 37529 distinguishable, because it involved a contractor both delivering and refueling portable generators and was decided solely on the basis of a finding of the existence of an emergency situation.

Having found that the Carrier violated the Agreement, we next address the appropriateness the requested remedy. The Carrier submitted much documentation in support of its argument that the claim was excessive, and that most of the Claimants were unavailable due to excessive distances from their homes or gang project locations, Hours of Service Act limitations, vacations, as well as being unresponsive to work calls. As noted in Third Division Award 37795 relied upon by the Organization, it is the Organization’s burden to establish the actual loss of work opportunity and the amount of time spent by BMW-represented employees performing the disputed refueling work. Other than making a general statement as to the Claimants’ availability, the Organization did not address the documents offered by the Carrier or the allegations concerning individual unavailability, or the reasonableness of having employees travel excessive distances during winter conditions merely to refuel certain generators. Because the Carrier contended that certain employees who lived inside the State of Nebraska were called to perform service but did not respond to the request, and others were working up to their permissible limits, but did not provide specifics on these individuals, we will remand the matter to the parties to determine which, if any, of the Claimants were

located within a reasonable distance from the generators requiring refueling during the claim period, the specifics of any vacations and calls made to offer work to them, the number of hours of additional work that could have legally been performed by them on the dates in question, if any, and the amount of time spent by BMW-represented employees refueling these generators. If a joint check determines that there were some Claimants who could have reasonably been assigned to do the refueling work actually performed by BMW-represented employees during the claim period due to their proximity to the site locations and work hours, and who were not unavailable due to vacations or failure to respond to valid work assignment calls, they shall be compensated accordingly. In order for particular Claimants to receive monetary compensation as result of the violation herein, the Organization must establish both their proximity and availability as a result of this joint review.

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 11th day of January 2011.