

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42120
Docket No. SG-41056
15-3-NRAB-00003-090301**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 BNSF Railway Company:

Claim on behalf of C. D. Sconyers, for four hours at his prevailing overtime rate of pay, account Carrier violated Rule 1 (Scope), Rule 2, and Rule 12, when, on December 13, 2007, it allowed track forces 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 Wyandotte, Oklahoma, MP 331.33, to Claremore, Oklahoma, MP 395.00, and denied the Claimant the opportunity to perform this work. Carrier's File No. 35-08-0023. General Chairman's File No. 08-009-BNSF-129-S. BRS File Case No. 14196-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.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employees Division - IBT Rail Conference was advised of the pendency of this dispute and chose to file a Submission with the Board.

This claim involves an allegation by the Organization that work belonging to its members was improperly assigned to members of a different union, i.e., the Brotherhood of Maintenance of Way Employees Division - IBT Rail Conference (BMWE).

On December 8, 2007, a severe winter storm containing freezing rain, ice and snow caused extensive power outages in Oklahoma and Kansas that continued for a number of days. The effects of the storm were severe enough that on December 10, 2007, the Governor of Oklahoma declared a disaster emergency for the entire state. Without power, the Carrier's signals and grade crossing systems do not function properly, which presents a danger to both the public and BNSF employees. The Carrier installed a number of portable generators on an emergency basis in areas affected by the power outage in order to provide needed electricity to operate equipment, including signals. Because the generators are gas-powered, they required periodic re-fueling. This case arose on December 13, 2007, when the Carrier assigned Trackmen (BMWE forces) to refuel the emergency generators and check commercial power between Wyandotte, Oklahoma, (MP 331.33), and Claremore, Oklahoma, (MP 395.00). On January 31, 2008, the Organization filed this claim on behalf of Signal Maintainer C. D. Sconyers for four hours overtime, because he was not assigned to perform the refueling work between Noon and 4:00 P.M. on December 13, 2007. According to the Organization, the Claimant had been refueling generators during his regular shift. He was sent home from work at the end of the shift when he could have worked a total of 12 hours under the federal Hours of Service Law. Meanwhile, Trackmen worked 12-hour shifts refueling the generators.

Because the Parties were unable to resolve the claim through their normal grievance process, it was submitted to the Board for adjudication.

The Carrier contends that although the work of refueling generators would normally be work for BRS-represented employees, existing emergency conditions gave the Carrier greater latitude in assigning its forces. This has been widely recognized and upheld in a number of Awards. Here, signal and track forces worked together to

install the emergency generators and until the emergency was over, track forces could refuel them. In on-property Third Division Award 37795 (Zusman) the Board held that emergencies permit the Carrier to use non-Agreement personnel; Award 37795 further held that as long as generators were being installed to power signal systems, the emergency still existed. In the instant case, the installation of generators on the Cherokee Sub-division continued for several days due to the amount of damage the storm caused, demonstrating that the emergency was ongoing. Even if the claim were found to have merit, the Organization's claim for damages must fail. There is nothing in the record, beyond the Organization's mere assertions, to prove up a claim for a monetary remedy – no records or documents to support the Organization's claim as to the number of hours worked, or even who performed the disputed work. The actual amount of time required to refuel a generator is approximately three to five minutes, which Award 37795 found to be de minimis. Nor is there any proof of injury to the Claimant.

Conversely, the Organization alleges that the Carrier violated the Agreement when it sent the Claimant home after he had worked eight hours (and could have worked another four hours) while Trackmen worked 12-hour shifts to refuel the generators. According to the Organization, once the generators had been installed and the signals were operating, the emergency was over and the work of maintaining the generators was scope-covered work for BRS-represented employees. The same Award relied on by the Carrier (37795) recognized that "the work of refueling [generators] belonged to the employees [Signalmen] because the generators were a device attached to the signal system." The Award continued: "Once the generators were installed to the signal systems to assure power, the emergency was over." The generators that were being refueled were installed and were no longer subject to any special emergency Rules. Nor was the work here de minimis, because it takes time to travel to and from the locations of the generators, to refuel them, to check them to make sure that the power is operating correctly, and there were a number of generators placed in operation. With respect to the remedy, the Claimant was sent home four hours early and could have remained on duty performing the same work as the BMW-represented Trackmen. Boards have held that when employees are deprived of the opportunity to perform work reserved to them pursuant to the Agreement, the employees lose the wages they would have earned and are entitled to recover for such loss.

Distilled to its essence, the BMW's Submission asserted that the Agreement between BMW and BNSF stipulates and protects the right of BMW-represented employees to perform such work on the property.

The issue of refueling emergency generators installed as a result of a devastating winter storm has been presented to the Board on several occasions. Award 37795 cited by both Parties is only one example, albeit one that set forth the parameters under which the Carrier could assign work during such storm emergencies. To reiterate, Award 37795 found that the work of refueling generators is scope-covered work under the Collective Bargaining Agreement between BRS and BNSF, so that in the ordinary course of things assigning BMW-represented Maintenance of Way forces to perform the refueling would violate the BRS Agreement. However, Award 37795 also recognized that emergency conditions could "provide a great deal of leeway for the Carrier to safely respond, including the use of non-Agreement personnel." Finally, Award 37795 recognized that once the emergency was over, the work should appropriately be assigned to BRS-represented forces.

More recently, Third Division Award 40837 (BRS v. UP - Newman) reviewed a similar situation and determined that, in fact, the work at issue should have been assigned to Signalmen, not Trackmen.¹ Of particular note in the instant case is the question of when does an emergency end? The Carrier contends that the state of emergency continued until all of the generators were installed throughout the affected areas on the Cherokee Sub-Division. According to the Organization, the emergency was over once individual generators were installed and power was restored to the signal system. The Board in Award 40837 held:

"... [T]he 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

¹ Award 40837 went on to determine that the Organization had not proven the Claimants' entitlement to any remedy and remanded the case to the Parties for further determination of the facts. That does not change the basic holding of the Award, however.

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 generators were installed to the signal system to assure power, the emergency was over.”

As in Awards 37795 and 40837, the Board in this case finds that the work of refueling generators that provide back-up power to the signal system constitutes signal appurtenance maintenance work reserved to BRS-represented employees by the Scope Rule. The Board further recognizes that during the period of emergency caused by power outages due to the winter storm that struck throughout Oklahoma on December 7, 2007, the Carrier had leeway to use both Signalmen and Trackmen to install the back-up generators. However, once a generator had been installed and power was restored to the signal system, the emergency was over insofar as that particular signal was concerned and the work of refueling the generator should have been returned to the Signalmen. In particular, the facts of this case are not materially different from those presented in Award 40837, and the Board here reaffirms the rationale set forth in that Award, that once “the Carrier no longer chose to use Signalmen up to their 16 hours permitted by the [Hours of Service] Act in emergencies, . . . the refueling assignments made during the claim period were not the result of an emergency.” In the instant case, the Claimant was sent home after an eight-hour shift, when he could have worked 12 hours during an emergency under the amended Hours of Service Act. The Carrier’s decision to send the Claimant home at the end of his normal shift, rather than have him work the extra emergency hours authorized by the Hours of Service Act, confirms that on December 13, 2007, the emergency was over, at least at the geographic territory set forth in this claim. The emergency having ended with the restoration of back-up power between MP 331.33 and MP 395.00, the work of refueling generators on December 13, 2007, should have been assigned to Signalmen, and the Carrier violated the BRS Agreement when it assigned the work in question to Trackmen instead.

The final issue for the Board is the question of remedy. Unlike the fact situation in Award 40837, which involved an extraordinarily large number of claimants spread

out over a large geographical area, some of whom were working elsewhere or were on vacation or otherwise not available for work, the instant case involves a single Claimant at a specific location who had spent his normal shift refueling generators and was sent home while Trackmen continued to perform the same work that he had been performing during his shift. This is a clear case of a work opportunity denied to the Claimant, for which he is entitled to be reimbursed, for four hours at his overtime rate of pay.

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 13th day of July 2015.