

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44912
Docket No. SG-46987
23-3-NRAB-00003-210723**

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 R. Besmer, for compensation of 190 hours at the truck driver rate of pay \$0.45 for a total of \$85.50, account Carrier violated the current Signalman’s Agreement, particularly Rule 3, when on January 24, 26, 28, February 4–11, and 18–25, 2020, Carrier failed to pay the truck driver rate of pay for a vehicle over 10,001 lb. which requires a Dot. Medical Card to operate. Carrier’s File No. 1737971. General Chairman’s File No. N0227. BRS File Case No. 16509-UP. NMB Code No. 44.”

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 Claimant in the instant case was assigned as a Skilled Signalman on Gang 8194 in Carrier's Signal Department. On January 24, 26, and 28, and February 4–11 and 18–25, 2020, the Claimant was tasked with operating Truck No. 57043 while carrying passengers and materials. Truck No. 57043, a Ford F350, has a total gross vehicle weight of 11,200 lbs. The sticker in the truck indicates that the total payload on the truck is rated at 2,960 pounds.

The Claimant recorded the Signalman Truck Driver rate of pay through payroll which was denied by Carrier's timekeeper. In a letter dated March 3, 2020, the Organization filed a claim on behalf of the Claimant. The Carrier denied the claim in a letter dated June 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 violated Rule 3 of the parties' Agreement when it failed to compensate the Claimant for performing truck driver duties. Rule 3, Signalman Truck Drivers, provides,

- A. A signalman or assistant signalman assigned to a gang who in addition to the assignment of signal work is required by the Carrier to operate a gang truck (over one-ton rating) used to haul employees and material will be paid a differential allowance of forty-five (\$.45) cents per hour. This differential allowance will not be subject to general wage increase or cost of living allowance. The duties of driving will be offered to the senior qualified signalman by the gang foreman, it being understood that if the senior signalman does not desire the driving duties, that the gang foreman may only assign it to such senior signalman if no other qualified signalman or assistant signalman drivers are in the gang.
- B. When signal department trucks are used to transport signal employees and equipment, a signal employee possessing a valid operator's license will be utilized to operate the vehicle.

The Organization contends that the language of the Agreement is specific, clear, and unambiguous in the fact that it provides the Claimant will receive the truck driver pay for operating company vehicles like the Claimant's assigned truck, Truck No. 57043. This truck has a gross vehicle weight of 11,200 lbs., and is subject to the Claimant possessing a medical card and a yearly inspection per DOT and CFR 49,

part 396. Furthermore, the Organization contends that the payload rating for a Ford F-350 is 2,060 pounds, clearly more than one ton. The Organization contends that it has presented evidence establishing that the Claimant's assigned truck meets the criteria of Rule 3.

The Organization contends that first the Carrier asserted that the Claimant's truck did not carry passengers and materials. When it became clear that it had, the Carrier asserted that the truck was not over one ton. The Organization contends that the Carrier has failed to show that the Claimant was not entitled to the differential allowance due to be paid to any Signalman required to operate a gang truck, as the Claimant was.

The Carrier contends that the Claimant is not entitled to the differential because the truck that the Claimant is assigned to operate is not a truck with an "over one-ton rating." The Carrier contends that the Claimant's truck was not carrying passengers and materials during the claimed time.

The Carrier contends that the payload capacity does not determine the rating of the truck, so the payload capacity of the truck is immaterial. Ratings are a way to categorize vehicles and are not associated with actual payload capacity. Payload capacity has exceeded the truck rating for each classification.

The Carrier contends that the Organization has failed to set forth any evidence to support its allegation that the Claimant was entitled to the differential. The Carrier contends that a www.cars.com article stated that the rating for a Ford F-350 is one ton. The Carrier contends that the current Signalman's agreement provides the additional 45¢ only for operating vehicles that exceed the one-ton rating and the Claimant's assigned truck is rated as a one-ton truck.

The Carrier contends that the dispute in facts regarding how the rating is derived is irreconcilable by this Board. The truck's rating is central to the Organization's claim, as it argues that the truck fits the criteria for the Rule 3 differential. But the record contains disputed facts as to whether the truck is rated at one ton or over one ton and must be dismissed, according to the Carrier.

In order to prove its claim, the Organization must demonstrate that all the elements of Rule 3 are satisfied. The parties have presented contradictory evidence regarding the rating of the truck that the Claimant was assigned to drive. The clear and unambiguous language of the parties' Agreement provides that the Claimant is

only entitled to the 45¢ hourly differential when he is required by the Carrier to operate a gang truck with a rating over one ton. The Carrier has presented evidence to show that the truck was not rated over one ton and the Organization presented evidence to show that it was. Thus, the Board is confronted with an irreconcilable conflict in a material fact, one that cannot be resolved by this Board.

In such a case, it is well-settled that the Board must deny the claim on the grounds that the moving party has failed to establish a *prima facie* case. Third Division Award 33895, *citing* Third Division Awards 21423, 16780, 16450, 13330, among others.

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 NOS. 44912 and 44913**

(Referee Kathryn A. VanDagens)

The Majority's findings in this case are both perplexing and erroneous. The Majority failed to apply the agreement language as written. As noted in the Award, Rule 3 was the governing agreement provision and provides:

"A signalman or assistant signalman assigned to a gang who in addition to the assignment of signal work is required by the Carrier to operate a gang truck (over one-ton rating) used to haul employees and material will be paid a differential allowance of forty-five (\$.45) cents per hour."

The Majority correctly notes that in order to prevail the Organization must provide evidence to meet the elements of the claim. Reason for dissent arises for its findings beyond that, as the Organization provided substantial evidence establishing all elements.

In this case, the rating sticker for Vehicle No. 57043 was provided which demonstrated the payload rating of 2,960 lbs. and gross vehicle weight (GVW) rating of 11,200 lbs.; both numbers exceed the one-ton (2,204 lbs.) rating provided in the clear and unambiguous language of Rule 3. At this point the first element was satisfied. The second element was proven with photos and a statement as evidence in the record demonstrating that both employees and materials were being hauled in the truck operated by the Claimant. This satisfied the second element. Of note, neither of these facts were disputed by Carrier nor could they be.

At this point the analysis of the Board should have stopped and the prima facie case was established. The application of clear and unambiguous language is a fundamental cannon of interpretation not requiring extensive arbitral reference. For brevity, Third Division Award No. 1088 held:

"We further find that Petitioner has met its burden of proof in this record and that for the Board to deny this claim would require a construction of the Agreement not stated in its provisions. This Board cannot add an exception which does not exist in the specific terms of the Agreement.

It is the duty of this Board to interpret the rules of the Agreement as they are met. We are not authorized to read into a Rule, that which is not contained therein, or by an award add to or detract from the clear and unambiguous provisions thereof. Many Awards have been made by this Board, on this subject, and we refer to only a few as affirming our position. See Awards 4439, 5864, 5971, 5977, 6365."

Carrier's violation was established with the substantial evidence and clear agreement provisions. However, the Majority improperly added exception to the clear language.

The Majority arbitrarily entertained and ultimately based its finding on a dispute in fact. The evidence found to dispute the clear and substantial evidence provided by the Organization was a generic *www.cars.com* article discussing different ratings of standard pick-up trucks. The finding

of a dispute in fact was wholly improper, allowing an opinion of the Carrier based on a generic article to defeat clear, substantial evidence regarding the vehicle at issue. The record established the vehicle was not a standard pick-up and was rated over one ton.

Despite the simplicity of these cases and the records provided, the Majority failed in its obligation to enforce the agreement language as written and give proper weight to the pertinent facts and evidence provided. There is no basis for the Board to use unsupported assertions and opinions outside the facts presented as the foundation of its decision.

For the foregoing reasons, the Organization dissents to the Majority's findings and lack of proper analysis.

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

Brandon Elvey

Labor Member

Zachary C. Voegel

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Labor Member