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

**Award No. 44923**
**Docket No. SG-47181**
**23-3-NRAB-00003-220064**

**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 N.F. Boshers, C.D. Bradshaw, B.L. Charleston and S.L. Wilkins, for 44 hours each at their respective overtime rate of pay; account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when on August 29 through 31, 2020, it assigned a contractor R.J. Corman to refuel generators powering signal equipment between Mile Post 489 thru Mile Post 504 on the McGhee and Monroe Subdivisions, thereby causing the Claimants a loss of work opportunity. Carrier's File No. 1742681, General Chairman's File No. SSR-78, BRS File Case No. 4624, NMB Code No. 312 - Contract Rules: Scope."**

**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 Claimants in the instant case were all assigned as Signalmen on Signal**

**Gang 8295 within the Carrier's Signal Department. On or about August 27, 2020, the Carrier's Signal Operations Center began receiving trouble indication messages regarding a loss of power at various locations between Mile Post 489 and 504 on the McGehee and Monroe Subdivisions. Hurricane Laura was impacting the region and affecting the Carrier's operations. The storm caused damage to approximately 1,322 railroad miles of track.**

**On August 29, 2020, the Carrier assigned R.J. Corman, a contractor, the work of refueling generators used to power signal cabins and signal equipment between Mile Post 489 and 504 on the McGehee and Monroe Subdivisions, in lieu of the Organization's members. Contractor R.J. Corman consisted of two men working various hours over the claimed dates. R.J. Corman employees drove to signal locations, powered down generators for refueling operations, and restored power once refueling operations were complete.**

**The Organization took the position that the emergency caused by the Hurricane had ended on August 29, 2020, when trains began running on signal indication. In a letter dated September 21, 2020, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated November 16, 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 language of the parties' Agreement is specific, clear, and explicit in that it reserves the right to construct, install, and maintain the signal system and all associated appurtenances and apparatuses to the Organization's members. The Scope Rule states, in part:**

> **This agreement will include the appurtenances and apparatus of the systems and devices referred to herein.**

**The Organization contends that the generators involved in this dispute are used to exclusively power the signal system and are an appurtenance thereof. Moreover, the Organization provided statements from both Carrier Officers and Signalmen in their charge letter proving Signal employees have a long history of installing, fueling, and removing temporary generators for the purpose of providing back-up power to signal cabins and signal equipment.**

**The Organization contends that the accepted demarcation point between signal and commercial power has always been the rain head. The Organization contends**

**that the portable generator's installation occurs after the rain head, the point at which a Signalman's responsibility is covered under the Scope Rule. The Organization contends that the portable generators are not merely replacing commercial power, as was incorrectly found in Third Division Award 41131.**

**The Organization contends that arbitral precedent holds that if the purpose of the work is exclusively for the signal system, it is Signalman's work. Third Division Award 42120. In such a case, only employees covered by the Signalman's Agreement are entitled to perform the work.**

**The Organization contends that while the Carrier may have greater leeway to use contractors in an emergency, 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. *See,* Third Division Award 42120. The work of refueling the generator should have been returned to the Signalmen. The Organization contends that the Carrier has failed to prove its affirmative defense, that an emergency continued when the disputed work was performed. The Organization points out that the Carrier offered no documentation or evidence in support of its assertions.**

**The Carrier contends that the Organization has failed to prove a violation of the Agreement. The Carrier contends that the Organization has failed to show that the disputed work has been performed by Signalmen to the exclusion of all others. The Carrier contends that the portable generators powered both Telecom and Signal department equipment and systems. The Carrier further contends that previous boards have found that equipment that sits outside of the service connection demarcation point merely serves as a replacement when commercial power is interrupted.**

**The Carrier contends that even if the work were scope-covered, numerous Boards have recognized that a carrier possesses greater latitude in assigning the work when faced with an emergency. *See, e.g.,* Third Division Award 20527. In Third Division Award 37529, the Board found that the carrier's use of outside forces to transport, install, and monitor portable generators during an emergency ice storm was not a violation of the parties' Scope Agreement.**

**The Carrier contends that the on-property record unquestionably establishes that the Carrier was faced with an emergency when Hurricane Laura wreaked havoc on the Carrier's operations. The Organization never refuted that the Hurricane presented an emergency for the Carrier. The Carrier contends that as long as emergency generators were being used, the emergency continued. Under the**

**circumstances, the use of nonagreement employees to protect and maintain the equipment and systems of the Signal and Telecom departments was not a violation of the parties' Agreement.**

**The Carrier contends that Third Division Award 41131, an on-property award, resolves this dispute, because the Board there found that the Organization had failed to prove that its members historically performed the work to the exclusion of all others. The Carrier contends that the Organization bears the burden of proving a system-wide past practice of performing such work to the exclusion of all others, which it cannot do. The Carrier contends that both Telecom and Signal department equipment and systems are powered by the portable generators.**

**The Carrier also contends that the claim for damages is excessive.**

**This is not the first time that the parties have addressed the issue of refueling emergency generators. In Third Division Award 40837, an on-property award, the Board wrote,**

> **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…. Thus, we find that the Organization sustained its burden of proving scope coverage of the refueling work in issue.**

**We find the reasoning of this case to be more persuasive than that of Third Division Award 41131, which found that the Organization there had failed to demonstrate that Signalmen performed the work of refueling portable generators to the exclusion of other employees or contractors. While there are some cases to the contrary, when the work is performed by outside contractors, the Organization need only show that the disputed work is recognized as signal work, historically performed by its members. While the Carrier argues that the portable generators power both Telecom and Signal systems, the Organization is only claiming work as against outside contractors. In such a case, we find it unnecessary for the Organization to demonstrate that the work of refueling portable generators was done exclusively by its members.**

**The Organization has provided sufficient proof that this work has been historically performed by its members. In the on-property correspondence, the Carrier recognized that Signalmen had been used in the past to fuel generators while pointing out that during "hurricanes, snow storms, wildfires and similar events" maintenance of way employees and contractors had also been used to fuel generators. The Carrier's statement does not demonstrate that the work is not customarily done by Signalmen in non-emergencies.**

**The Carrier's second argument is that it possesses greater latitude during emergency events to assign work to nonagreement employees. *See, e.g.,* Third Division Award 37795. The Organization does not dispute this principle. However, the Organization argues that by August 31, 2020, the lines were reopened to train traffic and the emergency had ended.**

**In Third Division Award 37795, this Board wrote, "Once the generators were installed to the signal systems to assure power, the emergency was over." The Board found that use of nonagreement personnel to fuel the generators after that point was a violation of the Scope Agreement. As pointed out by the Organization, and confirmed in on-property Third Division Award 40837, the Hours of Service Act defines an emergency as ending when the signal system is restored to service. Third Division Award 36982; Third Division Award 37795. In Third Division Award 42120, the Board expressly discussed how to determine when a *bona fide* emergency ends when emergency generators are used. After recognizing the Carrier's right to use other than Signalmen during an emergency, the Board wrote, "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."**

**Here, the Carrier offered no evidence that an emergency continued beyond the point when the signal system was restored, and the train lines were reopened. For the period claimed, the emergency had ended.**

**The remaining issue is one of remedy. The Organization claims that the Claimants are entitled to compensation for their loss of work opportunity. The Carrier responds that the claim is excessive as no Claimant has suffered any loss of work. Each of the Claimants was fully employed and performing in their positions. It is the Organization's burden to establish the actual loss of work opportunity and the amount of time spent by the contractors performing refueling work. The Organization has not presented any evidence establishing the number of hours that**

**the two contractors performed refueling, how often this task occurred, or which Claimants were available to perform this work. Accordingly, we will remand this matter to the parties to determine which, if any, of the Claimants could have been reasonably assigned to do the refueling work during the claim period. These Claimants shall be entitled to compensation for a proportionate share of the hours worked by the contractors refueling generators.**

## 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 21st day of April 2023.**