

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44930
Docket No. SG-47195
23-3-NRAB-00003-220109

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 J.A. Reyes, for 944 hours at his respective overtime rate of pay and continuing until the contractor is no longer performing scope-covered work; account Carrier violated the current Signalmen’s Agreement, particularly the Scope Rule, beginning on August 7, 2020, it assigned contractors Reinhold Electric and Evers Electric to refuel generators powering signal equipment between Mile Post 295.4 and 309.71 on the Del Rio Subdivision, thereby causing the Claimant a loss of work opportunity. Carrier’s File No. 1743940, General Chairman’s File No. SSR-96, BRS File Case No. 4689, 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.

At the time this dispute arose, the Claimant was assigned as a Skilled Signal Maintainer on Signal Gang 3256 in the Carrier's Signal Department. Beginning on August 6, 2020, the Carrier assigned Contractors Reinhold Electric and Evers Electric, the work of refueling generators at newly installed locations between Mile Post 295.4 and 309.71 on the Del Rio Subdivision.

Reinhold Electric and Evers Electric each consisted of one man working various hours over the claimed dates, including weekends. Reinhold Electric and Evers Electric employees drove to signal locations, powered down generators for refueling operations, and restored power once refueling operations were complete.

In a letter dated October 5, 2020, the Organization filed a claim on behalf of the Claimant. The Carrier denied the claim in a letter dated December 1, 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 is specific, clear, and explicit in the fact 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 exclusively to power the signal system and are an appurtenance thereof. Moreover, the Organization provided statements from many Signalmen in the Appeal Letter, demonstrating 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 Carrier contends that the Organization has failed to prove a violation of the Agreement or 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 and that previous boards have found that equipment that sits outside of the service connection demarcation point merely serves as a replacement for commercial power.

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 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. *See, e.g.*, Third Division Award 13236. While the Carrier argues that the portable generators power both Telecom and Signal systems, it has presented no evidence to demonstrate that the generators are used by other than the signal system. If the Signalmen were claiming the work against another union, the Organization would be required to demonstrate that the work of refueling portable generators was done exclusively by its members. Those who have historically performed the work have a right to it against non-employees.

The Organization has provided ample proof that this work has historically been performed by its members. Conversely, the Carrier provided no evidence that the claimed work was done other than in signal locations, or that any employees other than signal employees have done this work. Mere allegations are not proof.

The remaining question is to the remedy. It is the Organization's burden to establish the actual loss of work opportunity and the amount of time spent by the two contractors performing refueling work. The Carrier contends that the Claimant is fully employed and suffered no loss of work. The Organization has not presented any evidence establishing the number of hours that the two workers performed refueling, how often this task occurred, or when the Claimant was available to perform this work. Accordingly, we will remand this matter to the parties to determine which, if any, of the hours the Claimant could have reasonably been assigned to do the refueling work during the claim period.

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.