

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45273
Docket No. SG-47505
24-3-NRAB-00003-220698**

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 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 D. Alford, J. Autin, W. Floyd, J. Kellum, J. McCoy, C. Meyers, S. Peart, M. Toal, and M. Trotter, for 398 hours each at their respective overtime rate of pay; Claimants M. Canezano and J. Bayham for 80 hours each at their respective overtime rate of pay; account Carrier violated the current Agreement, particularly the Scope Rule, when on September 1–20, 2021, it utilized a contractor, CCS, and Maintenance of Way employees to perform the scope-covered work of setting and fueling generators used to power signal equipment, resulting in a loss of work opportunity for the Claimants. Carrier’s File No. 1764186, General Chairman’s File No. VGCS-SR-214, BRS File Case No. 5545, 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 were assigned to Signalmen positions in the Carrier's Signal Department. Their normal working hours were from 7:00 AM to 6:00 PM., Tuesday through Tuesday, or 7:00 AM to 3:30 PM Monday through Friday, with rest days of Friday through Sunday and holidays.

Beginning August 30, 2020, through September 1, 2021, the Carrier utilized the Claimants to install and fuel portable generators to restore power to multiple locations on the Livonia Subdivision between M.P. 11.39 – M.P. 115 and on the Alexandria Subdivision between M.P. 114.80 – M.P. 130, due to outages caused by Hurricane Ida.

On September 1, 2021, the trains began running on signal indication. The Carrier removed the Claimants from the work and utilized a contract company, CCS, and Maintenance of Way forces to perform refueling operations.

In a letter dated September 26, 2021, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated November 4, 2021. 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 concedes that the Carrier has greater leeway to use contractors in an emergency but asserts that once a generator has been installed and power is restored to the signal system, the emergency is over insofar as that particular signal is concerned. *See*, Third Division Award 42120. The work of refueling the generator should have been continued with the Signalmen. The Organization contends that the Carrier has failed to prove its affirmative defense of an emergency. The Organization points out that the Carrier offered no documentation or evidence in support of its assertions.

The Organization contends that the Carrier could have rescheduled Claimants' regular work, rescheduled the disputed work, or had the work performed on an overtime basis. The Organization contends that the Claimants have suffered a lost work opportunity, and so should be granted compensation.

The Carrier contends that the Organization has failed to prove a violation of the Scope Rule. 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 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 Ida wreaked havoc on the Carrier's operations. The Carrier contends that the Organization failed to prove that there was no longer an emergency when the disputed work occurred. Under the circumstances, the use of nonagreement employees to protect and maintain the Carrier's equipment 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 contends that the remedy sought by the Organization is excessive. The Carrier contends that the claimed remedy is improper and without Agreement support.

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 historically been performed by its members. The Carrier recognized that Signalmen had initially 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 September 1, 2021, the trains were running on signal indication 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."

The Carrier bears the burden of proving its affirmative defense that the emergency continued during the claimed period. But it 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 number of hours that the contractors performed refueling, how often this task occurred, or which Claimants were available to perform this work, is disputed on this record. 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 24th day of July 2024.