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

Award No. 45365
Docket No. SG-47738
25-3-NRAB-00003-230138

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of D. Metcalfe, for 84 hours at his respective overtime rate of pay; account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when on various dates from September 22, through September 29, 2021, it permitted a contractor, Capitol Railroad Contracting, to unload signal batteries from M.P. 202.78 and M.P. 326.19 on the Boone Subdivision, thereby creating a loss of work opportunity for the Claimant. Carrier's File No. 1774032, General Chairman's File No. N 0296, BRS File Case No. 5893, 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.

According to the Organization, on the dates set forth in the claim, a contractor unloaded signal batteries from M.P. 202.78 and M.P. 326.19 on the Boone Subdivision. The Organization asserts such work violated the Scope Rule, which provides:

SCOPE RULE

This agreement governs the rate of pay, hours of service and working conditions of employees in the Signal Department, who construct, install, test, inspect, maintain or repair the following:

*** * ***

3. Storage battery plants with charging outfits and switchboard equipment, sub-station and current generating systems, compressed air plants and compressed air pipe mains and distributing systems as used for the operation of such railroad signaling, interlocking, and other systems and devices listed in (1) above. (This only applies to Signal Department electric or air lines within such systems and up to the necessary service connections).

According to the Carrier's Engineering Department Manager Signal Construction (Carrier Exhibit B2 at 8):

"Loading and unloading material is non-exclusive work for the BRS. This work is currently, and has historically, been done by contractors, employees of other crafts, and BRS employees. No scope covered work was performed by contractors in this claim, their only role was to unload pallets of batteries. ..."

The portion of the Scope Rule relied upon by the Organization does not specifically address the work in dispute – unloading material. No installation work was performed by the contractor and the Organization has not shown that the work is exclusive to scope-covered Signal employees. See Third Division Award 28358 ("... this task of transporting signal material is not reserved by the applicable scope rule"); Third Division Award 29708 ("... transporting of material is not covered under the Scope Rule of the Organization's Agreement").

Absent the required showing by the Organization, the claim must be denied.

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 19th day of December 2024.

LABOR MEMBER'S DISSENTING OPINION TO NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION AWARD NO. 45365

(REFEREE EDWIN H. BENN)

The Majority's decision in this case was improper and premised on the misapplication of several principles that require a dissent.

Exclusivity Doctrine Does Not Apply

Primarily, the Majority asserts "*the Organization has not shown that the work is exclusive to scope-covered Signal Employees."* The record and oral arguments provided that the "exclusivity doctrine" only applies in jurisdictional disputes between classes or crafts, not when the work is assigned to an outsider. This was established early on in ***Third Division Award No. 13236 (Referee John H. Dorsey)*** which held:

> "Carrier premise is that we are here confronted with a Scope Rule which does not specifically vest Signalmen with the right to the work here involved. From this it argues that to prevail Signalmen must prove that the employees covered by the Agreement have in the past 'exclusively' performed such work throughout the property; and, not only to the extent it is an incident to the skilled work of Signalmen. We believe this to be a misapplication of the exclusivity doctrine.
>
> The exclusivity doctrine applies when the issues is whether Carrier has the right to assign certain work to different crafts and classes if its employes- not to outside. We are here confronted with contracting out of work- not assignment of work to employes. That the Gas Company did the work without charge is immaterial.
>
> The employes of the Carrier, in any craft or class, which have performed the work, Signalmen in this case, have a contractual right to the work, against non-employes, unless Carrier proves: (1) an emergency; (2) lack of skill; (3) special tools and equipment; (4) lack of employe manpower. In the record before us Carrier has failed to prove the existence of any of these conditions." (Emphasis added) The Carrier is trying to clock itself with the 'exclusivity' argument to keep from addressing these issues. This was not an emergency, nor was it a lack of skill, or manpower, or the need of special tools or equipment." ***See also Third Division Award Nos. 23217, 31386, 39520, 45271 (on-property), 45274 (on-property), and 45277 (on-property).***

Notwithstanding the improper application of this doctrine to the instant dispute, the only evidence on record to refute the scope-coverage was Carrier's assertion of a past practice in assigning this to others.

The Carrier's Lack of Rebuttal Evidence

In asserting a past practice, the Carrier had the burden to prove through a preponderance of evidence the elements that the practice was unequivocal, clearly acted upon, readily ascertainable over a reasonable period of time, and accepted by both parties ***See Public Law Board 6786, Award No. 1, Special Board of Adjustment 1194, Award No. 1, and Special Board of Adjustment 7778, Award***

No. 1. The only evidence submitted by the Carrier was two vague and unverified statements from Carrier Managers. One statement reads:

> "Loading and unloading material is non-exclusive work for the BRS. This work is currently, and has historically, been done by contractors, employees of other crafts, and BRS employees."

The Carrier and the record provided no evidence to support this alleged practice nor instances it referred to. There was nothing to establish a single element of a past practice. This single unsupported statement was used by the Majority as its basis for its findings. Boards have long recognized that "*Mere assertions, self-serving declarations and general statements are of no real probative value to this Board"* ***Third Division Award No. 17051.*** Similarly, ***Third Division Award No. 20107*** recognized and held:

> "Nowhere in the record has the Carrier provided evidence of any supportive or explanatory facts as a basis for this conclusion. We therefore believe the criteria set forth in our prior Award 15444 (Dorsey) is applicable:
>
> '….when Petitioner made a prima facie case, as it did, the burden of going forward with the evidence shifted to Carrier. The unsupported assertions of Carrier did not satisfy its burden….'"

Such being the case, the Majority failed in its review of the record and improperly gave weight to vague and unsupported assertions in its approval of the agreement violation in this case.

Conclusion

The findings in this award are not well reasoned nor supported. The Majority based its decision on unsubstantiated assertions made by the Carrier; the same type of assertion which are consistently deemed as inadequate for the Organization to meet its burden of proof in disputes. The Section 3 forum is an appellate review in which the analysis of the record and proper weight given to evidence is the guiding star. In this case, the Majority failed in its appellate review. Instead, it overlooked evidence presented and gave approval of a past practice devoid of evidence. These types of decisions embolden the Carrier in its endeavor of gaining a benefit through arbitration which it has failed to gain through the Section 6 bargaining process. This has the effect of improperly changing agreements and removing work from those that it properly belongs to. For all of the aforementioned reasons, I must respectfully and vigorously dissent.

Respectfully submitted,

Brandon Elvey
Labor Member