

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45367
Docket No. SG-47779
25-3-NRAB-00003-230151**

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

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

STATEMENT OF CLAIM:

“Claim on behalf of D. Sotello, for 19 hours at his respective over-time rate of pay; account Carrier violated the current Agreement, particularly the Scope Rule, when, beginning on April 25, 2022, it utilized an outside contractor to fuel a generator powering signal equipment at CP SA290 on the Del Rio Subdivision. Carrier’s File No. 1774350, General Chairman’s File No. S99-SR-292, BRS File Case No. 5806, 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, beginning April 25, 2022, the Carrier utilized a contractor to fuel a generator on the Del Reo Subdivision at CP SA290. The Organization asserts that the generator was utilized to power a new signal cabin and its associated appurtenances due to commercial power not being operational.

According to the Carrier, the work was directly associated with installation of new commercial power (which is non-scope covered) and filling portable gas-powered generators to maintain power for Telecommunication and Signal Department systems until commercial power was completed is not reserved to scope-covered employees.

As in Third Division Award 45366, “[t]here is insufficient evidence to show that the specific disputed work in this case was exclusively reserved to scope-covered employees, either by rule or practice.”

Based on the above, the claim shall 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. 45367**

(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.

For context, the record in this case established two primary components:

- The Collective Bargaining Agreement contains no provisions permitting the contracting out of signal work. The Scope Rule of the Collective Bargaining Agreement covers the installation of lines, fixtures, and disturbing blocks of the Signal Department.
- The Carrier assigned a contractor to maintain and fuel a generator associated with the signal department. This was supported with pictures attached by the Organization.

The Organization provided a long list of prior awards that recognized the refueling of generators as scope-covered work, which included *Third Division Award Nos. 37795, 42120, 44922, 44923, 44930, and 44931*. On this basis, the Organization made a prima facie case that this was scope-covered work assigned to contractors in violation of the agreement. Despite this clarity, the Majority applied improper analysis on several grounds.

Exclusivity Doctrine Does Not Apply

Primarily, the Majority asserts "*There is insufficient evidence to show that the specific disputed work in this case was exclusively reserved to scope-covered employees, either by rule or practice.*" 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. The Carrier is trying to cloak 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. The Carrier and the record provided no evidence to support this alleged practice nor instances it referred to. Moreover, the alleged use of telecom equipment was unsupported with evidence, refuted by the Organization, and shown to be false in the record. Unsubstantiated assertions were used by the Majority to refute the statements, signal plans and agreement language provided in the record. 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 based on conjecture rather than a proper appellate review of the record established. 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 the probative evidence on the record and gave approval of baseless assertions as 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,

A handwritten signature in black ink, reading "Brandon Elvey". The signature is written in a cursive style with a large initial 'B' and a long, sweeping tail on the 'y'.

Brandon Elvey
Labor Member