

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation - (Amtrak)
Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, on March 22, 1986, the Carrier assigned Supervisor J. Dugan to perform B&B Foreman's work at the Bear, Delaware Maintenance Facility (System File NEC-BMWE-SD-1525).

(2) B&B Foreman J. R. Cooper shall be allowed eight and one-half (8.5) hours of pay at the time and one-half rate because of the violation referred to in Part (1) hereof."

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 employees 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 waived right of appearance at hearing thereon.

On March 22, 1987, the Carrier assigned seven B&B Mechanics on overtime to place and finish concrete for the Tie Rehabilitation Facility located at Bear, Delaware, near Wilmington. It is the Organization's contention that the Carrier utilized an exempt Supervisor to "direct the . . . work" of the Mechanics. The Organization claims that this supervision should have been provided by a B&B Foreman, the Claimant.

Article I, the Work Classification Rule, describes the "primary duties" of a B&B Foreman as follows: "Directs and works with employees assigned under his jurisdiction." Such employees would refer to B&B Mechanics who "Construct, repair and maintain bridges, buildings and other structures."

The Organization also relies on Rule 55, pertinent portions of which read as follows:

"(a) Employees residing at or near their headquarters will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them, in order of their seniority.

* * *

(c) When it is necessary to call employees for service in advance of their bulletined working hours, or after men have been released from work commenced during bulletined hours, the same preference will be given on rest days as on other days to employees residing at or near headquarters who are qualified and available."

The Carrier sees the dispute as an invasion of its right to determine whether or not use of a Foreman is required in all instances. As stated by the Organization, however, this is not the issue. In this instance, no challenge is made to whether supervision was required. What the Organization argues is that the Carrier, of its own choosing, did assign supervision (an exempt Supervisor), and that in this circumstance it was work which should have been assigned to the Claimant.

The Carrier also bases its defense on the alleged non-exclusivity of supervisory work, not resting solely with B&B Foremen. This argument is not persuasive here. First, if indeed first-level supervision for B&B Mechanics is required, the use of an available B&B Foreman who normally and customarily performs the work is appropriate. More significantly, this is not an appropriate instance for the exclusivity test. This is not a dispute as to which craft, subdivision of craft, or classification is appropriate; rather, it is a Claim concerning the performance of Agreement work by a non-represented supervisory employee.

What is of direct concern to the Board, however, is whether the exempt Supervisor served, in fact, in a supervisory capacity for the B&B Mechanics on the day in question, as claimed by the Organization. The record appears to show that the Carrier concedes this point. The Carrier's denial letter of July 10, 1986, states:

" . . . Claimant had no demand right to work
performed by a management employee"
(Emphasis added)

In its Submission the Carrier states, "The overtime work in this case was properly performed by a management employee." In its Rebuttal, the Carrier contends that the exempt Supervisor "normally and customarily provided whatever supervision these employees needed. . . ."

From this, the Board must conclude that the Carrier, at its option, assigned supervision to the B&B Mechanics. It follows that this was work properly accruing to the Claimant. This is not a finding, however, as to whether or not the Carrier was required to provide any direct supervision.

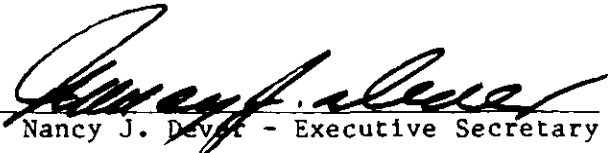
There remains the question of appropriate remedy. The Board is disinclined to review once more the contentions of the parties as to the appropriate rate of pay, given the great number of other Awards discussing this question. Suffice to say that in this instance the Board determines that the appropriate pay will be granted at the pro rata level and not at the punitive rate.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1990.

CARRIER MEMBERS' CONCURRING
AND DISSENTING OPINION
TO
AWARD 28349, DOCKET MW-28035
(Referee Marx)

In this Award, the Majority properly preserved the Carrier's right to determine when supervision is required. It also recognized and upheld Amtrak's well-arbitrated practice of paying the straight time rate of pay for missed overtime work on its property.

However, in finding that the oversight and direction provided by the exempt General Foreman should have been performed by a BMW-represented B&B Foreman, the Majority apparently overlooked the salient, un rebutted facts stated in the record before it that:

1. The parties' Scope and Work Classifications Rule specifically states that, "The listing of work under a given classification is not intended to assign work exclusively to that classification" and, further, that the Agreement is not intended "to require the transfer of work now being performed by employees not covered by this Agreement to employees covered by this Agreement."
2. There are and always have been gangs and work units of BMW-represented employees throughout the territory covered by the Agreement who work without a BMW-represented Foreman over them, taking their direction instead from ARASA-represented or exempt supervisors.
3. There never was a B&B Foreman assigned at the Bear, Delaware, Maintenance Facility to supervise B&B Mechanics.
4. B&B Mechanics headquartered at that facility have historically taken their direction and instructions from the exempt General Foreman, who manages all of the shop maintenance work, without a BMW-represented B&B Foreman between them.

5. Minimal supervision was needed and given to this group of seven skilled craftsmen working together to pour a concrete pad.

In view of these facts, that aspect of the Award which sustains the Organization's position is erroneous and without precedential value.

We dissent.

Michael C. Lesnik

M. C. LESNIK

Martin W. Fingerhut

M. W. FINGERHUT

Robert L. Hicks

R. L. HICKS

P. V. Varga

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James E. Yost

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June 4, 1990