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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37817
Docket No. MW-38172
06-3-04-3-93

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 the Carrier assigned and allowed General Foreman J. Brooks to perform Maintenance of Way work (removing and replacing platforms) at the Claymont Train Station on September 25, 26, 30 and October 1, 2002 instead of B&B Mechanic M. Bremer (System File NEC-BMWE-SD-4256 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Bremer shall now be compensated for sixteen (16) hours' pay at his respective time and one-half rate of pay for each date of September 25, 26, 30 and October 1, 2002.”

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.

This claim involves the allegation that the Carrier assigned a supervisor to perform B&B Mechanic work on the claims dates. The Claimant is a B&B Mechanic on Gang C-122 headquartered at Wilmington Shop with a tour of duty from 7:00 A.M. to 3:30 P.M., Monday through Friday. The disputed work was performed by Gang I-232, headquartered at Penn Coach Yard, during its regular tour of duty from 8:00 P.M. to 6:00 A.M., Monday through Thursday. It involved the Track Department rehabilitation project at Clayton Station, Delaware, and the removal, repair and replacement of inter-track platforms. General Foreman Brooks was assigned to supervise and direct Gang I-232, which included three B&B Mechanics.

The initial claim filed on October 23, 2002 requested ten hours a night at the overtime rate on behalf of the Claimant for an alleged violation of Scope Rule 14. On the property the Carrier asserted that the preponderance of Brooks' work was supervisory in nature and that any labor he performed was minimal and incidental to his primary duties. In its January 14, 2003 appeal the Organization asserted that Brooks worked the entire time doing Mechanics' work and sought 16 hours a night at the overtime rate. The Carrier then stated that the Organization had changed the nature of its claim rendering it procedurally invalid. In its April 11, 2003 appeal, the Organization attached a handwritten note submitted on February 10, 2003 by B&B Foreman Lott indicating that he worked on the claim dates and that Foreman Brooks did more than minimal work with his gang. In rebuttal, the Carrier argued that Lott's statement was not credible because virtually all of the disputed work was completed prior to him coming to work on his 7:00 A.M. to 3:30 P.M. tour, noting that none of the Gang I-232 Mechanics complained that the General Foreman was doing their work or filed any claims, despite the fact that any resulting overtime would have belonged to them rather than the Claimant.

The Organization argues that the Carrier violated the Agreement by allowing a supervisor who held no active seniority or work rights to perform work accruing to a B&B Mechanic such as the Claimant, citing Third Division Awards 28185, 30786, 31129, 31531 and 35823. It asserts that the Carrier failed to validate its

affirmative defense by the presentation of any documentation concerning the amount of physical labor performed by Brooks, inviting the application of the negative inference rule. The Organization notes that the Carrier's exclusivity contention has no valid application to a dispute involving a supervisor's performing scope-covered work, citing Third Division Awards 25469, 25991, 28349 and 31133. Finally, the Organization argues that the appropriate remedy for the Claimant's missed overtime opportunity is payment at the time and one-half rate, relying on Third Division Awards 26508, 26690, 30448, 30586, and 32371.

The Carrier initially contends that the claim as progressed is procedurally defective and fatally flawed because it differs from the one first filed by both amount of compensation sought and the Rule 14 violation alleged, citing Third Division Awards 15847, 29272, and 36020. The Carrier next asserts that the Organization failed to prove that the disputed work is reserved exclusively to the BMW or B&B Mechanics, thus defeating its claim, relying on Third Division Awards 25523, 26236, 28263, 28794, 30605 and 31254. The Carrier also argues that the Organization failed to establish that General Foreman Brooks performed any specific amount of scope-covered work in the performance of his supervisory functions, noting that a request for payment at the overtime rate for work not performed on this property is excessive, citing Third Division Awards 27146, 27701, 28181, 28349 and 28796; Public Law Board No. 4549, Award 1.

A careful review of the record convinces the Board that, even considering the merits of the claim despite the amendment from ten to 16 hours during its appeal on the property, the Organization has not sustained its burden of proving a violation of the Agreement. While there is no question that if Brooks performed more than a minimal amount of scope-covered work there would be a Rules violation, see e.g. Third Division Awards 28185, 30786 and 31129, the evidence in this record is insufficient to support such a finding. We note that the one statement submitted by the Organization came from an individual who was not in a position to see what actually was done during the regular tour hours of Gang I-232, and lacked specificity concerning the amount of work actually performed by Brooks. The only people who could attest whether Brooks performed scope-covered work and to what extent were the members of Gang I-232, and there are no statements from either Brooks or any of the three B&B Mechanics on that gang. The fact that there was no complaint lodged by any of the Gang I-232 Mechanics contending that Brooks was performing their work undermines the Organization's ability to prove that there

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was an ascertainable loss of work opportunity to the Claimant to support a request for ten or 16 hours a night of pay (at whatever rate) on the claim dates. Accordingly, 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 21st day of June 2006.