

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40977
Docket No. SG-41059
11-3-NRAB-00003-090416**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:

Claim on behalf of A. January, for payment of four hours at the time and one half rate commencing November 17, 2007, and continuing until this dispute is resolved, account Carrier violated the current Signalmen’s Agreement, particularly Appendix B-5, Section IV - Trouble Desk, and Assistant Signal Foreman Memorandum of Agreement dated August 8, 1980, when it created an unqualified trouble desk position at the Boston South Station CETC, and denied him these work opportunities. Carrier’s File No. BRS(N)-SD-1110. BRS File Case No. 14189-NRPC(N).”

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 Board finds the facts herein and background presented substantially the same as those we reviewed in Third Division Award 40976. We once again gave considerable study to the Carrier's position that it has a right to blank a vacant position, with which we concur. The Board also considered carefully the Carrier's position that it had the right to permit Signalmen to perform work at the Boston South Station CETC Center, as no proof exists that the work performed belonged to or was reserved to the Assistant Foreman class (Third Division Award 28581).

The Organization has the burden of proof and has met that burden with Rules that clearly state that those positions will be classified as Assistant Foreman positions, and not Signalmen at the CETC Trouble Desk, and will receive overtime according to the language negotiated. Herein, the Organization documented with four statements that Signalmen were doing Assistant Foreman work at the CETC Trouble Desk. One such statement confirmed that J. Alves, "has been doing the job of a[n] Assistant Foreman Trouble Desk operator." Another stated in pertinent part that:

"... Mr. Alves is doing the same work as the Assistant Foreman which the trouble desk job require[s], but only getting Signalman pay not the Assistant Foreman pay that the Job always paid.

The work that Joe Alves do[es] is answer telephones and radio, send people out on trouble calls . . . as B&B to clean platforms of ice and snow. C&S to troubleshoot switches and signals. TRK to go out on rail problems.

The above work is the same work that trouble desk Assistant Foremen do."

The Organization presented sufficient probative evidence to confirm that Alves was doing the same work on the Boston Trouble Desk as Assistant Foremen were doing while he worked that position. The Organization argues that the Carrier created a "mirror position" for the vacant Assistant Foreman position. There is no rebuttal asserting that the Signalman working the Trouble Desk was doing different work.

It is not necessary that the Signalman was doing the exact work or performing all duties of the position, but only that they performed a substantial part

of the job. In this instance there is proof that the Assistant Foreman's work was performed by personnel not classified as Assistant Foreman or filled by those qualified thereby under the Agreement.

Certainly, the Carrier has the right to blank positions, but it did not do so. The record evidence indicates that it filled the C&S Trouble Desk vacancy with positions other than an Assistant Foreman. The record contains substantial probative evidence that Alves filled the vacancy and performed C&S Trouble Desk work exactly as the Assistant Foreman would perform. Accordingly, the Claimant lost the opportunity to work overtime under the Agreement.

The Carrier argued that the penalty requested is improper on this property because straight time is paid for lost work opportunities. There is no rebuttal from the Organization and it, therefore, stands as fact.

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 18th day of May 2011.

**CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARDS 40976 THRU 40980
DOCKET NOS. SG-41058, SG-41059, SG-41060, SG-41061, SG-41062**

(Referee Marty E. Zusman)

These Awards involve a series of five claims regarding the Carrier's non-stop efforts to fill Assistant Signal Foremen and Assistant Signal Foremen-Relief positions on the Trouble Desk at the Boston South Station CETC commencing in October 2007.

It is undisputed in the record that in spite of the fact that the Carrier continuously advertised Assistant Signal Foreman vacancies on the Trouble Desk, BRS-represented employees refused to bid for the "relief" or third shift positions. Some employees even forfeited their seniority in the Assistant Signal Foreman class rather than accept force assignment to the vacancies. In order to meet its operational needs, the Carrier was compelled to establish Signalmen positions in an effort to provide some level of administrative clerical support for the Train Control Center. Nevertheless, the Carrier continued to advertise the vacant Assistant Signal Foreman positions.

In these Awards, the Majority improperly ruled that the Carrier (1) violated the Trouble Desk Agreement, in spite of the fact that it maintained the Assistant Signal Foreman positions on the Trouble Desk and continued its fruitless efforts to fill those positions (2) violated the overtime call out procedures even though no one was called out on overtime and (3) violated the Agreement when it refused to pay the incumbents of the Signalmen positions at the higher rated Assistant Signal Foreman rate of pay even though they never performed work exclusively reserved to the Assistant Signal Foreman class. To add insult to injury, the Majority failed to take into account and give the Carrier credit for its unrelentless efforts to find an alternative solution to the parties' dilemma. To say that these decisions are not based on existing Agreement provisions or established arbitral precedent is an understatement.

First, nothing in the Trouble Desk Agreement, or in the basic Rules Agreement, prohibits the Carrier from establishing positions, other than Assistant Signal Foreman positions, to provide administrative clerical support, as was done in these cases. Both parties to these disputes recognized that the Assistant Signal Foreman positions responsible for the Trouble Desk were never abolished and the Carrier relentlessly continued its fruitless efforts to fill those positions consistent with the provisions of the parties' Agreement. It should go without saying that the parties' Agreement contains not only mutual rights, but also obligations on behalf of both parties, including BRS-represented employees, to fill advertised positions.

**CARRIER MEMBERS' DISSENT TO AWARD 40976, ET AL
DOCKET NOS. SG-41058, ET AL
Page 2**

Second, it is well established in this industry that overtime call procedures only apply when employees are called out for overtime. Here, no overtime was offered or worked. Third Division Awards 37828, 31724 and 30525 are but a few examples of this principle. Accordingly, there was absolutely no basis on which to rule that the call out procedures were triggered or violated.

Finally, it is equally well established in this industry that in order to qualify for a higher rate of pay, Claimants must "substantially" fulfill the responsibilities of the higher rated position. Simply because the Signalmen at the Train Control Center answered phones, relayed information and performed related clerical administrative functions, does not constitute "substantial" fulfillment of Assistant Signal Foreman functions as historically defined on this Carrier's property. Stated differently, although Trouble Desk Assistant Signal Foremen perform some administrative clerical functions, as do virtually every position throughout the Carrier's property, those administrative clerical tasks do not constitute "Assistant Signal Foreman" work, as historically defined by the parties. In fact, Third Division Award 28581, which was not only referenced in these decisions but, more importantly, denied a 1987 Trouble Desk claim between these same parties, recognized that (1) administrative clerical functions are not the exclusive responsibility of Trouble Desk Assistant Signal Foremen (2) Trouble Desk Assistant Signal Foremen did not have a demand right to be called in on overtime to perform those functions, and (3) they can be performed by others, including employees outside the craft or class. The instant Awards rendered by the Majority clearly suggest that the latter approach would have been the more appropriate action herein, as well.

These Awards are not only illogical and palpably erroneous, they represent an unwarranted windfall for employees who consciously chose not to fill Assistant Signal Foreman positions when offered to them.

We vigorously dissent to these decisions.

Richard F. Palmer
Carrier Member

Michael C. Lornik
Carrier Member

May 18, 2011