

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41700
Docket No. SG-41597
13-3-NRAB-00003-110227

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 R. B. Ryan for four hours at the time and one half rate of pay, commencing July 18, 2009, 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 Providence M.O.W. Base RI, and denied the Claimant these work opportunities. Carrier’s File No. BRS-SD-1134. BRS File Case No. 14528-NRPC(S).”

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 dispute involves a challenge to the Carrier's creation of a Trouble Desk Signalman position as a violation of the Assistant Signal Foreman Agreement of August 8, 1980 and the Overtime Call List for the Trouble Desk, the pertinent portions of which appear below.

"APPENDIX B-5

IV. Trouble Desk Overtime on the Trouble Desk will be offered as follows:

A. The Assistant Foreman-Trouble Desk working the preceding trick will be offered the opportunity to work the first four (4) hours of the vacancy and the Assistant Foreman Trouble Desk scheduled for work the succeeding trick will be offered the opportunity to work the last four (4) hours of the vacancy.

MEMORANDUM OF AGREEMENT DATED AUGUST 8, 1980

3. It is also agreed that the positions presently assigned to the Communications and Signals Trouble Desk located in New Haven, Connecticut, will be classified as Assistant Foreman and will be readvertised in accordance with the current rules of the Agreement."

The Claimant established seniority as an Assistant Foreman on March 8, 1984 and, at the time of the claim, was regularly assigned to the second trick Assistant Foreman Trouble Desk position headquartered at the Providence, Rhode Island, M.O.W. Base with rest days of Monday and Tuesday. The Carrier advertised and filled a third trick Signalman Trouble Desk position on July 18, 2009 when it was unable to fill the vacant third trick Assistant Foreman Trouble Desk position despite repeated advertisements. This claim disputes the creation of that "unqualified" position and the denial of the Claimant's Agreement right to be offered the opportunity to work overtime on the vacant third trick Assistant Foreman position.

The Organization argues that the exact same issue raised by this claim has already been determined between the parties on this property in Third Division Awards 40976, 40977 and 40980, and the holding therein that the Carrier violated

the clear language of the Memorandum of Agreement requiring Trouble Desk positions to be filled by Assistant Signalmen, when it filled such position with a Signalman, thereby denying the Claimant's contractual entitlement to be offered overtime in violation of Appendix B-5 (IV) is stare decisis in this case and must be followed by the Board. It posits that the Carrier found itself in the position of not being able to fill vacant Assistant Foreman Trouble Desk positions because it failed to properly address attrition, and that fact does not provide a valid basis or justification for it to violate the Agreement.

The Carrier contends that the Organization failed to meet its burden of proof in this case, because there was no showing that the Signalman working the third trick Trouble Desk position was performing work reserved to the Assistant Foreman classification, citing Third Division Award 28581. It contends that its inability to get qualified bidders for the vacant Assistant Foreman positions is justification for establishing Signalman positions on the Trouble Desk to provide administrative support and to obtain on-the-job training so as to enable it to attract and fill the vacant positions with qualified employees. The Carrier argues that it may elect to blank vacant Assistant Foreman positions and assign such functions to other classifications of employees without violating the Agreement, noting that such positions were not abolished and remained advertised. It points to its Dissent in the prior decided cases relied upon by the Organization, to show that those Awards were wrongly decided and palpably erroneous, and should not be followed herein.

A careful review of the record convinces the Board that the Organization has sustained its burden of proving a violation of the Memorandum of Agreement and Appendix B-5 (IV) in this case. As noted, Third Division Awards 40976, 40977 and 40980, between these parties on this property, decided the issue presented by this claim in favor of the Organization. The same facts were presented, and the same arguments were made by both parties, in those cases. We adopt the following excerpt from Third Division Award 40976 as applicable to, and determinative of, the instant case:

“The Carrier forcefully argued that the work performed was not reserved for the Assistant Foreman class, pointing to Third Division Award 28581. That Award is significantly different in finding that the Organization did not meet its burden of proof based on a general Scope Rule that work was reserved to those assigned to the Trouble Desk. In this instance there is no argument of scope, but the August

8, 1980, Assistant Signal Foreman Memorandum Agreement, Item 3 that those positions assigned to the Trouble Desk will be Assistant Signal Foremen and also Section IV, Trouble Desk Overtime Agreement that those vacant assignments would accrue first to Assistant Signal Foremen.

The Board is sensitive to the Carrier's dilemma, but required to enforce the negotiated language of the parties' Agreements. There is no rebuttal in this record that Alves was assigned to work a position at the Trouble Desk that under the Memorandum 'will be classified as Assistant Foreman' and performed not all, but substantially the work of the Assistant Foreman.

Certainly, the Carrier has the right to blank positions, but it did not do so. This record 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."

While the Carrier's Dissent disagrees with the conclusion of the majority of the Board, we are unable to accept its argument that the basis for the finding or its rationale is palpably erroneous or illogical. Rather, we are convinced that the Board's findings above are equally applicable herein, and should be followed under the principle of stare decisis. See, Third Division Awards 39294 and 39006. The Carrier's inability to find qualified employees to fill the vacant Assistant Foreman Trouble Desk positions does not permit it have the job performed by a Signaller for less pay, as it did in this case. Accordingly, under Appendix B-5 (IV) the Claimant, who was the Assistant Foreman working the preceding trick, is entitled to four hours' pay for each day the Signaller performed work on the third trick on the Trouble Desk during the claim period. As was the case in Third Division Award 40976, the Carrier argues that the penalty requested was excessive because straight time is paid for lost work opportunities on this property, and there was no rebuttal by the Organization. Therefore, the claim is sustained for payment at the straight time rate of pay.

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 16th day of September 2013.