

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37826
Docket No. MW-38525
06-3-04-3-510**

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 Employes
(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 failed to call and assign Mr. J. Whelan to perform Maintenance of Way overtime work (gauging and spiking track) at Providence, Rhode Island on April 13, 2003 and instead assigned ARASA Assistant Track Supervisor P. Kolonick (Carrier's File NEC-BMWE-SD-4367 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Whelan shall now be compensated for all hours worked by Mr. P. Kolonick on April 13, 2003.”**

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 allowed an Assistant Supervisor to work side by side with a track gang performing work reserved to the BMWE-represented employees by the Scope Rule. The Claimant is a Foreman Welder. The overtime in issue involved gauging and spiking work and was performed by 15 Track Department employees including three Track Foremen. While the Carrier admitted that the Assistant Supervisor assisted the gang under his jurisdiction as deemed necessary for the safe and efficient performance of the work, the Organization claimed that the scope-covered work he did exceeded that which can reasonably be expected in the performance of his supervisory duties.

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 the Track Department in which the Claimant works, citing Third Division Awards 28185, 30786, 31129, 31531 and 35823. It asserts that the Carrier's response to the claim indicating that it was unable to ascertain the extent of supervisory involvement and expressing an inclination to allow a call payment but not to the Claimant, who it contended was an improper claimant, is an admission that scope-covered work was performed by the Assistant Supervisor. The Organization contends that the Foreman Welder is a proper claimant because he retains and accumulates seniority in the lower classification of Trackman and has preference for this overtime over an Assistant Supervisor who holds no seniority, he was the senior rostered Trackman on the subdivision not working the class of Trackman, and it is permitted to name any claimant it wishes when a violation is established, citing Third Division Awards 29313 and 32440. 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 contends that the Organization failed to establish that the Assistant Supervisor performed any specific amount of scope-covered work, or that he exceeded the permissible bounds in the performance of his supervisory functions.

It notes that none of the 15 employees working with the Assistant Supervisor complained about the work that he was performing or stated that he was engaged in scope-covered work, nor did they file a claim for any additional work. The Carrier asserts that it had a sufficient work force to complete the task and the Organization failed to meet its burden of showing that there was any missed work opportunity for the Claimant or any employee in this case. It denies that the Assistant Supervisor exceeded the permissible bounds and notes that mere assertions are insufficient to support a claim, citing Third Division Award 35862. The Carrier argues that at best, there is an irreconcilable dispute in fact that cannot be resolved by the Board, relying on Third Division Awards 28435, 28794 and 33416. Finally the Carrier contends 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, 28796; Public Law Board No. 4549, Award 1.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving that the Assistant Supervisor performed scope-covered work in excess of that permitted in the performance of his supervisory functions. The Organization asserted that the Assistant Supervisor worked side by side with employees doing Trackman work, but submitted no proof in the form of statements from the 15 employees on the gang he supervised as to what he did and for how long. The Carrier said that he did what was necessary in the performance of his supervisory duties and responsibilities and the Organization admits that he is responsible for the integrity of the track and the safe passage of trains and can work along with the gang to instruct or insure safety.

It is the Organization's burden to prove a violation of Rule 55 or the Overtime Call Order Agreement. The rationale used by the Board for denial of the claim in Third Division Award 37817 is similarly applicable in this case. There the Organization submitted one "witness" statement which was found by the Board not to prove what work the supervisor actually performed. In this case there was no direct proof by any of the potential 15 witnesses as to what alleged Trackman work the Assistant Supervisor performed. Even though the Carrier's September 18, 2003 denial stated that it could not gauge what the Assistant Supervisor's assistance to the gang consisted of, whether tutorial or de minimis, the Board cannot accept the Organization's argument that this is a tacit admission of a violation. It is for the Organization to prove, in the first instance, that the Assistant Supervisor performed

scope-covered work, as alleged, prior to the Carrier having to put forth evidence in rebuttal. The Organization failed to meet its initial burden in this case and the claim must fail for lack of proof.

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.