

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40976
Docket No. SG-41058
11-3-NRAB-00003-090415

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 M. M. Godek, for payment of four hours at the time and one half rate commencing November 16, 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 the Claimant these work opportunities. Carrier’s File No. BRS(N)-SD-1112. BRS File Case No. 14191-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.

As background, certain facts are clear and undisputed. The Carrier had considerable trouble filling Assistant Foreman and Assistant Foreman-Relief positions on the Trouble Desk at the Boston South Station CETC. Although the Carrier continued to advertise, it received no qualified bids for the third trick assignments.

The Carrier ultimately created Signaller positions at the Boston CETC Center giving rise to the instant claim. In this case, Signaller J. Alves was awarded and worked one of those positions.

The Organization filed claim alleging that the Carrier created an “illegal Signaller Position trouble desk” to obtain the work at a lower wage and creating a loss of overtime for the Claimant, who holds the qualified Assistant Foreman position. There are two Agreements which the Organization argues were violated by the Carrier when it established and assigned Signaller Alves to work at the Boston CETC Center Trouble Desk beginning on November 16, 2007, i.e., Appendix B-5, Section IV and the August 8, 1980 Memorandum of Agreement, Part 3, which read as follows:

“Memorandum of Agreement

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. [Emphasis added; positions later relocated to Boston]

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 to work the succeeding trick will be offered the opportunity to work the last four (4) hours of the vacancy.

- B. If either of the Assistant Foremen referred to in paragraph (A) is not available or declines the opportunity . . . the other shall be given the opportunity to work the entire eight (8) hours.
- C. If neither the Assistant Foremen-Trouble Desk referred to in paragraphs (A) and (B) above elects to perform the overtime work, the opportunity to fill the vacancy will be offered to the Assistant Foreman-Trouble Desk on relief day in seniority order.”

The Organization argues that the Claimant was not properly called for overtime, even though he holds a regular assignment of second trick Assistant Foreman, Trouble Desk. Each time the Carrier utilized Alves as a Signaller on the Trouble Desk beginning on November 16, 2007, the Claimant was due four hours of overtime when the first shift incumbent was available to work four hours, or eight hours, if the incumbent of the first trick was not available to work four hours.

The Carrier contends that the Signaller Trouble Desk positions were created to provide assistance to the Dispatching Office. They were created due to the lack of qualified bids for the Assistant Foreman positions, and were learning positions. As Signaller Trouble Desk positions, for which Alves worked, they lacked qualifications and did not perform the work of the Assistant Foreman-Trouble Desk.

The Carrier argues that Alves “did not perform work accruing to the assistant foreman-trouble desk position.” Further, the Carrier did not violate the Agreement when it permitted Alves to work the Trouble Desk and blanked the third trick Assistant Foreman-Trouble Desk assignment. The Carrier argued that it had a managerial right to blank the third trick assignment and, in doing so, there was no overtime available. The work that the Assistant Foreman-Trouble Desk performed, such as trouble shooting switch and signal problems, was never performed by Alves, because he was unqualified. Nor did he perform the work of the Assistant Foreman class while working the Trouble Desk.

The burden of proof rests with the Organization and must be more than allegations. In this record, four letters were submitted that support the Organization’s argument that Alves did perform Assistant Foreman work — not all of it, but a substantial part during the full time working at the Trouble Desk. Alves

stated that he had “been working the Boston trouble desk at signalman’s rate and doing the same job as the others on the desk that are getting Assistant For[e]man rate.” Signalman Barros submitted a similar statement. Two Assistant Foremen also submitted statements, one confirming that Alves, “has been doing the job of a[n] Assistant Foreman Trouble Desk operator” and the other stating, 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 the Assistant Foremen were doing while he worked that position. There is no showing in this record that the Assistant Foremen working the Trouble Desk were doing different work at their station. There is no direct rebuttal.

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 an Assistant Foreman. The Board finds no evidence that any of the work performed by Alves was work not performed during the time the Claimant would work the position as an Assistant Foreman; or for that matter, any evidence that additional trouble shooting of switches or signal problems, while critical functions, were anything other than rare occurrences with the brunt of responsibilities performed as indicated by signed statements. The work Alves performed on his position was that of the Communications and Signals Trouble Desk that by Agreement will be classified as Assistant Signal Foreman. Accordingly, the claim has merit.

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.

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
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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. Lesnik

Carrier Member

May 18, 2011