Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40978
Docket No. SG-41060
11-3-NRAB-00003-090417

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 R. J. Barros, for the difference in pay between the Assistant Foreman Trouble Desk rate of pay and the Signalman rate of pay for all hour[s] worked, account Carrier violated the current Signalmen's Agreement, particularly Rule 33, when it failed to compensate Claimant at the applicable Assistant Foreman Trouble Desk rate of pay between October 19, 2007, and November 11, 2007. Carrier's File No. BRS(N)-SD-1109. BRS File Case No. 14188-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.

From October 19 through November 11, 2007, the Claimant was assigned to work the Trouble Desk at the Boston South Station CETC. He held a Signalman position and was paid at the Signalman's rate of pay. There is no dispute between the parties that for some time the Carrier was unable to obtain bids from qualified employees for the Assistant Foreman and Assistant Foreman-Relief positions. Consequently, the Claimant was ultimately assigned to the Trouble Desk.

The Organization argues that the Carrier violated Rule 33. The Claimant was assigned to the Trouble Desk and "performed all functions of the Asst. For[e]man Trouble Desk at a reduced rate of pay. . . ." The Organization argues that the Agreement requires the C&S Trouble Desk to be staffed by an Assistant Signal Foreman, not by unqualified employees, such as the Claimant, who are then required to perform Assistant Foreman work.

The Carrier denies any violation of Rule 33, noting that it has continually attempted to fill the positions without success. The Carrier argues that the Claimant's work was not that of an Assistant Foreman position, but simply providing assistance when necessary in the Dispatching Office. The Claimant was never required to do the work of an Assistant Foreman, for which he was unqualified.

The Rule in dispute reads as follows:

> "Rule 33 – Tour Where More than One Rate Applicable
>
> An employee, who during a tour of duty performs work for which more than one rate of pay is applicable, shall be paid for the entire tour of duty at the highest rate of pay applicable to any of the work performed. An employee who performs service temporarily in a lower rated position shall not have his rate reduced."

The dispute involves the argument put forth by the Organization that the Claimant should have been paid the higher rate of pay for working the Trouble Desk and performing the work of an Assistant Foreman.

The Carrier's major argument is best presented on-property when the Director of Labor Relations denied the claim for higher rated pay for the Claimant,

a Signalman who lacked seniority and qualifications for the Assistant Foreman position. The Director stated, in pertinent part:

> ". . . Claimant merely provided assistance where necessary and functioned within the range of his ability. Claimant did not assist a signal maintainer trouble shooting switch or signal problems, the work normally associated with the trouble desk assistant foreman. The maintainer would have to look to supervisory staff for such assistance. The Employees have failed to show that the Claimant performed any work reserved to the assistant foreman class. . . ."

The Carrier contends that there is a clear lack of proof that the Claimant performed the higher rated Assistant Foreman work.

The Board studied the record and the proof presented by the Organization to meet its required burden. There are four statements presented by the Claimants in four interrelated claims. The Claimant in this case, wrote a single sentence stating, in part, that he was "doing the same job as the other's on the desk that are getting assistant for[e]man rate." Signalman J. Alves 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:

> ". . . 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 the Claimant in this case was doing the same work on the Boston Trouble Desk as 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 stations. Arguments that the Claimant was not qualified or did not possess sufficient seniority to work as an Assistant Foreman, or that the "Claimant did not assist a signal maintainer trouble shooting switch or signal problems" are not on point.

Rule 33 states that an employee who "performs work for which more than one rate of pay is applicable, shall be paid for the entire tour of duty at the highest rate of pay applicable to any of the work performed." Clearly, the Claimant performed work where more than one rate of pay was applicable. On the property, there was no rebuttal that the Claimant performed all of the same work as Assistant Foremen were doing at the Trouble Desk for less pay. Nothing in Rule 33 states that to receive the higher rated pay the employee must perform all duties of the higher rated position.

Prior Awards have held that the employee must do a "substantial" amount and, in this case, the Claimant certainly performed essentially the same work as an Assistant Foreman at the Trouble Desk and any material difference was not proven. It is not important to document that the work is reserved for an Assistant Foreman — only that the Claimant did, in essence, the same work as the higher rated position and was paid less. As stated in Third Division Award 12634:

> "It is well settled by previous Awards . . . that it is not necessary for an employe to take over and perform all of the duties and responsibilities of a higher rated position in order to be entitled to pay at the higher rate."

Based on the full facts and record evidence, the Board finds that the claim has merit. The Claimant substantially performed the duties of the Assistant Foreman at the Trouble Desk and although the Carrier tried unsuccessfully to fill such positions with qualified employees, the Rule makes no exception. Accordingly, the claim must be sustained for the difference in pay as claimed.

AWARD

Claim sustained.

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.

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