

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41699
Docket No. SG-41596
13-3-NRAB-00003-110226**

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. J. Barros, for the difference in pay between the Assistant Foreman Trouble Desk rate of pay and the Signalman rate of pay, for all hours worked, and continuing until resolved, account Carrier violated the current Signalmen’s Agreement, particularly Rule 33, when it failed to compensate the Claimant commencing on July 17, 2009, at the applicable Assistant Foreman Trouble Desk rate of pay. Carrier’s File No. BRS-SD-1132. BRS File Case No. 14527-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 the appropriate rate of compensation for service performed by the Claimant on the Trouble Desk at the CETC Center in Boston, Massachusetts. The August 8, 1980 Assistant Signal Foreman Agreement, as amended, states that the C&S Trouble Desk will be staffed by Assistant Foremen. After the Carrier was unable to get qualified individuals to fill the Assistant Foreman vacancies on the Trouble Desk, despite repeatedly advertising those positions, it posted a Signaller position on the Trouble Desk, which was filled by the Claimant. He is neither qualified to be an Assistant Foreman, nor is he able to qualify for that position because he does not maintain seniority as a Maintainer, which is a prerequisite to such qualification. The claim asserts that the Claimant is performing substantially all functions of an Assistant Foreman, but is being paid at a reduced rate. The following provision of the Agreement is relied upon by the Organization.

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 Organization argues that clear contract language must be interpreted as written, citing Third Division Award 10888, Second Division Award 6581, and that the Board has upheld additional compensation for an employee who substantially performs work in a higher rated position, relying on Third Division Awards 12634 and 22533. It asserts that the Claimant substantially performed the job functions on the Trouble Desk required by Agreement to be assigned to an Assistant Foreman, and is entitled under Rule 33 to be compensated the higher rate of pay associated with that position. The Organization points out that the exact same issue raised by this claim has already been determined between the parties on this property in Third Division Awards 40978 and 40979, and the holding therein that Signallers assigned to the Trouble Desk at the CETC Center in Boston are performing the higher rated work of the Assistant Foreman classification, and must be compensated accordingly, is stare decisis in this case and must be followed by the Board.

The Carrier contends that the Organization failed to meet its burden of proof in this case, because it did not show that the Claimant substantially performed all

functions of an Assistant Foreman, a position for which he was not qualified, but only the administrative functions of the Trouble Desk, which is insufficient to qualify for higher pay under Rule 33, citing Third Division Awards 36838, 35923, 28582, 22831 and 22760. It contends that it is not prevented by the parties' Agreement from establishing Signalmen positions to provide administrative support to the Trouble Desk, and may elect to blank vacant Assistant Foreman positions and assign such functions to other classifications of employees. The Carrier relies upon its inability to get qualified bidders for the vacant Assistant Foreman positions as justification for establishing Signalman positions on the Trouble Desk, noting that training in this position may produce qualified Assistant Signalmen to fill the vacancies. 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 sustained its burden to prove a violation of Rule 33 in this case. As noted, Third Division Awards 40978 and 40979, 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, as seen from the following excerpt from Third Division Award 40978:

“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 to the Dispatching Office. The Claimant was never required to do the work of an Assistant Foreman, for which he was unqualified."

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 finding that the Claimant therein performed work where more than one rate of pay was applicable, did substantially the same work as the Assistant Foreman on the Trouble Desk for less pay, and is entitled to the difference in pay claimed under the provisions of Rule 33, which does not require the performance of all of the duties of the higher rated position, is 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 to have the job performed by a lower rated classification for less pay, as it did in this case. Accordingly, the Claimant is entitled to be compensated the difference in pay for work performed on the Trouble Desk during the claim period.

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 16th day of September 2013.