

Form 1

**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.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 41700

**DOCKET NO. SG-41597
NRAB 00003-110227 (Old)
NRAB 00003-140519 (New)**

NAME OF ORGANIZATION: (Brotherhood of Railroad Signalmen)

NAME OF CARRIER: (National Railroad Passenger Corporation (Amtrak))

In Third Division Award 41700, which was adopted on September 16, 2013, the Board sustained the claim in accordance with the Findings, holding that the Carrier violated the Assistant Signal Foreman Memorandum of Agreement and Appendix B-5(IV) by filling the C&S Trouble Desk vacancy with positions other than Assistant Foreman. Therein the Board directed that, "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."

A dispute arose over the proper interpretation of Award 41700 and the amount of time owed to the Claimant. Specifically, the Carrier asserts that payment is limited to the hours worked by the Signaller named specifically in the initial claim (R. Barros), and does not include any hours worked by other non-Assistant Signal Foremen on that third trick Trouble Desk assignment after July 18, 2009. The Organization disagrees, and seeks payment for all hours worked by employees outside the class during the continuing claim period commencing on July 18, 2009.

Award 41700 was based upon the following Statement of Claim:

"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.”

The Board noted that: “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” (Appendix B-5 (IV)). The Carrier never argued that the Organization had impermissibly attempted to broaden the claim at the Board by not naming Signalman Barrios, and acknowledged on the property that the claim was for creating an unqualified Signalman position on the Trouble Desk.

In finding that the Carrier violated those provisions, the Board relied upon Third Division Awards 40976, 40977 and 40980, which decided the same issue between these Parties on this property based on the same facts and arguments. It adopted as applicable, the excerpt in Third Division Award 40976 noting that by filling the C&S Trouble Desk vacancy with positions other than an Assistant Foreman, the Carrier violated the Assistant Signal Foreman Memorandum of Agreement, and that by denying the Claimant the opportunity to work overtime, it violated Section IV of Appendix B-5. The Board followed those Awards under the principle of stare decisis. It stated that “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 Signalman for less pay, as it did in this case.”

In line with such reasoning, the Board’s finding that the Claimant “. . . is entitled to four hours’ pay for each day the Signalman performed work on the third trick on the Trouble Desk during the claim period” does not support the Carrier’s contention that such monetary remedy was intended to be limited to the occasions when the specific Signalman who occupied that position at the time the initial claim was filed, and was identified by name in the Organization’s initial claim correspondence, held the Trouble Desk vacancy. There can be no dispute that this continuing claim was founded upon the Carrier’s decision to fill the third trick Trouble Desk vacancy with an individual in a classification other than Assistant Signal Foreman. The fact that Signalman Barrios did not continuously occupy the position, but that other non-Assistant Signal Foremen were used in his stead, cannot be relied upon to limit the Carrier’s liability. Although the Carrier argued that the

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Claimants involved in Third Division Awards 40976, 40977 and 40980 had their monetary remedies calculated based upon the same type of limitation - hours based upon days worked by the specific Signalman identified in those claims - the Organization took issue with such assertion without any proof of its underlying factual basis, and the record contains no evidence of such practice, or acquiescence by the Organization in such an interpretation.

Because the Board found that payment at the straight time rate of pay was appropriate, we make clear that the Carrier must compensate the Claimant at her straight time rate of pay in compliance with the provisions of Appendix B-5 (IV) for each day that she was regularly assigned to the second trick Assistant Signal Foreman Trouble Desk position and the third trick Trouble Desk position was assigned to a non-Assistant Signal Foreman, commencing on July 18, 2009. The Parties are directed to make a joint check of the records in order to ascertain the appropriate number of hours for which the Claimant is entitled to compensation pursuant to this Interpretation.

Referee Margo R. Newman who sat with the Division as a neutral member when Award 41700 was adopted, also participated with the Division in making this Interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of August 2015.

CARRIER MEMBERS' DISSENT
to
INTERPRETATION No. 1
to
AWARD 41700; Docket SG-41597
(Referee Margo R. Newman)

The Carrier respectfully dissents to this Interpretation to the extent that the Majority allowed the Organization to amend, i.e., broaden its claim at the Board level from that which it initially submitted and progressed on the property, in clear violation of the fundamental tenets of on-property claim handling under the Railway Labor Act. The Interpretation reasons that the Carrier never argued that the Statement of Claim was impermissibly amended at the Board level.

The General Chairman's September 16, 2009 claim specifically requested:

"Mrs. Ryan now claims (4) hours each day commencing July 18, worked succeeding her shift or (8) hours on each day when the other as described in paragraph 'A. of the aforementioned Agreement was not available . . . to fill (4) hours of the vacancy . . .' worked by Mr. Barros holding and working Signalman position 106-ENG-0709 Trouble Desk X 192 Third trick in violation of the aforementioned Asst. Foreman Agreement at time and one half rate of his pay."

However, the Statement of Claim submitted to the Board for adjudication reads, in relevant part, as follows:

"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."

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Countless arbitral decisions recognize that the Organization cannot broaden its Statement of Claim as was done in this case, but rather, is limited to its initial claim submitted on the property. This principle applies to the subject matter jurisdiction of the Board in reviewing the appellate record, and was not waived by the Carrier. This Interpretation improperly shifts the burden of proof to the Carrier, when in fact, such burden properly remained with the Organization as the moving party.

Unquestionably, it is not the Board's function to perfect an inartfully-framed claim but, as evidenced by the foregoing, that is exactly what the Majority permitted the Organization to do in this case. For these reasons, the undersigned respectfully dissent.

Sharon R. Jindal

Carrier Member

Michael C. Lesnik

Carrier Member

October 28, 2015