

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43987
Docket No. MW- 44974
20-3-NRAB-00003-180486**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(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 assigned ARASA Assistant Supervisor J. Carr to perform regular, daily track inspection work with Track Foreman M Ricci within the Providence Subdivision territory on October 31, 2016 and November 1, 2016 instead of calling and assigning Track Inspector D. Dugan thereto (Carrier's File NEC-BMWE-SD-5515 AMT).”**
- (2) “As a consequence of the violation referred to in Part (1) above, Claimant D. Dugan shall be compensated for twenty (20) hours at the applicable overtime rate of pay.”**

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.

The Claimant has established and maintains seniority in the Carrier's Maintenance of Way and Structures Department. At the time of the dispute, the Claimant held the position of Track Foreman. On October 31 and November 1, 2016, Assistant Supervisor John Carr, sought a track inspector to join Track Foreman Michael Ricci in a hi-rail vehicle to perform track inspections. The Claimant was not called. Being unable to find a second Track Foreman to join Ricci, the Carrier assigned Carr, who is represented by the American Railway and Airway Supervisor's Association ("ARASA"), to perform track inspections alongside Ricci on the disputed days. Together, they inspected two main line tracks while traveling in one vehicle. Carr worked ten (10) hours on October 31 and November 1, 2016.

On November 7, 2016, the Organization filed a time claim on behalf of the Claimant, asserting a violation of The Scope Rule and Rule 55 because the work was reserved to BMWED-represented employees and Carr is not subject to the Agreement between the Carrier and the Organization. On January 27, 2017, the Carrier denied the appeal, denying that it had contracted out the work, because Carr is a Carrier employee, and is qualified to perform track inspection work. The parties were unable to resolve the claim on-property, so it is now properly before this Board for final adjudication.

The Organization contends that Track Inspection work is reserved to its members pursuant to the Scope Rule. Therefore, the Organization contends that the Carrier violated the Agreement when it assigned a non-represented supervisor to perform its work. The Organization contends that it need not show that this work is exclusively performed by BMWED-represented employees, before protesting the Carrier's assignment of scope-covered work to supervisors.

The Carrier contends that the claim must fail because the Organization cannot show that its members have performed track inspection work exclusively on a system-wide basis. It further contends that ARASA-represented Assistant Foreman Carr is undisputedly qualified to perform track inspection work and that inspection of track is among the duties performed by these employees, pursuant to §§ 213.242 § (c) and 213.0242 § (c) of MW1000. The Carrier contends that the record shows that track

inspection is shared work. The Carrier contends that it has not contracted out the work in violation of the Scope Rule, because Carr is a Carrier employee, represented by ARASA, and not a contract employee.

The Carrier further contends that the remedy claimed is excessive, because the work in question was not performed during overtime, but during regular work hours.

The Scope Rule of the parties' Agreement provides, in part:

“Effective March 2, 1987, the following work may not be contracted out without the written concurrence, except in the case of an emergency, of the appropriate General Chairman,

- (1) Track inspection, maintenance, construction or repair from four (4) inches below the base of the tie up, and undercutting.”

There is no dispute that track inspection is customarily done by the Organization's members and that even in this instance, Carr explained that he performed the work after unsuccessfully seeking several Inspector Foremen to do it. While the Claimant held seniority under the BMWED Agreement, Carr did not, but the Claimant was not called to perform the work before Carr was assigned. Although Carr is qualified to perform track inspection work, on the disputed dates, he replaced an Inspector Foreman by performing reserved work.

Where the work is customarily, but not necessarily exclusively, performed by Scope-covered employees, it is improper for the Carrier to assign the work to supervisory employees. Third Division Award 28185, citing Third Division Awards 25991 and 15461. Because Carr is represented by ARASA, the Carrier contends that this is a dispute between two crafts and the Organization must prove that the work was exclusively performed by its members. This Board has already rejected this argument as applied to supervisors. It found that when work is assigned to supervisory employees rather than Scope-covered employees, it “is not an appropriate instance for the exclusivity test. This is not a dispute as to which craft, subdivision of craft, or classification is appropriate; rather, it is a Claim concerning the performance of Agreement work by a non-represented supervisory employee.” Third Division Award 28349. Supervisory employees who are represented by ARASA remain supervisors. The

dispute here involves the assignment of scope-covered work to a supervisor, not another craft or class.

When work is performed by others than for whose benefit the contract has been made, the work is contracted out, even when it is performed by the Carrier's other employees. Work customarily performed by Agreement-covered employees may not be contracted out to be performed by the Carrier's supervisors except under the contractually-permitted reasons. Third Division Award 31129. None of the Agreement exceptions apply here.

While the Organization requested that the Claimant be compensated at the overtime rate, the record demonstrates that the work was done during regular hours at a regular rate. The Claimant is entitled to compensation for twenty hours at the straight time rate.

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 5th day of March 2020.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43987 – DOCKET 44974 (Referee Kathryn A. VanDagens)

The Carrier dissents to this Board's findings. The Majority asserted that the question before this Board had been settled on this property, but in support of that assertion cited two awards that addressed work given to non-represented employees. In contrast, the work here was performed by an agreement-covered supervisor. In Award No. 28349, cited by the Majority, this Board addressed a claim against an exempt supervisor, i.e. a management employee. This Board stated the following:

More significantly, this is not an appropriate instance for the exclusivity test. This is not a dispute as to which craft, subdivision of craft, or classification is appropriate; rather, it is a Claim concerning *the performance of Agreement work by a non-represented supervisory employee*.

The Majority also cited Award No. 28185, another BMW claim against a non-represented employee where the Board stated that “[i]t would be wholly improper to assign such work to *supervisory employees who are not covered by any Agreement*.” The issue before the Board in this appeal was not settled by those awards which have no application to the facts at issue here.

The Carrier provided evidence of a 40-year history of shared work between the ARASA-represented supervisors and BMW-represented employees, along with Carrier rules which presume that supervisors will perform certain work with BMW employees. This Board has upheld the right of the Carrier to assign work to supervisors where there is a historical record of a mixed practice or shared work as there is here. *See NRAB Third Division, Award No. 31254*.

The Majority's decision is palpably erroneous in that it fails to acknowledge the distinction between agreement-represented supervisors and management officials. There is long-standing precedent that the exclusivity test is the appropriate standard in scope claims between represented employees, which was the case here. The Majority provided no explanation or justification for diminishing the scope of the Amtrak ARASA Agreement by equating an ARASA-represented employee with a manager here. This Award will have consequences for the scope of work Amtrak's ARASA-represented supervisors share with the BMW, causing potential disruption to Amtrak's long-standing practices and work assignments.

For these reasons, I respectfully dissent.

Angela Heverling
Angela Heverling

Jeanie L. Arnold
Jeanie L. Arnold