

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44878  
Docket No. MW-46533  
23-3-NRAB-00003-210489**

**The Third Division consisted of the regular members and in addition Referee Michael G. Whelan 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 Supervisor K. Snoots to direct work of agreement covered employees and provide roadway worker protection on south end number one (#1) track at the Ivy City Maintenance Facility located in Washington D. C. “on October 29, 2019 instead of calling and assigning Bridge and Building (B&B) Foreman R. Painter thereto (System File BMWE-158068-TC AMT).**
- (2) The appeal as presented by Vice General Chairman L. Owens, on March 6, 2020, to Lead Labor Relations Specialist, P. Clinton shall now be allowed as presented because said appeal was not disallowed in accordance with Rule 64.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Painter shall be compensated ‘\*\*\* ten hours straight time paid at the applicable B&B Mechanic Foreman rate of pay (\$35.33/hour) for a total of \$353.30, and that all lost credits and benefits normally due \*\*\*’ (Emphasis in original).**

**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 claim involves the Carrier's assignment of a supervisor to perform B&B Foreman duties on October 29, 2019. The Organization alleges that this work included directing a project and providing roadway worker protection for a BMW maintenance gang while they performed routine repairs on a blue light protection system on the south end of Track One at the Ivy Maintenance Facility. The Organization further alleges that the work performed by the supervisor violated the Agreement because it was not work of an incidental nature but is regular B&B Foreman work that is historically performed and thus reserved per the Agreement to the BMW. Finally, the Organization contends that its grievance must be sustained because the Carrier did not submit a timely response to the grievance.

The Carrier admits that it assigned a supervisor represented by The American Railway and Airway Supervisor's Association ("ARASA") to provide Road Worker Protection and minor direction to employees when a blue flag light needed to be repaired at a mechanical facility, but that in so doing it did not violate the Agreement because it has the managerial right to determine the type of supervision necessary for its employees to perform a job, and it was reasonable to utilize a supervisor already on duty for the unexpected job instead of calling in the Claimant on his rest day. Further, the Carrier contends that there was no violation of the Scope Rule because this was not work that was exclusively performed by or reserved to BMW-represented employees. Finally, the Carrier contends that the Organization's procedural argument must fail because the Carrier's responses were timely.

This case is about whether the Carrier violated the Agreement when it used an ARASA-represented supervisor to supervise BMW-represented employees without calling in a B&B Foreman. There are competing precedents on the property addressing whether the Agreement is violated when exempt supervisors supervise BMW-represented employees. In support of their respective positions, the Organization relies on Third Division Awards 28349 and 43897, and the Carrier relies on Third Division

Awards 38127 and 29110. For the reasons discussed below, the Board finds the rationale of these latter Awards to be persuasive.

In Third Division Award 28349, the Board sustained the Organization's claim that an exempt supervisor performed supervisory duties reserved to a Foreman after concluding that this was Agreement work that did not involve a dispute between which craft, subdivision of a craft, or classification is appropriate. Simply concluding that supervisory tasks performed by a BMW-represented Foreman is "Agreement work" does not properly consider the Scope and Work Classification Rules. As the Work Classification Rule states, a Foreman "directs and work with employees assigned under their jurisdiction," which means that this classification straddles the line between traditional Maintenance of Way work—such as that listed in the Scope Rule—and some limited supervisory tasks. It is appropriate to take notice that supervisory tasks have always been performed by other Amtrak employees and to acknowledge that the Scope Rule states that "[n]othing in this Agreement shall be construed to require the transfer of work now being performed by AMTRAK employees not covered by the Agreement to employees covered by this Agreement." Thus, the Scope Rule preserves the ability of supervisors to supervise BMW-represented employees regardless of whether foremen may also customarily engage in some limited supervisory tasks.

The better approach to cases involving supervisors performing supervisory tasks also performed by BMW-represented Foreman—as taken in on-property Third Division Awards 38127 and 29110—is to acknowledge that there is nothing in the Agreement that restricts the ability of supervisors to perform supervisory tasks. In Third Division Award 38127, the Board denied a Foreman's claim for overtime based on five reasons, three of which directly align with the facts of the instant case. Specifically, the Board held that: (1) there was nothing in any Rule in the Agreement requiring that job briefings only be performed by a Foreman; (2) a supervisor obtaining track foul time does not prove that the supervisor improperly performed Foreman's duties; and (3) issuing instructions is the kind of work that supervisors ordinarily perform. Similarly, in Third Division Award 29910, the Board denied the Organization's claim, finding that the Agreement could not be read to require assigning a BMW-represented Foreman to make board-up repairs to vandalized windows, which was done under the supervision of a General Foreman who held no seniority under the BMW Agreement. Under the rationale of these Awards, supervisors—whether they are exempt or represented—do not violate the Agreement when they perform the type of supervisory duties involved in this case.

The parties also disagree about whether the exclusivity test applies to this case. The Organization relies on Third Division Award 43897 for the proposition that an ARASA-represented supervisor performing traditional unit work does not present a dispute as to which craft, subdivision of a craft or classification is appropriate, and therefore the exclusivity test does not apply. It should be noted that this Award involved supervisors performing track inspections, not supervisory tasks as in the instant case. More importantly, the Board in that case relied on earlier precedent involving exempt supervisors. Specifically, the Board cited to Third Division Awards 28185 and 25991. In Third Division Award 28185, the Board found that it would be improper to assign work that had been performed by a member of the B&B department to “supervisory employees not covered by any agreement.” In Third Division Award 25991, the Board found the carrier violated the Agreement by assigning supervisors to perform work reserved to Organization members by the agreement, citing Third Division Award 15461, in which it was held that it was improper to assign work to supervisory employees “who are not covered by any collective bargaining agreement.” The instant case is distinguishable from the Awards relied on in Third Division Award 43897 because it involves an ARASA-represented supervisor, so it does present a dispute between represented employees about which craft or classification is appropriate to perform certain supervisory tasks. Under these circumstances, the Organization was required to prove that its members exclusivity perform the supervisory tasks involved, which it was unable to do.

Regarding the procedural issue of timeliness, the Organization argues that the Carrier did not timely respond to its appeal of the denial of the instant claim. Specifically, the Organization argues that it submitted its appeal on March 6, 2020, and did not receive the Carrier’s disallowance of the appeal until May 27, 2020, well after the sixty days provided in Rule 64 of the Agreement had expired. The Carrier argues that its response disallowing the Organization’s appeal was postmarked May 7, 2020, within the 60-day time limit. Further, the Carrier argues that the parties’ practice is to use the United States Postal Service for its appeal correspondence and it cannot be held responsible for delays that may have occurred following its mailing of the response.

The evidence establishes that the Carrier received the Organization’s appeal on March 9, 2020, and that the Carrier’s disallowance of appeal was sent via first class mail to the Organization on May 7, 2020—within the 60-day time limit in Rule 64—but it was not received by the Organization until May 27, 2020.

Recently, in Third Division Award 44722, the Board considered the issue of whether the “mailbox rule”—which looks at the date a document is deposited in the U.

S. Mail—or actual receipt is required to satisfy procedural filing requirements. The Board reasoned that,

[w]e find the better view is to follow the awards utilizing the “mailbox rule” requiring a finding that the Carrier’s denial was timely under Rule 14. Well-reasoned precedent quoted above aside, that finding is particularly appropriate given that the USPS continues to lengthen the number of days it considers to be timely for first-class mail.

The evidence of delay by the USPS in this case supports the reasoning above, and the Board is persuaded that the mailbox rule shall apply. For these reasons, the Carrier’s disallowance of appeal was timely and there is no procedural violation of the Agreement.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 10<sup>th</sup> day of March 2023.