

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39923
Docket No. MW-39756
09-3-NRAB-00003-060582
(06-3-582)

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
(
(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 called and/or assigned junior and Southern District Gang employees L. Kauffman and/or J. Moore to work a vacancy of division contractor protection foreman at or near the Pennsylvania Turnpike Bridge at Mile Post 98.63 on June 8, 9 and 10, 2005, instead of Division Foreman G. Sinopoli, Jr. (System File NEC-BMWE-SD-4541 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Sinopoli, Jr. Shall now be compensated a total of sixteen (16) hours at the overtime rate for the aforesaid loss of work opportunity.”**

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.

During the time period relevant to this dispute, the Claimant was assigned as a Foreman on Mid-Atlantic Division Gang G-622, headquartered at Lancaster, Pennsylvania, with a regular work schedule of Monday - Friday, 7:00 A.M. - 3:30 P.M., with rest days of Saturday and Sunday. L. Kauffman and J. Moore, each of whom was junior to the Claimant, were assigned as Foremen on Southern District Gang Z-012, headquartered at Lancaster, Pennsylvania, with a regular work schedule of Monday - Thursday, from 6:00 A.M. - 4:30 P.M., with rest days of Friday, Saturday and Sunday. B. Murray was assigned as Foreman to Mid-Atlantic Division Gang G-662, headquartered at Harrisburg, Pennsylvania, with a regular work schedule of Monday - Friday, 7:00 A.M. - 3:30 P.M., with rest days of Saturday and Sunday.

Murray was on vacation on Wednesday, Thursday and Friday, June 8, 9 and 10, 2005. The Organization contends that the Carrier violated Agreement Rule 55(a) by calling Messrs. Moore and Kauffman to fill the vacation absence on overtime rather than the Claimant. The Carrier responds that it did not use Moore or Kaufman on June 8 and 9, but used another Foreman who performed the work as overtime continuous with his regular assigned tour of duty. The Carrier avers that it used Kauffman on those days to perform contractor protection work at the Pennsylvania Turnpike Bridge during his regular tour of duty. The Carrier contends that the only overtime Kauffman earned on those days was 3.5 hours each day which was paid in error for his travel between his headquarters and the job site and which should have been paid at straight time rates. The Carrier states that it did use Moore to fill the vacation absence on June 10 and he did earn 12.5 hours of overtime from 5:30 A.M. to 6:00 P.M. The Carrier argues that on each of the dates, the Claimant was unavailable because his regular tour of duty overlapped with the vacation absence.

Rule 55 (a) of the Agreement provides:

“Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them, in order of their seniority.”

It is apparent that the days and hours of the regular tour of duty of the employee whose vacation created the absence were identical to the days and hours of the Claimant's regular tour of duty. Thus, the Claimant was not available to fill the vacation absence. Moore was available on Friday, June 10 because Friday was a rest day for him. Although Moore actually worked 12.5 hours of overtime on June 10, this does not alter the fact that the Claimant's regular tour of duty overlapped for eight and one-half hours of the overtime period worked by Moore. Availability is a requirement for entitlement to an overtime opportunity under Rule 55. The Claimant did not meet that requirement.

The claim for overtime on June 8 and 9 must be denied for a second reason. The contractor protection foreman work that Kauffman performed on those days was performed during his regular tour of duty. It was not overtime work. Regardless of whether the 3.5 hours of overtime that Kauffman received were paid in error, it is clear that those hours were worked continuous with his regular tour of duty. It is well-established that an employee may work the overtime continuous with his regular tour of duty regardless of Rule 55(a). See, e.g., Third Division Awards 32233 and 27090. Accordingly, the claim must be denied.

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 31st day of August 2009.