Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28180
THIRD DIVISION Docket No. MW-26873
89-3-85-3-646

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation - (Amtrak)
Northeast Corridor

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned a junior foreman to perform overtime service on April 28, May 2, 5, 6, 7, 14, 16 and 27, 1984, instead of calling and using Foreman M. A. Butler, who was senior, available and willing to perform that service (System File NEC-BMWE-SD-1045).

(2) Foreman M. A. Butler shall be allowed seventy-two and one-half (72 1/2) hours of pay at his time and one-half rate."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

During the period relevant to the dispute herein, Claimant held the position of Foreman in the Contractor Protection Gang G-742 which was headquartered at Penn Coach Yard, Philadelphia, Pennsylvania.

By letters dated June 2, 1984, Claimant filed a total of six Claims citing overtime worked by junior Foremen on the various days cited in the claims. The Claims were combined at the appellate level and are all now properly before the Board for determination.

The Organization maintains that in this case, the Claimant resided near his headquarters, normally and customarily performed Track Department Foreman's duties, and was available for service. Therefore, in the Organization's view, when opportunity for overtime work requiring a Track Department Foreman arose on the dates in question, Claimant was entitled to be called for the work in preference to employees who were junior to him. In support of its position, the Organization relies upon Rule 55(a), which states:

"PREFERENCE FOR OVERTIME WORK

(A) Employes residing at or near their headquarters 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."

Claimant clearly falls within the rubric of the foregoing Rule, the Organization insists. Carrier's contention that it was not obligated to call the Claimant because he did not "ordinarily and customarily" perform Maintenance Gang Foreman's work or Burro Crane Foreman's work, which comprises the bulk of the overtime performed, is erroneous and misleading and should be rejected by this Board. Furthermore, the Organization argues that its Claim for compensation at the overtime rate is proper since that is the amount Claimant would have received had he been properly assigned to perform overtime service. Numerous Awards are cited by the Organization on the issue of remedy, all holding that the applicable rate is that which the employee would have received had he performed the work.

Carrier has advanced several arguments in support of its contention that this Claim should be denied. Because we find to partially uphold the Claim, we will address each of the Carrier's contentions in turn and discuss why they are deemed unpersuasive.

The Carrier's first argument is based upon what it perceives to be a procedural flaw in the processing of the Claim. When the six Claims were initially filed by the Claimant, Carrier notes that the Claims failed to cite any rule which had allegedly been violated. The rules belatedly offered at the second level of processing on the property were improperly submitted in an attempt to perfect the instant Claim, Carrier submits, and therefore, the Board should dismiss the Claims as fatally flawed ab initio.

We do not agree with Carrier's position nor do we find Third Division Award 10537 to have any application to the matter herein. In that case, the Organization presented before the Board a claim that was different than the one handled on the property. That is certainly not the case here. The original Claims all implicitly alleged a Rule 55 violation; that the Carrier fully understood the nature of the Claim is evidenced by the Division Engineer's answer at the first step, in which he maintained that the assigned overtime fell properly "under the guidelines established under Rule 55 of the current agreement." We find that the mention of Rule 55 in the second level appeal was by way of clarification rather than an enlargement of the substance of the Claim. Accordingly, the Claim will not be dismissed based on any procedural infirmity.

The Carrier's second argument goes to the merits, and it is, essentially, that Claimant is not entitled to the work claimed because he did not ordinarily and customarily perform service such as that which was performed by the Foremen junior to him. In addition to the fact that the record is devoid

of any factual predicate which would substantiate that contention, we note that Carrier is asking the Board to accept the notion that Carrier can assign overtime service in connection with foreman positions on the basis of the character or composition of the gang involved. We find nothing in the rules, however, that makes a distinction among a maintenance gang foreman or a contractor protection foreman or a burro crane foreman. To the contrary, the Work Classification Rule states that the description of a foreman's duties is as follows:

> "1.(a) Foreman - Directs and works with employes assigned under their jurisdiction."

In addition, notwithstanding Carrier's attempts to distinguish its position taken in prior cases, it appears that Carrier has previously maintained that the position of foreman in a contractor protection gang is not a separate and distinct classification outside the scope of the Agreement. We must conclude that absent any evidence that the Work Classification Rule distinguishes among the positions of foremen based on the composition of the gang, and absent any particular evidence that the practice is somehow contrary to the Rule, the Carrier violated Rule 55 when it assigned junior foremen to perform the work in question. The only exception is the Claim which requests overtime pay for May 14, 1984, when an employee performed the overtime in question. According to the Carrier, the work performed by this employee on that date was a continuation of his regularly assigned duties which commenced on his regular tour of duty. As the Organization has offered no rebuttal or argument on that point, we will deny that portion of the Claim.

With respect to the remaining Claim dates, we agree with the Carrier, based on our review of the record, that on AMTRAK properties, the prevailing practice is to pay straight time for missed overtime work. We will sustain the Claim for April 28, May 2, 5, 6, 7, 16 and 27, 1984, on that basis.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1989.

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
AWARD 28180, DOCKET MW-26873
(Referee Goldstein)

It is evident in reading this Award that the Majority reached into a totally inapplicable earlier case for its reasoning here while ignoring the very essence of this case, namely, who "ordinarily and customarily" performed the disputed work?

The Majority improperly shifted the focus in this case from governing Rule 55 to the Work Classifications Rule. The Majority noted that "...Carrier has previously maintained that the position of foreman in a contractor protection gang is not a separate and distinct classification outside the scope of the Agreement." The Majority apparently refers to Third Division Award 27072 involving this same Claimant. In that case the Work Classifications Rule was a relevant consideration since the Claimant contended in that case that he had an exclusive right to perform contractor protection to the extent that he purportedly had a demand right to be called in on overtime to do it. He submitted a claim because an on-duty Foreman flagged while he was off duty.

The issue in that earlier case was whether or not the contractor flagging had to be done on overtime and by the Claimant. The Carrier properly prevailed in that case. Even if there were a work classification entitled "Contractor Protection Foreman," the fact is that the Scope Rule plainly states that, "The listing of work under a given

classification is not intended to assign work exclusively to that classification. It is understood that employees of one classification may perform work of another classification subject to the terms of existing rules or agreement between the parties hereto."

The calling of overtime under Rule 55 hinges on more than an employee's seniority standing in a work classification as the Majority held in this Award. Certainly, if this had been the parties' intentions when they framed the Rule, it would have been simple enough to say that, without reference to who "ordinarily and customarily" performs the work. The Rule, as the parties framed it, and as it has been applied on the property both since and before Amtrak's ownership, sifts out of the work classification those employees who "ordinarily and customarily" perform the work before involving seniority preference "...on work ordinarily and customarily performed by them, in order of their seniority." It is well established that every Rule, phrase, and/or word in an Agreement is to be accorded significance wherever possible.

Hence, and contrary to the Majority's finding, the "character or composition" of the gang involved is not only entirely relevant, but is the first consideration to be made. Most of the contractor protection gangs on Carrier's

property are made up of a Foreman with one Trackman. The Foreman flags. His ordinary and customary work is substantially different from that of a Foreman leading a division maintenance gang, or a Foreman in a one-man track inspection gang, or a Foreman in a specialized district (not assigned fixed headquarters) production unit, though they all come from the same Track Foreman seniority roster. Further, the Majority seeks "factual predicate" for an undisputed fact in this case. There is no dispute that Claimant did not ordinarily and customarily perform the work in question.

The application of this Award as written would be grossly contrary to the intent and clear language of Rule 55 and the practice which has surrounded this Rule since its earliest days. We dare say that neither party to this dispute would desire the Rule to be applied in the manner contemplated by this Award since employees have certainly come to understand that they will receive preferential consideration for overtime on the work they ordinarily and customarily perform, if they are qualified and available, in the order of their seniority.

By ignoring clear language in Rule 55, the Majority has attempted to change the Agreement and exceeded this Board's

authority. With the exception of its finding that on AMTRAK properties the prevailing practice is to pay straight time for missed overtime work, this Award is palpably erroneous and lacks any precedential value.

Accordingly, we vigorously dissent.

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M. C. Lesnik

M. W. Fingerhut
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