Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29259
THIRD DIVISION Docket No. MW-28204
92-3-87-3-791

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 Agreement was violated when the Carrier assigned junior B&B employes T. Love and R. Stidham instead of B&B employes O. Lam and R. Barr to perform overtime service on May 6, 1986 (System File NEC-BMWE-SD-1574).

(2) The claim* as presented by Vice-Chairperson N. B. DiStefano on May 21, 1986 to Division Engineer B. F. Mitchell shall be allowed as presented because Division Engineer Mitchell failed to timely disallow said claim as contractually stipulated in Rule 64(b).

(3) As a consequence of Parts (1) and/or (2) above, Claimants R. Barr and O. Lam shall each be allowed six (6) hours of pay at their respective time and one-half rates.

*The letter of claim will be reproduced within our initial submission."

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.

This claim charges that Carrier improperly assigned two junior employees, rather than the Claimants, to perform overtime service on May 6, 1986. The Organization contends that the assignment involved overtime service to which the Claimants were entitled pursuant to Rule 55, which states:

"RULE 55

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.

(b) The provisions of this Rule 55 will not apply to employes at locations where it has been agreed to stagger the work week in accordance with the provisions of Rule 38; employes at work during their bulletined working hours, may be used in emergencies on other than their own section and may complete such emergency work without being considered as violating the seniority rights of employes assigned to the section involved who are off duty on their regular assigned rest days.

(c) When it is necessary to call employes for service in advance of their bulletined working hours, or after men have been released from work commenced during bulletined hours, the same preference will be given on rest days as on other days to employes residing at or near headquarters who are qualified and available."

Before addressing the merits of the claim, we will first dispose of the Organization's contention that Carrier violated the 60-day time limit for the disallowance of an initial claim as set forth in Rule 64:

"(b) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the designated officer of AMTRAK authorized to receive same, within sixty (60) days from the date the employe received his pay check for the pay period in which the alleged shortage occurs.

Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of AMTRAK as to other similar claims or grievances.

> (c) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of AMTRAK shall be notified in writing within that time of the rejection of his decision. Failing to comply with the provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of AMTRAK designated for that purpose. (Emphasis added)

The claim here at issue was submitted by the Organization by certified letter dated May 21, 1986. The return receipt was signed on Saturday, May 25, 1986, by a Baggage Room employee. The Organization asserts that since the Division Engineer's subsequent response denying the claim is dated and postmarked July 25, 1986, the denial is untimely under Rule 64 and therefore the claim must be allowed as presented.

Carrier denies that Rule 64 was violated, arguing that the Division Engineer, the officer authorized to receive the claim, did not receive the claim until Monday, May 27, 1986, inasmuch as his office was not open for business on Saturday or Sunday, May 25 and 26, respectively. Carrier contends that the claim was not actually received or "presented" until May 27, 1986, the first day on which his office was open for business following the receipt of the certified mail by a Baggage Room employee. Hence, Carrier maintains the July 25, 1986 reply to the claim fully complied with the 60-day time limit provision of the Agreement.

After careful consideration of the issue, we find Second Division Award 8268 directly on point. Citing a long line of earlier precedent Awards, the Board concluded that it is the date of receipt by Carrier's designated official that is determinative for the purpose of calculating timely disallowance of the claim. We concur with that view, as it is our opinion that any other conclusion would render superfluous the specific language of Rule 64 which requires that claims be presented "to the designated officer of Amtrak authorized to receive same ...." Accordingly, we find that the claim was timely disallowed.

With respect to the merits of the claim, the Organization's position is predicated on the assertion that Claimants should have been used for overtime solely on the basis that they were senior to the employees who were actually used on an overtime basis, a matter covered under paragraph (a) of Rule 55.

Carrier, however, denied any Agreement violation, pointing out that the two junior employees had been assigned to a project when the need arose to obtain additional materials from a supplier in connection with that project. Carrier submits that even if it could have been anticipated that the assignment would entail overtime, Carrier was not required to remove Claimants from their own long-term project solely for the purpose of affording them the overtime opportunity.

Carrier has cited Third Division Award 26385 as dispositive of the instant claim. In that case, this Board concluded that there was sufficient proof that Rule 55 had historically been applied to permit Carrier to "assign overtime work to employes who were doing such work in their normal tour of duty." It was also noted that "the Organization did not refute Carrier's arguments, either about historical establishment of Rule 55, or its application."

This case stands on a very different footing, however. Our review of the record reveals no evidence or argument by Carrier, regarding past practice during the handling of the dispute on the property. Any new or additional arguments raised by Carrier for the first time in its Submission before this Board thus have been waived. That being the case, we find Award 26385 distinguishable on its facts.

Rule 55 specifically states that employees residing at or near their headquarters will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily performed by them in order of their seniority. The Organization established these requisites as a prima facie matter with respect to the two Claimants. Carrier, on the other hand, failed to offer any proof, either in the way of contractual support or past practice, to justify its position that it is entitled to assign overtime work on the basis of who was doing the work in a normal tour of duty, rather than in accordance with seniority as set forth in Rule 55.

The claim, therefore, will be sustained, but only for compensation at the pro rata rate.

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 12th day of June 1992.

CARRIER MEMBERS' CONCURRING
AND DISSENTING OPINION
TO
AWARD 29259, DOCKET MW-28204
(Referee Goldstein)

We concur with the Majority's finding that the Carrier timely disallowed this claim and that the Organization's request for payment at the punitive rate is excessive and improper, particularly given the substantial volume of precedent on the subject between the parties. We dissent, however, to the Majority's finding in favor of the Organization's inapplicable and unsupported arguments with respect to the merits of the case.

The Majority's decision that the Carrier's position on the merits fails for lack of proof runs counter to well-established arbitral principles and the particular facts of this case. Among the more critical principles and facts overlooked are:

1. The burden of proving a claim is on the petitioner.

2. The Carrier asserted in the handling on the property, without refutation by the Organization, that Rule 55 is not even dispositive here, since the core issue is how the Carrier makes its daily work assignments. Citing Third Division Award 26385 (on the property) the Board held in Award 27090 that Rule 55

> "...does not support the view that seniority status must be followed simply because work during regular hours may or may not lead to completion during overtime."

3. It is an undisputed fact that the overtime claimed ran continuous with Mr. Stidham's and Mr. Love's tour of duty. In this regard, the Majority apparently overlooked the long-accepted understanding that overtime continuous with the tour goes to the person who performed the work during the tour. In support of its position, the Carrier set forth in the record a November 23, 1982 letter from former General Chairman F. J. Lecce, wherein he stated:

> "The Organization has consistently supported Carrier's right to assign employees who normally and customarily perform this work as

> a continuation of daily regularly assigned duties in order to complete such daily assignment, and on overtime calls for an emergency."

Notwithstanding, even if the overtime had been anticipated, which it was not, it was not even physically possible to replace Messrs. Stidham and Love with the senior people because Stidham and Love were somewhere on the road between Wilmington, Delaware and Connecticut at the time they went on overtime. Given the facts as summarized by the Majority, it is obvious the Majority did not have a clear understanding of the facts in this case.

4. By dismissing Award 26385 as inapplicable, the Majority dismissed two key aspects of Rule 55 which are of critical interest to this case: 1) the validity of the parties' historical practice, as noted above with respect to overtime continuous with one's tour of duty; and 2) the Rule's controlling emphasis, granting employees overtime preference to work "ordinarily and customarily performed by them." Rule 55 gives consideration to seniority only after the pool of those who ordinarily and customarily perform the work is assembled. On-property Third Division Awards 28782 and 26908 (adopted subsequent to the date this case was argued) likewise support the definition of "ordinarily and customarily" which applied here.

5. Precedent should not be lightly regarded as it endangers the prompt and orderly settlement of disputes on the property as contemplated by the Railway Labor Act. In this regard, see Second Division Award 3991, wherein the Board held:

> "We are aware of the fact that prior Awards of this or any other Division of this Board are not binding upon us in the same sense that authoritative legal decisions are. Nevertheless, all Divisions of this Board have consistently held that, if a dispute involves the same controlling facts and the same contractual provisions as were submitted for adjudication in a previous dispute, the Award in the prior case will generally be followed, except when such Award is shown to be glaringly erroneous or substantially unfair. * * * The rationale underlying those rulings is that in the interest of stable and satisfactory labor relations identical rules must necessarily be given like interpretations. Otherwise, employes doing the same work and covered by the same labor

agreement would not be afforded the benefit of equal treatment and equal protection under the law. Moreover, general adherence to previous rulings, except where deviation therefrom is warranted on the basis of the above indicated exceptions, signifies that our rulings are based on reason and intended to exclude further litigation. They are not merely random judgments indefinitely inviting further litigation."

For the reasons herein stated, we can only consider Award 29259 a maverick, without precedential value, and we dissent accordingly.

Michael C. Lesnik
M. C. LESNIK

M W Fingerhut
M. W. FINGERHUT

Robert L Hicks
R. L. HICKS.

P V Varga
P. V. VARGA

James E. Yost
J. E. YOST

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRING
AND DISSENTING OPINION
TO
AWARD 29259, DOCKET MW-28204
(Referee Goldstein)

Without taking specific exception to the ruling on the procedural issue raised and without addressing the application of the appropriate remedy but taking strong exception to the ruling in this case, I only need point out that the arguments raised in the response were the same as those raised by the Carrier in its submission. The Majority ruled that:

> "This case stands on a very different footing, however. Our review of the record reveals no evidence or argument by Carrier, regarding past practice during the handling of the dispute on the property. Any new or additional arguments raised by Carrier for the first time in its Submission before this Board thus have been waived. That being the case, we find Award 26385 distinguishable on its facts."

Respectfully submitted,

D. D. Bartholomay
Labor Member