

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30448
Docket No. MW-29132
94-3-89-3-570

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 employees O. Roth, J. Smith and V. Palazzo instead of senior B&B employees R. Palmieri, A. NiCastro and A. Mancuso to perform overtime work on the Spuyten Duyvil Bridge on July 29 and 31, 1988 (System File NEC-BMWE-SD-2332).
- (2) The Agreement was also violated when the Carrier assigned junior B&B employees O. Roth, J. Smith and A. Brown instead of senior B&B employees R. Palmieri, V. Totalli and D. Murphy to perform overtime work on the Spuyten Duyvil Bridge on July 23, 1988 (System NEC-BMWE-SD-2311).
- (3) As a consequence of the violation referred to in Part (1) above, Messrs. R. Palmieri, A. NiCastro and A. Mancuso shall each be allowed pay at their respective rates for twenty-six and one-half (26.5) hours.
- (4) As a consequence of the violation referred to in Part (2) above, Messrs. R. Palmieri, V. Totalli and D. Murphy shall each be allowed pay at their respective rates for sixteen (16) hours."

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.

At the relevant time, Claimants held positions as B&B Mechanics on gangs headquartered at Penn Station, New York, within the New York Division working Monday through Friday. On the claim dates, B&B Mechanics junior to Claimants who were headquartered at Newark, New Jersey (also having weekends off) were called to perform weekend overtime work on the Spuyten Duyvil Bridge. Claimants and the junior employees were all in the same seniority district (the New York Division). According to the Carrier, Mechanics headquartered at Newark have performed all straight time and overtime work on the Spuyten Duyvil Bridge (which is not on the Carrier's main line but is a moveable bridge which connects the northern tip of Manhattan with the Bronx) since that bridge was acquired by the Carrier from Conrail in 1987. According to the Organization, Claimants' headquarters were closer to the job site. This claim is on behalf of the senior Claimants for the lost overtime opportunities.

Rule 55(a) states:

"Employee 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."

Availability and greater seniority of Claimants are not in dispute. The question here is whether the work assigned to the junior employees was "work ordinarily and customarily performed" by Claimants.

In Third Division Award 29720 between the parties, the phrase in dispute in Rule 55 was discussed [emphasis in original]:

"The Organization and the Carrier agree that overtime work at the end of a shift properly belongs to those employees already assigned. The Organization contends that this does not apply where the work is on a following workday. The Carrier on the other hand, cites previous instances in which the work concerned a continuing project, as here, and the same employees were retained for overtime.

The phrase "work ordinarily and customarily performed" is not precise. It can refer to the type of work, which would clearly encompass the Claimants herein. Alternatively, it can be interpreted to refer to the continuation or completion of such work. The Board concludes that, in the particular circumstances here under review, the Carrier's interpretation is not in violation of Rule 55 (a).

... The Board finds the continuation of work on a long-term project cannot unqualifiedly be termed a "discrete" assignment."

This record does not show that the work involved in this case was a specific "continuation or completion" of work by the junior employees based at Newark. While on the property the Carrier asserted that "These B&B employees headquartered at Newark, have been assigned to perform work on the Spyten [sic] Duyvil Bridge on a straight time basis since August, 1987", that statement only shows that the junior employees have worked on the bridge in the past. That statement (nor any other evidence in this record) does not show that the overtime work in question was a "continuation or completion" of specific work required to be performed by the junior employees. Instead, the overtime work on the dates in question appears to be a discrete assignment on the bridge. The work involved therefore appears to be the "type" of work performed by the class of employees involved in this dispute. Third Division Award 29720. As such, Rule 55 is clear--seniority prevails in the assignment of that work.

Nor do we find in this case that the record supports a conclusion that because the Newark based employees have worked on moveable bridges in the past that all overtime work on moveable bridges should attach to those employees irrespective of seniority. Assuming that such division of work is accurate (an assertion disputed by the Organization) this record does not sufficiently demonstrate that the Newark based employees possessed any special skills necessary for the overtime work involved which were not possessed by the senior employees headquartered at Penn Station that would render the Penn Station employees unqualified to perform the work in question.

The division of work may be administratively efficient. But, when it comes to overtime, Rule 55(a) is clear - "work ordinarily and customarily performed by them" is to be assigned "in order of their seniority." Claimants "ordinarily and customarily performed" the type of work involved in this dispute - bridge work. In this case, Claimants' seniority required that they be given the overtime bridge work ahead of the junior Newark based employees. This Board cannot change that mandate.

With respect to the remedy, the Carrier asserts that the claimed amounts of compensation are excessive. In order to make Claimants whole for the lost overtime opportunities, Claimants shall be compensated at the applicable overtime rate consistent with the number of hours worked by the junior employees on the dates set forth in the claim. During handling on the property, that portion of the claim concerning Claimant Totalli was withdrawn by the Organization because the employee allegedly working in Totalli's place did not work on the day in question. Consistent with the Organization's position, this award shall therefore not apply to Totalli.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
AWARD 30448, DOCKET MW-29132
(Referee Benn)

The Majority's interpretation of Rule 55 is flawed. Enough said about the merits of the disputes.

More importantly, so as to ensure that there is no misunderstanding, the remedy directed by the Majority in this dispute is at the pro rata rate. Such remedy, of course, is consistent with prior Awards on this property, as well as with the remedy requested by the Organization, not only in its handling of the disputes on the property, but in its Statement of Claim before this Board.

Each of the following Awards decided that payment for lost work opportunity is made at the pro rata rate under this Agreement. This is a settled issue on this property.

Third Division Awards

28796	Stallworth	27150	Dennis	27089	Marx
28349	Marx	27149	Dennis	27088	Marx
28181	Goldstein	27148	Dennis	26534	Benn
28180	Goldstein	27147	Dennis	26456	Roukis
27701	Fletcher	27146	Dennis	26235	Gold

Public Law Board Awards

PLB 3932, Award 14 Zumas
PLB 4549, Award 1 Kasher

In Third Division Award 26534 Referee Benn held:

"[W]e are compelled to conclude that since 1976 an interpretation has evolved by litigation and practice wherein the remedy for an improper overtime assignment under this Agreement on this property is to provide for payment in accord with the Carrier's position at the pro rata rate rather than the punitive rate."

On the property, the two claims respectively requested:

"Therefore, the organization is requesting that all of the claimants mentioned be paid a total of (16) sixteen hrs. at the current pro-rata rate." (Emphasis added)

and

"Therefore, the organization is requesting that all of the claimants mentioned be paid a total of (26 1/2) twenty six and one half hrs. at the current pro-rata rate." (Emphasis added)

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO AWARD 30448, DOCKET MW-29132

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In its Statement of Claim before this Board the Organization requested that the Claimants be paid at their "respective rates." The Organization did not request payment at the punitive rate.


Michael C. Lesnik


Martin W. Fingerhut


Paul V. Varga

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
AWARD 30448, DOCKET MW-29132
(Referee Benn)

The award in this docket is correct and nothing contained in the Dissent detracts therefrom.

The Majority considered the arguments and evidence raised by each party, applied Rule 55 to the facts and properly found for the Organization. There is no need in this response to address the Carrier Members' argument over the proper remedy for the Carrier's violation of the Agreement. The remedy provided by Award 30448 is clearly and unmistakably expressed in the Findings as follows:

"*** Claimants shall be compensated at the applicable overtime rate consistent with the number of hours worked by the junior employees on the dates set forth in the claim. ***" (Underscoring added)

Award 30448 was adopted by the Third Division on September 13, 1994. Said award is final and binding upon both parties. The remedy directed by the Majority in Award 30448 is at the overtime rate. The pro rata rate is not the overtime rate. There can be no misunderstanding.

Respectfully submitted,



G. L. Hart
Labor Member