Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32223
Docket No. MW-31302
97-3-93-3-230

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior employe W. Pettiway to perform overtime service (watchman protection duties) for the tie gang in the Philadelphia Subdivision on August 26, 29 and September 4, 1991 (System File NEC-BMWE-SD-3031 AMT).

(2) The Agreement was violated when the Carrier assigned junior employes T. Gardner and P. Carey to perform overtime service (watchman protection duties) for the tie gang on September 10, 1991 (System File NEC-BMWE-SD-3032).

(3) The Agreement was violated when the Carrier assigned junior employes W. Pettiway, T. Gardner, P. Carey, D. Alley and D. Hawkins to perform eight (8) hours of overtime service on the 6th Street Bridge on September 30, 1991 (System File NEC-BMWE-SD-3034).

(4) As a consequence of the aforesaid violation, Claimant L. Holt shall be allowed nineteen (19) hours' pay at his time and one-half rate.

(5) As a consequence of the aforesaid violation, Claimants E. Asbury and G. Richardson shall each be allowed seven (7) hours' pay at their respective time and one-half rates.

(6) As a consequence of the aforesaid violation, Claimants J. Hayward, J. Vasquez, A. Hernandez, J. Crandley and R. Behrmann shall each be allowed eight (8) hours' pay at their respective time and one-half rates."

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.

The instant dispute was handled as three separate claims on the property, and consolidated for hearing and decision before the Board. The Claimants are Trackmen or Truck Drivers who regularly worked from 7:00 A.M. to 3:00 P.M. An exception is Claimant J. Crandley, whose special circumstances will be addressed below. All Claimants established and hold seniority in their respective classifications within the Maintenance of Way and Structures Department.

The cited employees who performed the overtime work in question are Trackmen or Truck Drivers who regularly worked from 3:00 P.M. to 11:00 P.M. The claims are for work the cited employees began during their normal tour and continued performing after their tour had ended.

The first claim was made by Claimant L. Holt, who holds superior seniority to W. Pettiway. On August 26, 29 and September 4, 1991, the Carrier assigned junior employee Pettiway to perform overtime service (Watchman protection duties) for the tie gang in the Penn Coach Yard on the Philadelphia Substation, in Philadelphia, Pennsylvania. Pettiway performed 19 hours of overtime service in the course of these assignments.

The Organization asserts that the character of work performed by a Watchman is work which is ordinarily and customarily performed by Claimant Holt, who was available, willing, able and qualified to perform the disputed service had he been called and assigned thereto.

The second claim was filed on behalf of Claimants E. Asbury and G. Richardson, who hold superior seniority to employees T. Gardner and P. Carey. On September 10, 1991 the Carrier assigned junior employees Gardner and Carey to perform overtime service (Watchman protection duties) for the tie gang in the Penn Coach Yard on the Philadelphia Substation, in Philadelphia, Pennsylvania. Messrs. Gardner and Carey each performed seven hours of overtime service in the course of this assignment.

The Organization asserts that the character of work performed by a Watchman is work which is ordinarily and customarily performed by Claimants Asbury and Richardson, who were available, willing, able and qualified to perform the disputed overtime service had they been called and assigned thereto.

The third claim was filed on behalf of Claimants J. Hayward, J. Vasquez, A. Hernandez, J. Crandley and R. Behrmann. The Claimants hold superior seniority to employees W. Pettiway, T. Gardner, P. Carey, D. Alley and D. Hawkins. On September 30, 1991 the Carrier assigned junior employees Pettiway, Gardner, Carey, Alley and Hawkins to perform overtime service renewing the 6th Street Bridge at Philadelphia, Pennsylvania. Messrs. Pettiway, Gardner, Carey, Alley and Hawkins each performed eight hours of overtime service in the course of this assignment.

The Organization asserts that the character of work performed on the bridge renewal assignment is work which is ordinarily and customarily performed by Claimants Hayward, Vasquez, Hernandez, Crandley and Behrmann, and the Claimants were available, willing, able and qualified to perform the disputed overtime bridge renewal service had they been called and assigned thereto.

With respect to each claim, the Organization argues that the Claimants were entitled to perform the disputed overtime service, and that the Carrier denied the Claimants the opportunity to perform service in violation of Rules 53 and 55 of the Agreement when it failed to call and assign them thereto. The Organization makes numerous other arguments, including: the Carrier's assertions regarding absenteeism are invalid and unproven; the overtime service performed on the 6th Street Bridge was

planned; the Carrier's assertions regarding the continuity of the disputed overtime service and the junior employees' regular assignment is invalid and without merit; the Carrier failed to prove its assertions that the claim was excessive; the alleged existence of a track emergency is not supported by the record; the assertion regarding the necessity of avoiding train delays is invalid and without merit; and the Carrier's position regarding Claimant Crandley's availability is invalid and without merit. The Organization urges the Board to sustain the claims and to award compensation at the overtime rate.

With respect to the claims of Messrs. Holt, Asbury and Richardson, the Carrier made numerous assertions during its handling of the disputes on the property, including: the disputed work was begun during the regular tour of the cited employees who continued the work on overtime at the end of their respective shifts; the overtime was the result of an absenteeism-induced manpower shortage and the need for adequate Watchman protection for the tie gang; and the Agreement does not require the Carrier to base straight time assignments on the probability of overtime occurring. The Carrier also took exception to the request for payment at the punitive rate.

With respect to the claims filed by Messrs. Hawkins, Vasquez, Hernandez, Crandley and Behrmann, the Carrier contended that the junior employees who performed work on the 6th Street Bridge project began the work during their regular tours and were continued on overtime; that the overtime was the result of an absenteeism-induced manpower shortage, and the need to complete the project and restore the track to service. The Carrier asserted that the Agreement does not require the Carrier to base straight time assignments on the probability of overtime occurring. The Carrier took exception to the request for payment at the punitive rate.

Special circumstances apply to the claim by J. Crandley for work done on September 30, 1991. Crandley is an Engineer Work Equipment (EWE) who is qualified to operate the multi-crane. Unlike the other Claimants, EWEs who are qualified to operate the multi-crane are a distinctly limited group. The Carrier asserts that in order to find an available qualified Multi-Crane Operator, it had to solicit employees from the 7:00 A.M. to 3:00 P.M. shift. Crandley was senior to the employee who ultimately was selected to perform the work.

By way of an affirmative defense for its selection of a junior employee instead of Crandley, the Carrier asserts that Crandley was asked if he was available. Crandley

allegedly responded to the Supervisor that he would "get back to him," but never did. The Carrier urges this Board to find that Claimant Crandley's inaction constituted a waiver of the work. The Carrier's version of these events was described in the Acting Division Engineer's December 12, 1991 response to Crandley's claim:

> "3. Mr. Crandley, on the morning of September 30, 1991, you were asked by Supervisor, R. McKinley and Assistant Supervisor, D. Hammond if you were available for the work. Your reply was that you 'would get back to them', which you never did, a junior employee was then scheduled for the work."

Both the Carrier and the Organization agree that a conversation did take place on September30, 1991 between Crandley and a Supervisor about Crandley's availability for the assignment, but disagree about the substance of that conversation. This establishes that, as to the claim of Crandley only, supervision was aware in advance that overtime work would be scheduled within Crandley's classification.

During the handling of the claim on the property, Crandley submitted a memorandum dated January 3, 1992 offering his version of the conversation:

> "In regard to the Carrier's response to my claim TK-22-91, please be advised of the following:
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> On the morning of 9-30-91, I was asked if I wanted to work on the bridge job that night. I replied that I would work the multi-crane, Mr. McKinley replied that he was just getting a list of available employees and that in fact he would get back to me in the afternoon.
>
> I heard nothing further and based on the Carrier's actions on 9-12-91 I went home at the end of my tour of duty."

Neither of the above two versions of the discussion between Crandley and supervision are corroborated by other independent evidence in the record. We find Claimant's statement to be more persuasive than the secondhand assertion from the Acting Division Engineer. The Carrier's affirmative defense therefore fails for lack of proof.

The Board therefore finds that the Organization met its burden of proof as to the claim of Crandley for eight hours of overtime work on September 30, 1991.

With respect to all other claims above, the Carrier argues that it has no contractual obligation to relieve junior employees whose straight time assignment evolves into an overtime assignment. If this position is correct, the other issues need not be addressed. The Organization objects on the grounds that this argument, to the extent it is applied to the claim on behalf of Messrs. Hayward, Vasquez, Hernandez, Crandley and Behrmann, was not made during the handling of the dispute on the property.

Based upon a careful review of the record, the Board finds that this objection by the Organization is without merit. The Carrier did raise this issue during the handling of the dispute on the property. In a letter dated December 12, 1991 from M.E. Simmers, Acting Division Engineer, to Claimant Crandley, Simmers stated: "All overtime incurred by the above [junior employees who performed the work] was consistent and continuous with their scheduled assignment of their regular tour of duty."

The Carrier argues that Rule 55 has been consistently applied to permit the assignment of overtime work to employees who were doing such work in their normal tour of duty, and that this long-standing application has twice been affirmed by this Board. The Carrier cites Third Division Award 26385, in which the Board stated:

> "[The Carrier] noted that Rule 55 had historically been applied to allow Carrier to proceed as herein disputed. Carrier was permitted to assign overtime work to employees who were doing such work in their normal tour of duty.
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> "The Organization did not refute Carrier's arguments, either about historical establishment of Rule 55 or its application."

Subsequently, in Third Division Award 27090, the Board cited Award 26385 and stated "... Rule 55 does not operate to impair the practice of permitting employees to complete a regular assignment when overtime is therewith required."

The Carrier established by convincing proof that the disputed overtime work evolved from work begun during the regular straight time assignment of the junior employees who continuously performed the work. The above Awards support the Carrier's decision to allow the junior employees to continue the work into overtime. A prior determination of the same issue between the same parties should control subsequent disputes between those parties. Accordingly, the instant claims must be dismissed, with the exception of the claim by J. Crandley.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 17th day of September 1997.