

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 35857  
Docket No. MW-32984  
01-3-96-3-372

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 Newark work zone Linemen J. Burkhimer, D. Burdick, I. Coston and D. Scherer to provide overtime service (Class ‘A’ protection work) within the Sunnyside Yard work zone boundaries at ‘E’ Yard, Penn Station, New York on January 16, 17, 19 and February 2, 1995, instead of assigning Linemen B. Kish and P. Sabol to perform said work (System File NEC-BMWE-SD-3529 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants B. Kish and P. Sabol shall each be allowed forty (40) 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 issue raised by this claim is whether the Claimants were part of a "gang" regularly assigned to Sunnyside Yard as contemplated by the Electric Traction Department (ETD) Work Zone Agreement (WZA), as amended October 1, 1987, and whether the disputed overtime assignment was made in compliance with said Agreement.

This claim involves the proper application of Rule 55, Preference for Overtime, as well as the ETDWZA, which provides, in pertinent part:

"3. Working zones on the New York Division for Electric Traction Department under Supervisor Electric Traction, New York, NY.

\* \* \*

Foremen Catenary, Foremen Substations, Gang Foremen Catenary, Gang Foremen Substations, Linemen, and Electricians, Newark, NJ.

Sunnyside yard to West End Union Interlocking MP 20.7

NOTE: When gangs are assigned to Sunnyside Yard, Newark territory will end at Tunnel Portal at Hackensack MP 3.

Gang Foremen Catenary, Gang Foremen Substations, Lineman and Electricians, Sunnyside Yard, NY.

Tunnel Portal at Hackensack MP 3 to Sunnyside Yard, Harold Tower.

Employees who feel the foregoing territory designations will affect their eligibility for overtime may, within five days from the date the agreement is posted, exercise seniority to an adjacent territory."

The Claimants hold advertised Lineman/Protection positions headquartered at Sunnyside Yard, with regular hours Monday-Friday from 7:00 A.M. to 3:00 P.M. Their duties include the protection of other than qualified personnel and apparatus in conjunction with contractor support on the 39th Street Bridge project. The four

employees assigned the disputed overtime in the E Yard at Penn Station, New York, between 9:00 P.M. and 7:00 A.M. were headquartered at Durant Yard in the Newark work zone. On the property the Carrier stated that because the Claimants had prior rights to all overtime associated with the 39th Street Bridge project, they revert to the bottom of the call list for any random overtime within the work zone.

**The Organization argues that, even if the Claimants reverted to the bottom of the call list for overtime within the Sunnyside Yard, New York, work zone, under both Rule 55 and the ETDWZA, they were still entitled to be called prior to employees working outside the work zone, here in the Newark, New Jersey, work zone. The Organization asserts that the ETDWZA clearly states that when gangs are assigned to Sunnyside Yard, as in the present case, the Newark territory ends at Hackensack MP 3, and does not encompass Penn Station, New York. On the property the Organization relied upon two letters sent by the Carrier's representatives in response to other claims indicating that the distribution of overtime is one of the primary reasons for the existence of work zones and give geographic meaning to the phrase "ordinarily and customarily" in Rule 55. It asserts that the Claimants were entitled to the overtime assignment and should be compensated at the overtime rate for such lost overtime opportunity, citing Third Division Awards 30448, 30586, 32226, 32371.**

**The Carrier contends that the Claimants did not constitute an ETD Linemen gang as contemplated by the WZA, because their protection assignments do not perform construction, repair and maintenance of the electric traction system. As there were no gangs assigned to Penn Station or Sunnyside Yard, the Carrier argues that the applicable work zone was extended to gangs headquartered between MP 20.7 and Sunnyside Yard, not just between Hackensack MP 3 and Sunnyside Yard. The Carrier asserts that the employees assigned to the overtime were working within the extended territory, and thus were entitled to the overtime assignment prior to the Claimants, who would have been below them on the call list for that territory because they had prior rights to 39th Street Bridge overtime only. Before the Board, the Carrier argues that the Claimants would not have been available for the overtime assignment because they could not have reached their regular assignment in Sunnyside Yard by 7:00 A.M. when the overtime was not completed until that time at Penn Station, and would have performed 18 continuous hours of work, creating a safety issue. Finally, the Carrier requests dismissal of this claim based upon the Organization seeking damages at the overtime rate, when it is well aware that the appropriate rate for a lost work**

opportunity on this property has been held to be the straight time rate, citing Public Law Board No. 4549, Award 1; Third Division Awards 27701, 28180, 28181 and 28349.

A careful review of the record convinces the Board that we need not reach the issue of whether Rule 55 entitled the Claimants to work the disputed overtime in order of seniority regardless of their bid to the 39th Street Bridge project and entitlement to all overtime on that project. On the property, the Organization did not voice any objection to the Carrier's placement of the Claimants at the bottom of the call list for random overtime within their territory in this case. The basis of the Organization's appeal was the fact that the Carrier assigned the disputed overtime to employees outside the work zone, not that the Claimants should have been considered above others within the work zone based upon their seniority. Further, we will not consider the Carrier's argument that the Claimants were "unavailable," because it was raised for the first time before the Board and not on the property as required.

After conference on the property, the Carrier contended that there were no Linemen gangs at Penn Station or Sunnyside Yard, thereby extending the work zone to include the Durant Yard/Hunter work zone. It asserted, without proof, that it was a customary practice to use employees in this zone for random overtime at Penn Station and Sunnyside Yard. There is no evidence of such a practice. However, the Organization never disputed that the Claimants were not members of a gang. A reading of the ETDWZA makes clear the work zone for Linemen headquartered in Newark, New Jersey, (the employees assigned the disputed overtime) is from Sunnyside Yard to West End Union Interlocking MP 20.7, but when gangs are assigned to Sunnyside Yard, the territory ends at Hackensack MP 3. The work zone for Linemen headquartered at Sunnyside Yard (the Claimants) is from Hackensack MP 3 to Sunnyside Yard, Harold Tower.

There appears to be little dispute that the Claimants would have preference for the overtime assignment over employees working outside the work zone in which the work takes place under Rule 55 and the ETDWZA. The Carrier contends that Durant Yard is within the extended boundaries of the Newark work zone which encompasses Penn Station. Because the Organization has the burden of proof in this case, and it failed to dispute either that there were no gangs assigned to Sunnyside Yard, the employees assigned the disputed overtime fell within the extended Newark work zone, or that the E Yard Penn Station overtime assignment was not within the boundaries listed in the ETDWZA for the Newark work zone, the claim must fail. The Organization

has not sustained its burden of proving that the Carrier's overtime assignment was outside the appropriate work zone, and thereby violated the Claimants' seniority right to overtime under Rule 55.

**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 18th day of December, 2001.**