

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37094
Docket No. MW-36875
04-3-01-3-484

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Electric Traction Substation Gang Foreman P. Stevenson to perform 'pre-determined' overtime service (processing transformer oil) at the Jericho Park Substation in the Odenton, Maryland work zone on June 13, 14 and 15, 2000 and instead assigned employees who held positions outside of said work zone (System File NEC-BMWE-SD-4054 AMT).
- (2) The Carrier violated the Agreement when it failed to call and assign Electric Traction Substation Electrician E. Wilson to perform 'pre-determined' overtime service (processing transformer oil) at the Jericho Park Substation in the Odenton, Maryland work zone on June 13, 14, 15, 16 and 17, 2000 and instead assigned employees who held positions outside of said work zone (System File NEC-BMWE-SD-4059).
- (3) As a consequence of the violation referred to in Part (1) above, Claimant P. Stevenson shall now be compensated for thirty (30) hours' pay at his respective time and one-half rate of pay.
- (4) As a consequence of the violation referred to in Part (2) above, Claimant E. Wilson shall now be compensated for fifty (50) hours' pay at his respective time and one-half rate of pay."

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.

This claim raises the issue of whether the Carrier violated Rule 55(a) and the Electric Traction (ET) Callout and Scheduled Overtime Procedures when it failed to canvas the Claimants for scheduled overtime work in connection with the continuous operation of an oil processing unit within their work zone and assigned four employees from outside the work zone for such pre-planned overtime. The Claimants had regular work schedules of Monday through Friday from 7:00 A.M. to 3:00 P.M. The continuous overtime assignment took place between June 13, 2000 commencing at 7:00 A.M. through June 17, 2000 ending at 11:00 A.M. The Claimants were scheduled to attend mandatory Engineering Training Camp from June 13 - 15, 2000 beginning at 8:00 A.M. There is a dispute of fact as to whether the training ended each day at 2:30 P.M. as contended by the employees, or 4:30 P.M. as alleged by the Carrier. The Carrier bypassed the Claimants for the overtime due to their unavailability to work the 12 hour shifts from 11:00 A.M. - 11:00 P.M. and 11:00 P.M. - 11:00 A.M., and Claimant Wilson's asserted lack of qualification to operate the oil processing equipment. The record reflects that the overtime was accomplished by a Foreman and an Electrician on each of two shifts, one actually occurring between 7:00 A.M. and 11:00 P.M., and the other starting at 9:00 P.M. and varying in end time between 7:00 A.M. on June 13, 9:00 A.M. on June 14 and 15, and 11:00 A.M. on June 16 and 17, 2000.

The Organization argues that the Claimants were both available to commence overtime after 3:00 P.M. on each day they attended training, because the training was completed by 2:30 P.M., so that each could have worked the 9:00 P.M. to 7:00 A.M. overtime shift. The Organization notes that Claimant Wilson did not

attend training class on June 16, 2000 and was available to work the overtime shift beginning at 9:00 P.M. regardless of when it ended on that date. The Organization relies upon the language of Rule 55 and the ET overtime procedure in asserting that the Claimants were entitled to a preference to this pre-determined overtime because it occurred within their work zones, and they were shown to be available and qualified to perform it. It contends that Wilson's statement that only one employee per shift was qualified to operate the oil processing equipment was unrebutted, negating the Carrier's assertion that he was not entitled to be called for this work. The Organization also argues that the Carrier presented no evidence that the mandatory training for the Claimants could not have been rescheduled to permit the Claimants to perform the overtime or the overtime assignment postponed one week until after the training class, relying upon Third Division Awards 13349, 14472, 14982, 30683 and 30867 for the proposition that availability for overtime cannot be defeated by the Carrier's assertion that the Claimants were scheduled elsewhere at the time. The Organization cites Third Division Awards 26508, 26690, 30448, 30586, 30660, 32223, 32226, 35495, 35642 and 36049 in support of its argument that this missed overtime opportunity for the Claimants should be compensated at the overtime rate.

The Carrier contends that it did not violate Rule 55(a) or the ET overtime procedures because both Claimants were unavailable for the overtime inasmuch as their scheduled mandatory training class conflicted with the shift hours worked on the continuous overtime assignment. The Carrier notes that the training commenced at 8:00 A.M. and was not completed until 4:30 P.M. each day, while the 12 hour overtime shifts ran from 11:00 A.M. - 11:00 P.M. and visa versa. Further, the Carrier asserts that Claimant Wilson was not qualified for either position assigned the overtime work because he was not qualified to operate the oil processing equipment as an Electrician and possessed no Foreman seniority. In the event the Board finds any merit to either of these claims, the Carrier notes that the remedy requested is excessive because any payment for missed overtime opportunities on this property is at the straight time rate, citing Third Division Awards 35495, 35642 and Public Law Board No. 4549, Award 1.

A careful review of the record convinces the Board that the issue raised by the Carrier concerning the Claimants' unavailability to work the pre-determined overtime in this case must fail. While the Carrier relied upon the anticipated scheduling of overtime on two 12 hour shifts between 11:00 A.M. - 11:00 P.M. and 11:00 P.M. - 11:00 A.M. in denying the claims, the record reveals that these were not

the actual shifts worked in performance of the Jericho Park oil processing project. The first shift worked consistently between 7:00 A.M. and 11:00 P.M. The Claimants did not contend that they were available during those work hours. However, the second shift which began at 9:00 P.M. had varied ending times, including one day at 7:00 A.M. and two days at 9:00 A.M. The Claimants were clearly available for an overtime shift between 9:00 P.M. and 7:00 A.M. while attending training, and there was no showing by the Carrier as to why the shifts on the other days could not have been adjusted slightly to accommodate this schedule, or the training started a little later to adjust to a 9:00 A.M. end of shift.

By this finding the Board is not saying that an employee can opt out of scheduled mandatory training if an overtime opportunity becomes available. However, under the facts of this case, where an employee is able to do both the training and the overtime with a minor adjustment of his work schedule, the Carrier should have considered this fact prior to bypassing the Claimants without giving them the opportunity to work overtime in their work zones in accord with the Rule 55(a) preference and the ET overtime procedures. Thus, Claimant Stevenson's claim has merit. In accord with the weight of authority on this property, he shall be compensated for 30 hours' pay at the straight time rate of pay for this missed overtime opportunity. Third Division Award 35642.

However, the Carrier defended against Claimant Wilson's entitlement to the disputed overtime assignment not only on the basis of his unavailability, but also on the basis of his qualifications. Wilson's statement does not dispute the Carrier's contention that he did not possess the qualifications to run the oil processing equipment needed in this assignment. Rather, his claim of entitlement is based upon the fact that only one of the two people working on the shift, a Foreman and an Electrician, needed to run the equipment and possess the qualification, and he was just as qualified as the other. The record is confusing on this point because the Carrier asserted that it was the Electrician who needed to possess the qualification, and Wilson's statement takes issue with the assignment of a Foreman to perform the actual work rather than supervisory responsibilities. Thus, on the state of this record, we are unable to find that the Organization sustained its burden of proving that Claimant Wilson possessed the necessary qualifications to perform the pre-determined overtime, thus deserving of preference under Rule 55(a). Accordingly, his claim is denied.

Form 1
Page 5

Award No. 37094
Docket No. MW-36875
04-3-01-3-484

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 21st day of July 2004.