

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37146
Docket No. MW-37005
04-3-01-3-640

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 Employes*
(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 B&B Mechanic D. Provence to perform overtime service (operate a Class 'B' vehicle) in connection with replacing a beam at King of Prussia Road on May 5, 2000 and instead assigned junior employee J. Guerino (System File NEC-BMWE-SD-4062 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Provence shall now be compensated for ten (10) hours' pay at the overtime rate.”

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 Claimant, the admittedly senior Mid-Atlantic Division B&B Mechanic, was entitled to the overtime assignment in dispute under the provisions of Rule 55. There is no dispute that both the Claimant and the employee assigned the overtime were qualified and available to perform the work that actually took place on May 5, 2000, which involved replacing a clearance beam brought to the work site by rail, rather than by trailer as initially planned due to the Carrier's failure to obtain the necessary permits, and required a Class "B" Commercial Driver's License (CDL), not a Class "A" CDL. The disputed overtime assignment was not a continuation of any regular assignment performed by either the Claimant or the junior employee and was work ordinarily and customarily performed by both of them.

The Organization argues that the clear language of Rule 55 gives the Claimant preference for the overtime work involved, because he was the senior available and qualified employee who ordinarily and customarily performed work of this nature, and this was a distinct assignment. It asserts that the Carrier kept changing its defenses when the Organization brought the facts to its attention, noting that a Class "A" CDL was not required since a Class "B" vehicle was the only one utilized from the outset, and that it was the Carrier's own malfeasance that prevented it from utilizing a Class "A" vehicle and that such change in plans was not as a result of some unknown or emergency situation. The Organization avers that the Claimant is entitled to receive ten hours pay at the penalty rate based upon this blatant violation of Rule 55, citing Third Division Awards 30660, 32223, 32226, 32371, 35642, 36049 and 36495.

The Carrier contends that it complied with Rule 55 when it made the initial overtime assignment because junior employee Guerino was the senior mechanic who was qualified to operate a Class "A" vehicle, which it intended to use at the time, and the Claimant was not so qualified. The Carrier argues that there was a sudden change of work method after the assignment was made, and that such change should not justify a finding of a violation of Rule 55 or the payment of penalty compensation. The Carrier also argues that the claim is excessive because the Board has held that the proper remedy for a lost overtime opportunity on this property is the pro-rata rate of pay, citing Third Division Award 35863.

A careful review of the record convinces the Board that the Organization met its burden of proving that the Carrier violated Rule 55 in this case. The Claimant met all of the requirements for obtaining a preference for this overtime assignment set out in Rule 55 - he was qualified, available, senior and this was worked he ordinarily and customarily performed. The Carrier never asserted that this was a continuation of a prior assignment. It was clearly distinct work. The Carrier's only defense was that it had planned to utilize a Class "A" vehicle for which the Claimant was not qualified to transport the beam to the job site when it made the initial overtime assignment, but later changed its plans due to its inability to obtain the appropriate permits. The Board is unable to accept the Carrier's failure to obtain the necessary permits as creating an emergency situation necessitating ignoring the Claimant's seniority entitlement under Rule 55. Clearly, the Carrier had knowledge prior to commencing the work that it would only be able to utilize a Class "B" vehicle, and it could have made the appropriate overtime assignment in accordance with the Agreement.

Having found that the Carrier violated Rule 55 in this case, the Board feels compelled by prior precedent on this property to limit the Carrier's liability to a payment of the lost ten hours of overtime work at the Claimant's pro rata rate of pay. See, Public Law Board No. 4549, Award 1 and Third Division Awards 36049, 35863, 35642 and 35495. Accordingly, the claim is sustained at the straight time rate of pay.

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 25th day of August 2004.