

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37150
Docket No. MW-37308
04-3-02-3-325**

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))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned ET outside contractor's equipment into either the North or South tunnel under the Hudson River on June 18, 25, July 2, 23, 30, August 6 and 13, 2000, instead of calling and assigning Track Foreman M. Cruz to perform the rest day overtime service in accordance with past practice (System File NEC-BMWE-SD-4092 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Track Foreman M. Cruz shall be allowed ten and one-half (10 1/2) hours' pay at his respective time and one-half rate of pay for each of the above-referenced dates."**

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 involves the Sunday night overtime work of piloting equipment on a project for replacement of tunnel lighting in New York. The Claimant is a Track Department Foreman of a maintenance gang at Pennsylvania Station working Monday through Friday from 7:30 A.M. to 4:00 P.M. There is no dispute that the Claimant has the necessary qualifications on the operating Rules and familiarization with the territory involved and was often used on Friday and Saturday night overtime to pilot equipment on this project, normally working 20 hours of overtime each weekend. The Carrier asserted that the Claimant was not used on Sunday nights for this overtime which began at 10:00 P.M. and was normally completed at 8:30 A.M., because such assignment would have made him unavailable to report for his regular tour of duty on Monday mornings. The Carrier also contended that this type of work was not exclusively reserved to the Track Foreman classification, although it was often filled by them, but was also performed by other department classifications and crafts. The Organization pointed out that the Claimant had worked many Sunday nights on overtime and still reported to his Monday morning assignment.

The Organization argues that because the piloting of an outside contractor's equipment has been ordinarily and customarily performed on overtime by Track Department Foremen, the Claimant was entitled to the Sunday night assignments under Rule 55 because he was the senior qualified employee in that classification in preference to the ET Department Electrician receiving this overtime, citing Third Division Awards 30448, 30660 and 32371. It notes that the Carrier's "practice" defense must fail for lack of proof, relying on Third Division Award 29259. The Organization points out that because the Carrier made no attempt to assign the Claimant this overtime or find a replacement for his regular assignment it cannot rely upon a belated questioning of his availability under Rule 55. It notes that the requested remedy was not made an issue on the property.

The Carrier contends that the Claimant was not available for these particular overtime assignments because they conflicted with his regular tour of duty, which

must be his first priority. It argues that availability must be viewed to mean situated so as to be able to cover the overtime from beginning to end and not to interfere with the employee's covering his own regular assignment. The Carrier asserts that it is not obligated under Rule 55 to offer an employee overtime that conflicts with his regular tour of duty and then attempt to find a qualified replacement for him on his regular assignment, thereby creating a vacancy by filling an overtime assignment. The Carrier also points out that the claim is excessive as it request payment at the penalty rate which has been held to be inappropriate on this property. Public Law Board No. 4549, Award 1.

A careful review of the record convinces the Board that the Organization has not sustained its burden of proving a violation of Rule 55 in this case. Initially we note that the piloting work here involved was not of the type that is customarily or ordinarily performed by either Track or ET Department employees during their regular tours of duty, and the fact that the Carrier chose to assign Track Department Foremen this overtime work a majority of the time does not equate to a finding that they customarily and ordinarily performed the work to give them preference over other employees under Rule 55. No practice was established by either the Carrier or the Organization in this regard. On the property the Carrier did defend against this claim by clarifying that it did not call the Claimant for this overtime assignment due to the conflict it would create with his reporting on time to his regular tour of duty, making him "unavailable" for this Sunday night overtime work, so we cannot accept the Organization's argument that it is precluded from raising such defense because it did not actually offer the work to the Claimant or attempt to find a replacement for him on his regular assignment.

Under the circumstances here involved, where the Claimant regularly was assigned this piloting overtime work on Friday and Saturday nights and where the Sunday night overtime he was alleged to have worked was not shown to conflict in hours with his regular assignment, we agree with the Carrier that it did not violate the language or intent of Rule 55 by determining that he was unavailable for these Sunday overtime assignments which were known to last ten and one-half hours in duration and would have prevented him from reporting to his regular tour of duty on time. The Board is of the opinion that the parties did not intend the Carrier to have to fill overtime strictly by seniority without regard for whether such assignment would conflict with an employee's regular work hours and create a

further vacancy which it would be required to fill. This is not the case where the Claimant was bypassed due to a hypothetical conflict with his working hours, or based upon his past conduct of rejecting offered overtime in certain circumstances. See, Third Division Award 30660. This was an ongoing project with regular weekend overtime piloting work, of which the Claimant often worked 20 hours a weekend, and the assumption that the Sunday assignment would last well into the beginning of the Claimant's shift was based upon past experience, and admitted by the Organization in crafting the remedy requested in this claim. In these particular circumstances, we hold that the Organization has not sustained its burden of proving a violation of Rule 55 in this case.

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 25th day of August 2004.