

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37658
Docket No. MW-37594
05-3-02-3-715

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 Mr. A. Urquhart to perform overtime service (watchman work) at Columbia Park Road on October 20 and 26, 2001, instead of Mr. G. Dellinger (System File NEC-BMWE-SD-4154 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Dellinger shall now be compensated for a total of twenty-five (25) 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 arises from overtime assignments made by the Carrier in the aftermath of September 11, 2001 when it instituted 24 hour terrorist watch duties at various key facilities throughout the Northeast Corridor. The Claimant is a Track Foreman with a scheduled tour of duty of Monday - Friday, 7:00 A.M. to 3:30 P.M. The Organization protests two overtime watchman assignments made to junior Foreman Welder Urquhart whose normal tour of duty was Sunday - Thursday, 9:30 P.M. to 6:00 A.M. The Claimant seeks payment at the overtime rate for work on Saturday, October 20, 2001 between 8:00 P.M. and 8:00 A.M. (12 hours) and on Friday, October 26, 2001 between 8:00 P.M. and 9:00 A.M. (13 hours).

The record reflects that the Claimant worked his normal schedule on October 19 (7:00 A.M. to 3:30 P.M.) and was called to perform 14 hours of overtime beginning at 10:00 P.M. and ending on October 20 at noon. He again was called for overtime on October 21 and worked between 10:00 A.M. and 11:30 P.M. Thus, the Claimant worked a total of 27.5 hours of overtime that weekend. Urquhart worked 12 hours of overtime. The Claimant was not scheduled to work on October 26, but was called in for overtime on October 27 between 6:00 A.M. and 3:30 P.M. and again commencing at 10:00 P.M. and ending at 1:30 P.M. on October 28, for a total of 25 hours of overtime that weekend, as compared with Urquhart's 13 hours. The Claimant had signed every overtime call out list posted for the weekends in question.

The Organization contends that the Claimant was qualified and available and, as the senior employee, should have received the overtime assignments in issue under Rule 55(a). It notes that there is no long hours condition within Rule 55 or elsewhere in the Agreement prohibiting such assignment, and relies upon Special Board of Adjustment No. 1048, Award 99 and Third Division Awards 32371, 35495 and 35642 as rejecting the Carrier's proper rest defense. The Organization cites Third Division Awards 26508, 26690, 28565, 29259, 30660, 31129 and 36239 as supporting a finding of a Rule 55 violation herein, and compensation at the overtime rate as an appropriate remedy.

The Carrier initially argues that the watchman work in issue is not within the scope of the Agreement or work usually or customarily performed by the Claimant, negating any claim to it under Rule 55. It explains that it utilized a number of crafts for this watch, and made every effort to honor seniority in assigning overtime while ensuring alertness on the job and attempting to distribute the overtime equally. The Carrier points to the fact that the Claimant worked 27.5 hours of overtime the first

weekend and 25 hours of overtime the second weekend, receiving far more overtime than Urquhart, as evidence of its compliance with the Claimant's seniority preference rights. It notes that had the Claimant been assigned the disputed overtime, he would have worked 25 hours beginning on October 20 at 8:00 P.M. with only a two hour rest period, and 28 hours on October 26 with a one hour rest period, creating a legitimate safety concern and limiting his availability. The Carrier makes reference to a department policy that no employee should work in excess of 16 hours without proper rest, and relies on Public Law Board No. 4979, Award 21 and Third Division Award 22424 in support of the validity of its overtime assignments in this case. The Carrier asserts that the application of Rule 55 does not create a demand right in the senior employee to all overtime. The Carrier also objects to the Organization's claim for compensation at the overtime rate, relying upon Third Division Awards 35863 and 31129 as holding that the appropriate payment in the case of work not performed on this property is the straight time rate.

A careful review of the record convinces the Board that, to a certain extent, the Carrier violated the Claimant's entitlement to a preference for overtime under Rule 55 in the circumstances of this case. While the facts do reveal that the Carrier made every attempt to schedule the Claimant for overtime during the weekends in issue, and that the Claimant did receive a substantial amount of overtime during that period, the Carrier's failure to schedule the Claimant during the disputed periods was not shown to be justified by any specific safety concern or written departmental policy or agreement with respect to the maximum number of hours an employee is permitted to work continuously. Rule 55 is clear and sets forth only considerations of qualification, seniority and availability. The Carrier has not shown that the Claimant was unavailable for either overtime assignment. As noted in Third Division Award 35495, the Carrier must present a rational basis for its decision that the Claimant was unfit to perform the assignment due to the number of hours he would have worked. At the time of the October 20, 2001 8:00 P.M. overtime assignment, the Claimant had not worked since noon, and would have had eight hours rest. The two hour break between the end of this assignment and the beginning of his October 21 overtime assignment at 10:00 A.M., without a further showing, does not make the Claimant unavailable. The October 26, 2001 8:00 P.M. overtime assignment came at a time when the Claimant had performed no service during that day. However, had he accepted such assignment, which concluded at 9:00 A.M., he would not have been able to commence his overtime assignment on October 27 at 6:00 A.M. Thus, the Carrier must be given credit for the three hours during which these assignments overlapped. On these facts, we cannot find that the

Carrier established a justification for considering the Claimant unavailable for these overtime assignments.

The Board has held that the fact that the combination of overtime hours sought and scheduled hours of the Claimant would exceed 16 hours in a 24 hour period is an insufficient basis for denying payment for such hours if a violation of Rule 55 is shown in Third Division Awards 35642 and 32371. At this point it is also clear that, on this property, the prevailing practice is to pay straight time for a missed overtime opportunity. See Third Division Awards 30660, 31129, 35495, 35642, 36239 and Public Law Board No. 4549, Award 1. Thus, the Claimant is to be compensated at the pro rata rate for 22 hours of missed overtime work, giving the Carrier credit for the time already paid on October 27, 2001.

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 7th day of December 2005.