

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37692
Docket No. MW-37615
06-3-02-3-746

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. J. Lewis to perform overtime service at Washington Coach Yard in Washington, D.C. starting on October 1, 2001 and continuing to November 29, 2001 instead of senior qualified employee C. Dent, III (System File NEC-BMWE-SD-4155 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Dent, III shall now be compensated for '... for all overtime earned by Mr. Jim Lewis at the B&B Mechanic Foreman time and one half 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 protests the assignment of overtime to Gang 302 B&B Mechanic Foreman J. Lewis during October and November 2001, a period during which he had let his NORAC Operating Rules qualification lapse, rather than to the Claimant, Gang 202 B&B Mechanic Foreman. It involves the application of Rule 55, Preference for Overtime Work, which provides, in pertinent part:

“(a) Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them, in order of seniority.”

The facts establish that both Lewis and the Claimant worked the same tour of duty, 7:30 A.M. to 3:30 P.M. Monday through Friday, and that Lewis was senior to the Claimant on the B&B Mechanic Foreman roster. The parties do not dispute that the work assignments in issue were for work ordinarily and customarily performed by both Foremen. This claim raises the issue of Lewis' lack of qualification during the claim period due to his allowing his NORAC qualification to lapse. Upon learning of such lapse on November 26, 2001, the Carrier immediately removed Lewis from his Foreman position until he obtained those qualifications again on December 7, 2001. Lewis worked no overtime during the period of his removal from the position, but did receive and work overtime during the claim period when he was without NORAC Operating Rules qualification. The Organization seeks payment at the overtime rate on behalf of the Claimant for the overtime hours worked by Lewis (144 hours). On the property the Carrier raised the Claimant's unavailability on six of the dates in October because he was assigned and worked overtime on those dates. Before the Board it notes that the Claimant worked more hours of overtime than Lewis during the claim period.

The Organization argues that it is undisputed that Lewis was unqualified to receive Foreman overtime during the claim period, and the plain language of Rule 55 requires that the Claimant, who was both qualified and available, be offered the overtime assignment, citing Third Division Awards 36233 and 36239. It asserts that the Carrier's good faith in making such assignment is not relevant, as it imposes qualifications and must live by them, accept responsibility for ensuring that employees meet them, and it cannot escape liability for a violation of the Agreement merely by relying on its own malfeasance, citing Third Division Awards 10051, 10527, 10647, 11757, 18003 and 20367. The Organization contends that the

Carrier's assertion that the Claimant was unavailable on the six dates he worked overtime must fail for lack of proof that there was an actual conflict of hours, relying on Third Division Award 35642. The Organization posits that its requested remedy must be held to be appropriate because the Carrier failed to take issue with it on the property and is procedurally precluded from doing so in its Submission to the Board, citing Third Division Award 35495 for the rationale for awarding the penalty rate for a missed overtime opportunity.

The Carrier argues that it is clear that it immediately removed Lewis from the Foreman position upon learning of the lapse in his qualifications and acted in good faith in assigning him overtime consistent with the Foreman roster while he was in that position. It notes that the mere fact that Lewis failed to maintain his qualifications on NORAC Operating Rules does not automatically equate to an Agreement violation, because the Organization failed to meet its burden of establishing that the work performed by Lewis during overtime mandated such qualification. The Carrier posits that in the absence of any evidence that its overtime assignment was a willful violation of the Claimant's rights, or that the Claimant suffered any monetary loss as a result of such assignment and Lewis' acceptance of such work having let his qualifications lapse, the record does not support the conclusion that the Organization has proven a basis for monetary liability, citing Third Division Awards 20203, 26304, 26385, 29480, 33621; First Division Award 11772; Public Law Board No. 4259, Award 3. Before the Board the Carrier asserts that the request for payment at the overtime rate has been established to be inappropriate on this property, relying on Third Division Awards 31129 and 35863.

A careful review of the record convinces the Board that the Organization has made out a prima facie case that the assignment of Foreman overtime to Lewis during the period when he was technically unqualified to perform Foreman work was a violation of the Claimant's seniority preference for overtime under Rule 55. The Board cannot accept the Carrier's assertion that it was incumbent upon the Organization to show that the actual overtime work performed by Lewis required NORAC qualification, because the Carrier determined that in order for an employee to be properly classified as a Foreman he must have the appropriate qualifications, including NORAC Operating Rules certification, independent of his actual daily work activities. This is seen by the fact that the Carrier immediately removed Lewis from the Foreman roster upon learning that his qualification had lapsed, and did not question what his work assignment was to be that day before

doing so. The record makes clear that Lewis was not technically qualified to be assigned Foreman overtime during the period between October 1 and November 26, 2001.

That being said, it is insufficient for the Organization to dispose of the Carrier's contention that the Claimant was unavailable for the overtime assignments given to Lewis on six specific dates in October due to his already having accepted and performed overtime by asserting that the Carrier failed to establish a conflict in hours. It is incumbent upon the Organization to prove a missed work opportunity on behalf of the Claimant in order for a remedy to be appropriate. Merely establishing an improper assignment to Lewis does not immediately entitle the Claimant to compensation for such assignments without a showing that he was available to work such assignments. Once the issue of the Claimant's unavailability was raised by the Carrier on the property, the burden shifted to the Organization to show a missed overtime opportunity. The Board finds that it failed to meet that burden for the dates of October 6, 10, 11, 23, 27 and 28, 2001.

With respect to the appropriate measure of compensation for the missed overtime opportunities supported by the record, the Board reviewed the record on the property and confirms the Organization's assertion that the Carrier failed to raise the inappropriateness of penalty pay therein. It did raise the Claimant's unavailability on the dates cited, so no remedy will be directed for that period. While the precedent on this property does support payment at the straight time rate for missed overtime opportunities (Third Division Award 35863) such is a new argument which the Board cannot reach in the circumstances of this case. The fact that the Organization acted after-the-fact herein to take advantage of the situation when it discovered the Carrier's mistake and Lewis' lapse of qualification cannot defeat this timely filed claim. See Third Division Award 11757. Neither can potentially conflicting positions which may be raised by the Organization in other cases. Accordingly, the claim is sustained as to overtime assignments to Lewis on dates other than those where the Claimant's availability was contested. See Third Division Awards 36233 and 36239.

AWARD

Claim sustained in accordance with the Findings.

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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 30th day of January 2006.