

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37698
Docket No. MW-37839
06-3-03-3-215

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) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Mr. C. Rabuck to perform foreman duties at New York Avenue in Washington, D.C. starting on March 31 through May 9, 2002, instead of senior qualified employee J. Sichelstiel (System File NEC-BMWE-SD-4214 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Sichelstiel shall now be compensated ' . . . for 222 hours of pay at the Track 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 Rabuck to perform Foreman's duties during a time period when he had let his Roadway Worker Protection (RWP) and Track Standards (MW-1000) qualifications lapse. It seeks the total number of hours worked by Rabuck on the Foreman position on behalf of the Claimant, another Foreman, who the Organization asserts should have been assigned to perform these additional Foreman duties on overtime. It involves the application of Rules 1, Assignment to Positions, and 55, Preference for Overtime Work. The applicable parts of those Rules follow.

"Rule 1 - Assignment to Positions

In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern.

Rule 55 - Preference for Overtime

(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 their seniority."

The facts establish that Rabuck was awarded the Foreman position on Gang A083 effective September 3, 2000. His hours were 11:00 P.M. - 7:00 A.M., Sunday through Thursday. The Claimant did not apply for this position. Rabuck was the senior qualified applicant on that job. The Claimant is the Foreman on Gang A082, with work hours of 7:00 A.M. to 3:30 P.M., Monday through Friday. He is senior to Rabuck on the Foreman Roster. During the period of Rabuck's vacation, from March 17 - 28, 2002, the Claimant performed Rabuck's position providing protection service on an overtime basis. Rabuck returned on March 31, 2002, but, unknown to the Carrier, he had let his qualifications lapse. He worked a total of 240 hours of straight time and 35 hours of overtime between that date and the Carrier's discovery of this fact. The Carrier removed him from his position as Foreman on Gang A083 on May 12, 2002; that gang was abolished on May 17, 2002. During the claim period the Claimant was paid for 232 hours of straight time service and 53.5 hours of overtime.

The Organization argues that the Carrier violated Rule 1 by assigning Rabuck to his Foreman position when he was unqualified, and Rule 55 by providing him with overtime in that position rather than the Claimant, who was the senior qualified employee in the Foreman classification. The Organization points to the fact that the Claimant was used by the Carrier to fill in for Rabuck on an overtime basis prior to the claim period, and is entitled to compensation on that basis for all work performed by Rabuck when he was unqualified, citing Third Division Awards 26508, 26690, 28656, 29259, 30660, 31129, 35863, 36045 and 36239. The Organization notes that it is the Carrier's responsibility to enforce its qualification standards and that it cannot defeat a challenge to its obligation by trying to pass the responsibility on to the employee.

The Carrier contends that the Organization failed to meet its burden of proof, relying on Third Division Awards 22621, 26835 and 29460. It notes that Rabuck was the senior qualified employee at the time his job assignment was made, thus defeating any argument that Rule 1 was violated. It asserts that it is the employee's responsibility to keep his qualifications current and it should not be held accountable for an employee's dishonest action in the absence of any showing that it knowingly kept him in a position for which he was no longer qualified. See Third Division Awards 20203 and 26304; First Division Award 11772. The Carrier notes that it was a spot check of Rabuck's qualifications on May 12, 2002 that showed that he had let them lapse, and he was immediately relieved of his duties until he reestablished his qualifications. The Carrier argues that even if it had been aware of the lapse on March 31, 2002, the Claimant would not have been entitled to fill the position on overtime at that time. The Carrier posits that the Agreement does not require it to fill temporary vacancies for 30 days, and it would have been April 30, 2002 when it would have advertised the position and awarded it to the senior qualified applicant, which may not have been the Claimant, if Rabuck had not reestablished his qualifications by that time. The Carrier concludes that the Organization failed to make out a showing that the Claimant was entitled to work in Rabuck's position during his disqualification. Additionally, the Carrier contends that the Organization failed to establish that during the claim period Rabuck performed any function requiring the qualifications he had let lapse. Finally, the Carrier argues that the claim is excessive because the Claimant received more pay than Rabuck during the claim period, there was no showing that the Claimant was not called for any overtime assignment he was entitled to or suffered any pecuniary harm, and the penalty rate is not appropriate for a missed overtime opportunity on

this property, citing Third Division Awards 31129 and 35863; Public Law Board No. 4259, Award 3.

A careful review of the record convinces the Board that the Organization failed to prove that the Carrier violated Rule 1 in its assignment of Rabuck to the Foreman position during the claim period. As the Carrier notes, that Rule relates to the initial assignment of an advertised position. The Organization has not established that it was intended to apply to the daily job assignments made once the position is awarded. Because there is no showing that the Claimant applied for the Foreman position on Gang A083 when it was awarded to Rabuck in September 2000, or timely protested such award, the allegation of a violation of Rule 1 must fail.

However, the Board concludes that the Organization made out a prima facie case that the assignment of Foreman overtime to Rabuck during the period where he was technically unqualified to perform Foreman work was a violation of the Claimant's seniority preference for overtime under Rule 55. Unlike Rule 1, Rule 55 contemplates a procedure to be followed by the Carrier in each different overtime assignment. The Board cannot accept the Carrier's assertion that it was incumbent upon the Organization to show that the actual overtime work performed by Rabuck required RWP or MW-1000 qualification, because the Carrier has determined that in order for an employee to be properly classified as a Foreman he must have the appropriate qualifications, including RWP and MW-1000 certification, independent of his actual daily work activities. The Carrier immediately removed Rabuck from his position 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 Rabuck was not technically qualified to be assigned Foreman overtime during the claim period. Thus, the Carrier violated Rule 55 by making such assignment. See Third Division Award 30660.

The remaining question concerns the appropriate remedy. The Carrier points out that the Claimant worked more overtime than Rabuck during the claim period. Being the senior qualified employee who customarily performed the work in question, the Claimant was entitled to the overtime assigned to Rabuck during the claim period if he was available to perform it. The record establishes that the overtime worked by Rabuck during the claim period appears to be one or at most two hours consecutive to his shift which begins at 11:00 P.M. and ends at 7:00 A.M. when the Claimant begins work. There do not appear to be any full days of

overtime assignments where Rabuck was called in when he was not scheduled to work. Thus, the Board directs the parties to determine when the overtime work in question was performed and whether the Claimant was available to perform the overtime based upon his regular tour of duty hours. Should it be determined that the Claimant was available for any of the overtime in issue, he shall be compensated at the straight time rate for such hours. See Third Division Awards 31129 and 35863.

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 30th day of January 2006.