

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37821
Docket No. MW-38468
06-3-04-3-435**

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 failed to call and assign Truck Driver R. Kahl to perform overtime service (drive truck) on March 24, 2003 and instead assigned Foreman S. Hamby (System File NEC-BMWE-SD-4341 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Kahl shall now be compensated for seven (7) hours at the overtime rate of pay for this lost work opportunity.”

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 alleges a violation of Rule 55 when the Carrier assigned a Foreman rather than the Claimant, a Truck Driver, for seven hours of overtime work involved with picking up a fuel/lube truck from Baltimore, Maryland, that was needed by their gang to work on the Tie Rail Project in Thorndale, Pennsylvania. Toward the end of their tour of duty on the claim date, Truck Driver Bongiorno, who was senior to the Claimant in the classification and working with the gang in question, accompanied by Foreman Hamby in the pickup truck, drove to Baltimore, to obtain the fuel/lube truck, which Bongiorno drove back to Thorndale. Foreman Hamby drove the pick up truck back from Baltimore, to Thorndale. It is the Carrier's failure to assign a second Truck Driver rather than a Foreman to drive the vehicle back that forms the basis of this claim.

The Organization argues that the Scope and Work Classification Rules establish separate and distinct classes of Foreman and Truck Driver and defines the work accruing to each class, and that work of the nature performed by Truck Drivers is reserved to that classification, citing Third Division Awards 14015, 25282, 27882, 28779 and 29088. It asserts that Rule 55 gives preference for overtime service to the senior qualified and available employee for work ordinarily and customarily performed by them, which, in this case, was Truck Driver work, and that the Claimant had preference over the Foreman for the assignment because it had nothing to do with the Foreman's primary duties of directing his employees. The Organization contends that the Carrier failed to substantiate its affirmative defense by any evidence other than mere assertion, relying on Third Division Awards including 17051. It requests compensation at the overtime rate for this missed work opportunity, relying on Third Division Awards 35642, 35863, 36045 and 37146.

The Carrier contends that it is well established on this property that driving a truck or any vehicle is not reserved exclusively to the Truck Driver classification, and that it was contractually permissible for it to assign the Foreman to oversee this work assignment, citing Third Division Awards 26236, 28263 and 31254. The Carrier asserts that the Organization failed to sustain its burden of proving a violation of Rule 55, relying on Third Division Award 35862, and notes that the requested compensation is excessive both because the overtime rate is sought and because the only truck driving the Foreman did was on the return trip from Baltimore, citing Third Division Award 35683; Public Law Board No. 4549, Award 1.

A careful review of the record convinces the Board that the Organization met its burden of proving a violation of Rule 55 in this case. While it may well be that various classes of employees occasionally drive trucks in the performance of their primary duties, there is no doubt that operating a vehicle is the work ordinarily and customarily performed by Truck Drivers under the Agreement, not Foremen. While the Foreman may well have been overseeing the Truck Driver in the performance of his duties in picking up the lube truck, the Carrier was well aware that this overtime assignment primarily involved Truck Driving duties, and that the person accompanying Bongiorno would be spending half his time alone driving a company pick up truck. Unlike the situation in the cases relied upon by the Carrier, the truck driving component in this case was not incidental to other duties being performed by the Foreman. Thus, under Rule 55, the Claimant, as a Truck Driver who was available and qualified, had preference for this overtime assignment. Because, by necessity, the work involved riding with Bongiorno for half of the trip and driving the other half, the entire seven hours spent must be considered part of the disputed assignment to which the Claimant had preference. However, as has been held before on this property, the appropriate compensation for a missed overtime opportunity is the pro rata rate, not the penalty rate. See Third Division Award 35863; Public Law Board 4549, Award 1. Accordingly, the Claimant shall be compensated for seven hours at the straight time rate for the Carrier's violation of Rule 55 in this case.

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 21st day of June 2006.