

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37828
Docket No. MW-38527
06-3-04-3-512**

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 EWE Operator R. Newton to perform EWE (Gradall) Operator work on April 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, May 1, 2, 8 and 15, 2003 and instead assigned junior employee E. Smeaton (Carrier's File NEC-BMWE-SD-4364 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Newton shall now be compensated for all time worked by junior employee E. Smeaton in operating the Gradall on the aforesaid 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 seeks compensation under Rule 55 when the Claimant, a EWE "B" (Pettibone) Machine Operator in the Track Department, was not called to operate a gradall machine in conjunction with the Thames River Bridge project being performed by B&B forces on overtime on the claim dates. The Carrier temporarily reassigned EWE "A" (Vacuum Truck) Machine Operator E. Smeaton from his B&B Ironwork Gang, which had been established under Rule 90-C, to operate the gradall machine on the Thames River Bridge project on straight time. The record reveals that the overtime worked by this Operator was continuous with his reassigned shift hours. There is no dispute that both employees are qualified to operate the gradall machine and that the Claimant is senior to Smeaton.

The Organization argues that both the Claimant and Smeaton had regular daytime tours of duty, and that the work in issue was scheduled to be performed by the B&B Department between 10:30 P.M. and 7:00 A.M. It asserts that the Thames River Bridge project was not related to Smeaton's regular EWE Machine Operator assignment, and that the Claimant's superior seniority gave him preference under Rule 55 to perform the gradall work on overtime, citing Third Division Awards 20310 and 24480. The Organization notes that the Carrier's failure to support its contentions with any evidence when the records material to this dispute were in its possession was at its peril, relying on Third Division Awards 15444, 28724, and 29823.

The Carrier contends that Smeaton was assigned to Ironwork Gang U-362 established under Rule 90-C with variable headquarters and hours and workweeks that can be changed upon notice to the employee. It asserts that it acted in accordance with the Agreement in temporarily changing Smeaton's assignment to facilitate the work on the Thames River Bridge project, which he performed at straight time rate, with the exception of some overtime continuous with his shift. The Carrier notes that Smeaton is a member of the B&B Department, which customarily and ordinarily performs this work, and it has been long-standing practice to assign B&B Department work to B&B Department employees. The Carrier argues that the Claimant, as a Track Department employee, had no preference to this work on overtime, when the Carrier could perform it with a B&B Department employee on straight time, citing Third Division Awards 27090, 28782, 32154, 35860 and 36098.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of establishing a violation of Rules 1 and 55 herein. Although the

Organization asserts that the Carrier failed to provide records to support its contentions, there appears to have been no dispute that Smeaton was temporarily reassigned from his regular daytime position on Gang U-362 to work five nights a week on this project on a straight time basis. The attachment to the claim admits that much. Additionally, the Division Manager's response sets forth specifically all hours worked by both the Claimant and Smeaton on the claim dates, including any overtime. Thus, the Organization was furnished with the relevant information to support the Carrier's position that the work was performed on a straight time basis by Operator Smeaton, who was subject to temporary reassignment without posting under Rule 90-C. There is no Agreement support for the proposition that the Carrier must assign the senior employee on overtime under Rule 55 to a job which it can properly perform on straight time, or that any overtime worked by Smeaton was not continuous with his regular assignment on this project. Additionally, if Rule 55 were applied in this case, the Organization failed to show that the Claimant rather than Smeaton ordinarily and customarily performed the B&B project work in issue. See Third Division Awards 27090 and 36098. Therefore, the claim must fail.

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 21st day of June 2006.