Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38192
Docket No. MW-38614
07-3-04-3-642

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation (Amtrak)

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 Mechanic J. Christinzio to overtime work (clean gondola car) in Wilmington, Delaware on August 21, 2003 and instead called and assigned junior employe G. Douglas (System File NEC-BMWE-SD-4384 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Christinzio shall now be compensated for four and one-half (4.5) hours 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.

At the time this dispute arose, the Claimant was a Repairman in the Roadway Equipment Repair Shop in Wilmington, Delaware. G. Douglas held a similar position as the Claimant, but was junior to the Claimant.

On August 21, 2003, the Carrier assigned four and one-half hours of overtime to Douglas to clean a gondola car of trash, rock, and debris. This claim followed asserting that Rule 55 was violated.

Rule 55 provides:

"RULE 55 PREFERENCE FOR OVERTIME WORK

(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."

* * *

In the handling on the property, the Carrier asserted that all Repairmen, including the Claimant, were offered the overtime opportunity, but only Douglas accepted the work. Statements provided by the Organization from various employees corroborate the Carrier's assertion that the overtime was offered to certain employees. However, a statement from the Claimant specifically denies that he was offered that opportunity ("On 08-21-03 I was not asked to work overtime."). Had the Carrier provided a similar statement from the individual making the overtime offers, the Board would have found that there was a dispute of a material fact necessary for the Organization to meet its burden and we would have dismissed the claim on that basis. However, aside from general statements in letters from the Carrier in the exchange of correspondence on the property, there is no evidence from the Carrier equivalent to the Claimant's denial in his statement that he was offered the overtime to refute the Claimant's denial. On that basis, the Board has no choice but to find, as a matter of fact, that while some employees were offered the overtime on the date in dispute, the Claimant was not offered that overtime. Based upon that fact, because the Claimant was senior to Douglas, the Claimant should have been offered the overtime. By not doing so, the Carrier violated Rule 55.

The Carrier's other arguments do not change the result.

First, the Carrier asserts that the work required the wearing of protective clothing and a respirator in accord with OSHA requirements and Douglas was properly certified for the required equipment while the Claimant was not. That fact would, in the ordinary case, bar the Organization from asserting that the Claimant was entitled to perform the work. Under that scenario, the Claimant would not have been "qualified" to perform the work under Rule 55. However, in a statement provided by Douglas, Douglas asserts that in performing the work ". . . I did not wear a respirator . . . because the material inside the gondola was just trash, tie butts, pallets, trash and some dirt . . . [t]his was not a hot job." If the Carrier allowed Douglas to perform the work without wearing a respirator, the Carrier is estopped from now asserting that the Claimant could not perform the work because he was not certified for a respirator.

Second, the Carrier argues that the claim was procedurally defective because it was not filed with the appropriate Carrier officer as required by Rule 64(b) ("All claims or grievances must be presented . . . to the designated officer of AMTRAK authorized to receive same . . ."). The September 26, 2003 claim was submitted by the Organization to Division Engineer J. Guzzi. On October 24, 2003, Division Engineer Guzzi denied the claim, only addressing the merits and not asserting that the claim should have been filed with another Carrier officer. In its February 13, 2004 letter, the Carrier advised the Organization that "[a]ll claims and grievances concerning matters at the Roadway Equipment & Trucking Shop should be directed to Mr. P. F. Ketterer." In its June 21, 2004 letter, the Carrier advised the Organization that "[a]s stipulated in the Carrier's letter dated January 5, 2004, under the BMWE Northeast Corridor Agreement, the officer designated to handle first level claims or grievances involving the Road Equipment Shop is Mr. P. F. Ketterer, Shop Manager."

The problem here is that, from the Carrier's perspective, there is no evidence in this record that as of the filing of the claim dated September 26, 2003, Shop Manager Ketterer was the designated Carrier officer to receive claims. As established in the record, Ketterer was that individual as of January 5, 2004. However, nothing before us in the record proves that Ketterer held that designated position when the claim was filed in September 2003. Without more from the record developed by the parties, we cannot find that the Organization filed the claim with the wrong Carrier officer.

The Carrier's assertion during argument before the Board that the Organization was advised as of November 7, 2000 that Shop Manager Ketterer was the Carrier's designated officer to receive claims and had the Organization raised the issue on the property, the Carrier would have made that demonstration, also does not change the result. The issue was not for the Organization to raise. The Carrier raised the procedural issue that the Organization filed the claim with the wrong Carrier officer. That being the case, the Carrier had the burden to demonstrate all necessary elements supporting its position through evidence in this record that the Organization was on notice prior to filing the claim that its claim should have been filed with Shop Manager Ketterer rather than Division Engineer Guzzi. In the development of the record, the Carrier did not meet that burden. All the record tells us is that as of January 2004 the Organization was advised that Shop Manager Ketterer was the designated Carrier officer to receive claims. We are confined to the record made by the parties.

With respect to the remedy, the Claimant shall be made whole for the lost overtime opportunity. As discussed in Third Division Award 38191, that compensation shall be at the Claimant's overtime rate.

AWARD

Claim sustained.

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 18th day of May 2007.

CARRIER MEMBER'S DISSENTING OPINION -
NRAB THIRD DIVISION AWARD NO. 38192, DOCKET MW-38614

Exception must be taken to the decision of the majority to pay the instant claim at the overtime rate.

In order to resolve the dispute between these parties over the issue of whether penalty payments for missed overtime work opportunities on Amtrak were to be paid at the straight time rate or the overtime rate, it was agreed to submit the matter to Public Law Board No. 4549 for adjudication. The Board determined that on Amtrak, the proper remedy was payment of the time lost at the straight time rate.

Despite what was agreed to be a final and binding decision on the issue, the BMWE continues to seek payment at the overtime rate and, on occasion, has been successful in this inappropriate pursuit. The last award of this Division to pay such a claim at the overtime rate was in 1994. Since that time every award of this Division has consistently upheld the decision of Public Law Board No. 4549 and paid the claims at the straight time rate. For example, In Award 31129, Referee Eischen stated:

> "... the controversy over damages at the punitive rate has been addressed and laid to rest on this property. See Public Law Board No. 4549, Award 1 and Awards cited therein."

Subsequent awards, including 30686 and 35863, specifically noted:

> "... It is well established in a myriad of Awards that the proper remedy on this property has been and is straight-time pay for lost overtime opportunity. Unless otherwise changed by mutual agreement of the parties, it is difficult to comprehend why this issue continues to arise."

For more than 12 years now, the organization has accepted those decisions without complaint or protest. The decision in this case answers the question as to why the issue continues to arise.

The majority and this Division should have followed the principle set forth in Award 32141, where Referee Eischen ruled:

> "This is not a case of first impression. In Third Division Award 29753 we denied a virtually identical claim, holding: 'Since the Carrier had no obligation to provide the services, the provisions of Rule 52 are not operative in this matter and we find that the Carrier is not in violation of the Agreement.' Again, in Third Division Award 31282, the same dispute involving the same school crossing duties at the same intersection in Lawrence, Kansas, again resulted in a denial 'in the interest of stability.' Now, all undaunted, like the Phoenix rising from the ashes, another identical claim is presented for our edification and determination. In paraphrase of Justice Oliver Wendell Holmes' observation on the subject of finality and authoritative precedent, we conclude that even the most protracted litigation between the most adamant of protagonists eventually must come to a conclusion."

The decision of the majority to pay the instant claim at the overtime rate does not alter the findings of Public Law Board No. 4549, and does not reflect the accepted and acknowledged practice on this property, which as noted above, can only be changed by mutual agreement of the parties. This decision not only fails to aid in the resolution of disputes, but gives new life to one already resolved.

For this reason, we dissent to the decision of the majority in this case.

R. F. Palmer
Amtrak
June 5, 2007