Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32226
Docket No. MW-31313
97-3-93-3-347

The Third Division consisted of the regular members and in addition Referee W. Gary Vause 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 Carrier violated the Agreement when it failed and refused to properly compensate Trackman R. Behrmann for the overtime work he was called to perform on Monday, November 11, 1991 (System File NEC-BMWE-SD-3077 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Behrmann shall be allowed an additional 5.3 hours' pay at his 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.

Claimant had established and held seniority in the Trackman class in the Carrier's Track Subdepartment and was regularly assigned as such at the time that this dispute arose.

On November 11, 1991, Veterans Day (a recognized holiday under the Agreement), the Claimant was required to report for duty to provide protection service for contracting forces. The contracting work was canceled for the day due to rain. Consequently, the Claimant was released from duty shortly after starting time and was compensated two and seven-tenths hours of pay at his time and one-half rate.

The Organization argues that inasmuch as the Claimant was required to report for his assignment to perform protection service on a recognized holiday, he was entitled under Rule 54 to be compensated for eight hours at his time and one-half rate.

This dispute is controlled by the Agreement between the Organization and the Carrier effective May 19, 1976, updated October 1, 1987, together with supplements, amendments and interpretations thereto.

The Pennsylvania Railroad Company was one of several bankrupt carriers in the northeast whose passenger lines were consolidated to form the National Railroad Passenger Corporation (Amtrak) - Northeast Corridor (Amtrak-NEC) ("the Carrier"). Rule 54 was carried forth into the current Agreement between the Carrier and the Organization from a previous Agreement between the Pennsylvania Railroad Company and this Organization.

In a letter under date of February 12, 1992 the Acting Division Engineer advised the Organization representative that the Carrier found the claim to lack sufficient substance or merit for consideration of payment and it therefore was denied in its entirety. The letter stated in relevant part:

> "3. Rule 54 does not apply to this situation. 'Protect Service', as stated in this rule, refers to situations where the Carrier assigns employees to an 'on-duty, stand-by status', to be available to correct emergency situations which may arise during high travel periods when normal forces are on an off-duty status. The work assignment accepted by Mr. Behrmann follows suit with any other scheduled overtime assignment such as changing a defective rail. The fact that

he was to provide contractor protection services cannot be construed to indicate 'protect services' since this work does not meet the guidelines as stated above. Rule 54 has no bearing in this case since the applicable Rule 53 was rightfully utilized.

4. Your request for payment at the overtime rate is viewed as excessive since numerous board decisions rendered on this property have consistently upheld the Carrier's position that payments for work not performed under this Agreement would be made at the pro-rata rate."

The central issue before the Board is whether Rule 53 (as argued by the Carrier) or Rule 54 (as argued by the Organization) applies. These Rules read as follows:

"RULE 53 CALLS

(a) Employees notified or called to perform service outside of and not continuous with the regularly assigned working hours shall report for duty with reasonable promptness and shall be paid a minimum of two hours and forty minutes at the rate of time and one-half, if held on duty longer than two hours and forty minutes, they shall be paid at the rate of time and one-half on the actual minute basis.

(b) The time of employees so notified to report at a designated time to perform service outside of and not continuous with the regularly assigned working hours shall begin at the time required to report and end when released at headquarters. The time of employees so called to perform such service immediately shall begin at the time called and end when they are released at their headquarters."

"RULE 54

PROTECT SERVICE ON HOLIDAYS OR ON THE EMPLOYE'S ASSIGNED REST DAY

Employes required to report for 'Protect Service' on holidays, or on Sundays, when Sunday is an assigned rest day, shall be allowed a minimum of eight hours at the rate of time and one-half."

The Carrier argues that payment for this assignment was governed by Rule 53, and that Rule 54 is inapplicable as the Claimant was not called for "Protect Service." The fact that the phrase "Protect Service" contained in Rule 54 is both capitalized and set off by quotation marks shows that it is a contractual term-of-art with a very specific meaning. Pre-determined contractor protection flagging is not work that falls within that specific meaning.

The Organization cites Decision No. 357 of the Pennsylvania-Long Island Railroad System Board of Adjustment dated October 7, 1947. The Board sustained the claim of Trackmen who were ordered to report on a Sunday for protection services at crossings to protect a special train in which the President of the United States was traveling. The Claimants stood by until the Presidential Special approached and passed and then they were sent home. The Board concluded that "[t]his was clearly a Stand-By or Protect Service assignment." However, the decision did not include any analysis which would aid the Board in evaluating the instant case.

The Carrier argues that the facts underlying Decision No. 357 are significantly different than the facts in the instant case, and it is those differences which distinguish bona fide "Protect Service." In Decision No. 357, the Organization carried its burden by differentiating the disputed assignment from normal Highway Crossing Watchmen assignments. It showed the difference in instructions, duties and equipment. In particular, it highlighted the special character of the train's passenger and showed that the sole purpose of the assignment was "to protect the Special Train from any and all emergencies that might arise to hinder the swift passage of the train."

The Carrier also cited Public Law Board No. 326, Award 38, in which the Board denied the time claim of an employee assigned to Light Engine Service. The Board

found that the Claimant was called for, and did perform Light Engine Service, which is a classified form of road service, and that this classified service was not converted into a form of unclassified service as "protect service."

The Organization relies upon a more recent decision, Third Division Award 26777, in which the Board sustained the time claim for employees providing flagging protection for contracting forces. The Claimants were released after being held by the Carrier for four hours because the contracting forces failed to appear at the job site. Claimants were compensated by payment of four hours of pay at their respective time and one-half rates. The Organization argued that Claimants were entitled to payment for four more hours at their time and one-half rates in accordance with Rule 54. The Board held that "[t]he clear language of Rule 54 requires the entry of a sustaining award." The essential facts in that case are virtually identical to the facts in the instant case now before this Board.

The Carrier urges this Board to agree with the position advanced by the Carrier Members' Dissent in Award 26777, and to conclude that the decision in Award 26777 was "palpably erroneous and without precedential value."

In support of its critique of Award 26777, Carrier cites Third Division Award 30188, in which the Board denied the claim of Linemen for overtime work to take the catenary electrical power out so that Track Department employees could safely perform clean-up with a front-end loader. The work was cancelled by the Carrier due to adverse weather conditions, and the Claimants were sent home upon reporting for work, and paid a call. The Board concluded that the Organization had failed to provide convincing evidence in the record that Rule 54 applies to the deenergizering of overhead wires. The Board discussed Award 26777, but declined to "disturb the findings of that Award as it relates to its underlying facts." The Board noted that the facts of Award 26777 "related to flagging and, as such, is not the fact pattern here."

Based upon a careful analysis of prior decisions of this Board, it is clear that Third Division Award 26777 has been distinguished, but not overruled. Because it is factually similar to the instant case, it must be considered as precedent. It is important that this Board respect prior Awards and apply the principle of res judicata to ensure stability and continuity in labor relations. This Board therefore will sustain the instant claim on the basis of the precedent established in Third Division Award 26777.

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 17th day of September 1997.