Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35495
Docket No. MW-32927
01-3-96-3-300

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) -
(Northeast Corridor

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior Foreman A. Alessi to perform overtime service (piloting the Sperry Car from Paoli to Holmes) on December 9, 1994, instead of calling and assigning Foreman F. Banford to perform said work (System File NEC-BMWE-SD-3551 AMT).

(2) As a consequence of the aforesaid violation, Foreman F. Banford shall be allowed eight (8) 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.

The Claimant was regularly assigned as a Foreman 7:00 A.M. to 5:00 P.M., Monday through Thursday. On Friday, December 9, 1994, the Claimant worked an 11 hour overtime assignment from 6:00 A.M. to 5:00 P.M. performing communication and protection work as he customarily performed on his regular assignment.

On December 9, 1994, the Carrier needed a Foreman to pilot the Sperry Rail Car from Paoli to Holmesburg, Pennsylvania, from 9:00 P.M. to 5:00 A.M. the next day. The Carrier assigned A. Alessi, a Foreman junior to the Claimant, to perform that work. This claim followed with the argument that as senior Foreman, the Claimant was entitled to the overtime call given to Alessi and, for a remedy, the Claimant should be compensated for the lost overtime opportunity at the overtime rate.

Rule 55 states:

"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."

There are three considerations in Rule 55 relevant to this case - qualification, availability and seniority. Qualification and seniority are not in dispute in this case. The Carrier concedes that the Claimant was qualified to perform the overtime work commencing at 9:00 P.M. and that the Claimant was senior to Alessi who was used for that overtime work. The issue raised by the Carrier is whether the Claimant was "available."

The Carrier asserts that because the Claimant worked from 6:00 A.M. to 5:00 P.M. on December 9, 1994, the Claimant was not "available" for another overtime assignment beginning at 9:00 P.M. The Carrier points out that the work needed commencing at 9:00 P.M. (piloting the Sperry Rail Car) required a high degree of vigilance to ensure the safe operation of the equipment. According to the Carrier, if the Claimant had been used for the 9:00 P.M. to 5:00 A.M. assignment on the Sperry Rail Car, he would have performed a total of 19 hours of work in a 24 hour period. That amount of work in a 24 hour period, argues the Carrier, made the Claimant not "available" under Rule 55.

Although framing its argument in terms of whether the Claimant was "available" under Rule 55, the Carrier is really arguing that because of the 19 hours of work in a 24 hour period, the Claimant was "unfit" to perform the overtime assignment which was given to Alessi.

The Carrier has broad discretion for determining fitness of an employee to perform assigned job duties. Those decisions are managerial prerogatives subject to very limited review by the Board. The Board will only look to whether the Carrier's fitness decision was arbitrary or capricious. If the Carrier's decision concerning fitness of an employee has a rational basis or justification, the Board must defer to that decision, whether we agree with that decision or not. In this case, we can find no rational basis in the record for the Carrier's decision.

A 19 hour work day is a long one. But, as the Organization points out, the Claimant would have had five hours of rest between assignments. Moreover, and most important, there is nothing in the record to show that aside from counting the number of hours in the 24 hour period that the Claimant would have worked, the Carrier made any objective evaluation of the Claimant's physical or mental abilities on that day to perform the duties of the overtime assignment given to junior Foreman Alessi. The Claimant was simply bypassed for the overtime call. Accepting the Carrier's argument in this case would, in effect, cause the Board to amend Rule 55 to insert a provision that employees cannot work 19 hours in a 24 hour period and that five hours of rest between assignments is not enough. That is not the Board's function. Only the parties can do that. If five hours between assignments is not enough rest, is six, seven, eight or nine? Where and how do we draw the line? See Third Division Award 32371 between the parties where a potential of between 19 and 23 hours of work in a 24 hour period (as opposed to 19 hours in this case) was insufficient to avoid the seniority requirements of Rule 55 [emphasis added]:

> "The Board does not find persuasive Carrier's reasons for excluding payments when the combination of overtime hours worked by Polinaire and the scheduled hours of Claimants would have exceeded 16 hours pay in a 24 hour period. It is acknowledged that Polinaire was improperly utilized on overtime work that Austin and Higueruela were entitled to perform. They filed a claim seeking payment for the hours Polinaire worked. They are entitled to be paid for these hours as a remedy even if, as Carrier said, such payment would be the equivalent of being on duty in

some instances of between 19 and 23 hours in a 24 hour period. The Agreement was violated when Polinaire was used instead of Claimants. As reparations for the violation they are entitled to be paid the equivalent of the total number of hours that Polinaire worked in violation of the Agreement."

Without more from the Carrier concerning its assessment of the Claimant's individual circumstances, we choose not to get on what in effect is a slippery slope which would cause the Board to establish by fiat a limit on hours where the parties have not done so by agreement. Without more from the Carrier concerning the Claimant's individual circumstances, we cannot find a rational basis for the Carrier's determination that the Claimant was unavailable - in effect, unfit - to perform the overtime assignment given to junior Foreman Alessi. That decision by the Carrier was therefore arbitrary. On the merits, we find the Carrier violated Rule 55 by not calling the Claimant for the overtime assignment given to junior Foreman Alessi.

The next issue is the remedy. The Organization seeks compensation for the Claimant at the overtime rate. The Carrier argues that relief is excessive and that only the straight time rate should be awarded.

Although there is a divergence of opinion, one strongly supported view consistent with the concept of "make whole" relief for demonstrated contract violations is that where an employee is deprived of an overtime opportunity, in order to make that employee whole, compensation should be at the overtime rate. Stated differently, this view is that had the contract not been violated, the employee would have worked the hours and been paid overtime and therefore the employee should be entitled to a remedy at the overtime rate and to rule otherwise serves as a reward to the party violating the Agreement and punishes the individual who suffered from the violation.

This remedial issue has been extensively examined on this property - with conflicting results. For example, see Public Law Board No. 4549, Award 1 where it was held after review of a number of Awards ". . . on this property the Carrier is only obligated to pay straight time compensation to BMWE employees who are bypassed improperly and miss overtime opportunities." Indeed, one of the Awards cited in Public Law Board No. 4549, Award 1 was this neutral member's similar conclusion in Third Division Award 26534 (". . . since 1976 an interpretation has evolved by litigation and practice wherein the remedy for an improper overtime assignment under this Agreement

on this property is to provide for payment in accord with the Carrier's position at the pro rata [straight time] rate rather than the punitive [overtime] rate"). See also, Third Division Awards 27701 ("We . . . have reviewed a number of Awards between these parties which clearly demonstrate that on Amtrak properties the prevailing practice, concurred in by the Organization, is to allow straight time for missed overtime work"); 28180 ("... on AMTRAK properties, the prevailing practice is to pay straight time for missed overtime work") and 28181 ("... the Carrier urges that any compensation owing the Claimant should be limited to the straight time rate. We agree that this is the majority view. . . ."); 28349 (". . . given the great number of other Awards discussing this question . . . the Board determines that the appropriate pay will be granted at the pro rata level and not at the punitive rate"). In support of its position that overtime should be awarded as a remedy, the Organization points to a number of more recent Awards which, consistent with the make whole philosophy or remedies for contract violations, have fashioned remedies at the overtime rate. See Third Division Awards 30448, 30586, 32226, 32371. See also, Third Division Awards 26508, 26690.

There is no question that, consistent with the Awards cited by the Carrier, on this property, between these parties, notwithstanding the compelling logic that to make an employee whole for a lost overtime opportunity the relief should be at the overtime rate, there is a substantial body of precedent which fashions relief for overtime violations only at the straight time rate. Public Law Board No. 4549, Award 1; Third Division Awards 26534, 27701, 28180, 28181, 28349, supra and Awards cited therein. There is also a second view consistent with the Awards cited by the Organization that an overtime remedy should be fashioned for such demonstrated violations. Third Division Awards 30448, 30586, 32226, 32371, 26508, 26690, supra. Interestingly enough, the parties have both cited Awards from this neutral member on the issue. See Third Division Award 26534 cited by the Carrier. Compare Third Division Awards 30448, 30586 cited by the Organization.

The short answer is that in those Awards where the issue of the appropriate remedy on this property between these parties has been litigated on the property and argued to the Board and where the past substantial body of precedent has been urged to the Board's attention, the Awards have come down consistent with the Carrier's position that the remedy should be limited to straight time relief. Where, for whatever reasons, that body of precedent has not been developed, the better reasoned remedy of overtime has been imposed. Here, the prior precedent supporting the Carrier has been extensively developed.

While a majority of the Board believes that in order to make an employee whole for a lost overtime opportunity the employee should be given that which he lost - i.e., overtime - concepts of stability flowing from prior Awards which specifically addressed the parties' differing opinions must take precedence. Here, given the long history on this property of those kinds of Awards which addressed the parties' differences and nevertheless remedied violations for lost opportunities only at the straight time rate, we are obligated to follow that body of precedent and award relief only at the straight time rate. The Claimant's entitlement shall therefore be at the straight time rate.

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, 2001.

CARRIER MEMBER'S DISSENTING AND CONCURRING OPINION - AWARD NO. 35495, DOCKET MW-32927

The majority erred in its' opinion that Amtrak violated the overtime preference rule of the agreement.

Rule 55 provides that employees will, if qualified and available, be given preference for overtime on work they ordinarily and customarily perform in order of seniority. As argued in this case and supported by arbitral precedent, such contract language does not reserve all overtime work to the senior employee. In this case the claimant was offered and accepted eleven (11) hours of overtime on work he ordinarily and customarily performed (protection of a construction project). Having already exercised his preferential right under the rule, he was not aggrieved when the next senior employee was offered a later overtime assignment (piloting an equipment move) that same day.

In addition to overlooking the traditional application of overtime preference rules such as that involved in this case, we believe that the majority similarly erred in its' opinion that an employee has a demand right to work nineteen (19) hours in a twenty-four (24) hour period.

Based on the above, we dissent to the majority opinion regarding the proper calling procedure under Rule 55 and find such decision to be without precedential value. However, we concur with the findings in the Award which properly recognized that on this property, payments for violations of that Rule are made at the straight time rate.

L. D. Miller

L. D. Miller - Carrier Member

July 2, 2001