

Award No. 35642
Docket No. MW-33845
01-3-97-3-340

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 assigned junior Maintenance Gang Foreman R. Trauger to perform contractor protection duties at the Plainsboro Road Bridge on September 14, 15, 16, 17, 22, 23, 24 and 25, 1995, instead of assigning Track/Contractor Protection Foreman M. Sullivan to perform said work (System File NEC-BMWE-SD-3664 AMT).**
- (2) As a consequence of the aforesaid violation, Foreman M. Sullivan shall be allowed sixty (60) hours' pay at the track foreman's 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.

This claim protests the assignment of a junior regular Track Maintenance Foreman to perform contractor protection overtime work at the Plainsboro Road Bridge near Princeton, New Jersey, rather than the Claimant, the senior Track/Contractor Protection Foreman, working on the Linden Avenue Project near Trenton, New Jersey. It involves the application of Rule 55, Preference for Overtime Work, which provides, in pertinent part:

“(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 seniority.”

The Organization contends that the Claimant ordinarily and customarily performed contractor protection work, was qualified, available, and senior to the Foreman assigned, and that the Carrier’s failure to attempt to contact him for the overtime assignment violates Rule 55. It asserts that the Carrier did not prove its affirmative defense of a past practice, noting that the Electric Traction (ET) overtime Agreement relied upon is specific to that department, and not applicable to the current dispute. The Organization seeks overtime premium to compensate for this violation, citing Third Division Awards 30448, 30586, 32226 and 32371 in support of the appropriateness of this remedy on the property.

The Carrier argues that the Claimant was not entitled or available to be called for this overtime assignment because he was regularly assigned to contractor protection on the Linden Avenue Project and the customary practice is that employees assigned to contractor protection positions are not considered available for other overtime assignments, because they have first rights to any and all overtime on their own assignment and must be available to provide required protection whenever the contractor’s forces intend to perform work. While admitting that this practice is memorialized in the ET Overtime Agreement, it asserts that it has been applied to other departments as well. It also alleges that performing ten hours of overtime immediately prior to his normal eight hour shift would have made him unfit for duty and compromised the safety of the crew, relying on Public Law Board No. 4979, Award 21 and Third Division Award 24707. Finally, the Carrier argues that the issue of the appropriate measure of compensation for a missed overtime assignment was vested in Public Law Board No. 4549, which determined that on this property the pro rata rate

was appropriate for work not performed. Third Division Awards 27701, 28180, 28182, 28349. It asserts that the claim should be dismissed to dissuade the Organization from expending the Board's time and money to re-litigate this matter, citing Second Division Award 6176.

A careful review of the record convinces the Board that the Organization has made out a prima facie case of a violation of the Claimant's seniority rights in preference for the overtime call under Rule 55, because he was clearly the senior Foreman who customarily performed the contractor protection services involved in the overtime assignment, while Trauger, the junior Foreman assigned, did not. This is not a case where the assignment is claimed to be a continuation of Trauger's normal position. See Third Division Award 30448.

The Carrier asserted that the Claimant was unavailable because he held a contractor protection assignment on a different project, would have physically been a distance from his regular job at his starting time had he worked the overtime elsewhere, and may have been unfit to work 18 hours during a 24-hour period. This affirmative defense was primarily based upon an alleged practice restricting contractor protection overtime to the assigned project, which was modeled after the ET Overtime Agreement, a document admittedly not applicable to the instant department. No other proof of the existence of such a practice outside the ET department was offered, despite the fact that on the property the General Chairman disputed the application of any such practice to this work. Further, the Board has held that the fact that the combination of overtime hours sought and scheduled hours of the Claimant would exceed 16 hours in a 24-hour period is an insufficient basis for denying payment for such hours if a violation of Rule 55 is shown. Third Division Award 32371. Finally, the Carrier has not presented evidence showing that a safety issue would have been created by assigning the Claimant the overtime in dispute. Therefore, we find that the Carrier failed to rebut the Organization's prima facie case with respect to overtime hours assigned to Trauger for which the Claimant was physically available.

With respect to the appropriate measure of compensation for this missed overtime opportunity, the Board has again reviewed the vast precedent cited by the parties to support the make whole versus non-penalty payment approaches for work not performed, and concludes that on this property, the prevailing practice is to pay straight time for missed overtime work. See Public Law Board No. 4549, Award 1, Third Division Award 28180. We find the cases cited by the Organization to be distinguishable

on their facts, the issues presented, and their ultimate holdings. Accordingly, the claim will be sustained at the pro rata rate for the 60 hours sought, because the record reveals no conflict between the Claimant's regular schedule and these hours worked.

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 28th day of August, 2001.