

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35863
Docket No. MW-35741
01-3-99-3-721**

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 Lineman Trainee E. Stives to perform overtime service in the vicinity of Newark, New Jersey on July 2, 7, 9, 20 and 22, 1998 instead of Lineman D. Engle (System File NEC-BMWE-SD-3893 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Engle shall now be compensated for forty (40) hours' pay 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.

The issue raised by this claim is whether an Electric Traction Department (ETD) Lineman Trainee may be assigned predetermined overtime in preference to a Lineman with established seniority within the work territory. The Claimant is an ETD Lineman working on Gang P-282 headquartered in Secaucus, New Jersey, who holds seniority within the work territory where the disputed overtime took place. Trainee Stives was assigned to work with Gang P-106 at the Airport/Hunter project site where the overtime work was performed. Both the Claimant and Stives had regular tours of duty on Monday-Friday, from 7:00 A.M. to 3:30 P.M. The overtime in issue was performed between 10:00 P.M. and 6:00 A.M.

This claim involves the proper application of Rule 55, Preference for Overtime, and the October 1, 1980 Electric Traction (ET) Memorandum of Agreement (MOA) which provides, in pertinent part:

“III. (a) A course of instruction will be established for ET Trainees. . . .

* * *

(c) Trainees will perform any work done by a qualified Mechanic or such other work as is assigned in connection with his training, but:

- (1) Trainees will not work in lieu of a qualified mechanic when qualified mechanics are available on their advertised territory, . . .
- (2) Trainees will be assigned overtime work in accordance with their seniority in their respective working territories.”

The Organization argues the assignment of an unqualified Trainee in preference to the Claimant, who was a qualified Lineman with seniority in the work territory, violates both Rule 55 and the MOA, which has been found to restrict the use of Trainees for overtime until senior qualified Mechanics with advertised positions within the work territory are called, citing Third Division Award 30686. The Organization points to the “in lieu of” language in the MOA as prohibiting the Carrier from using Trainees before

qualified Mechanics, and notes that the Carrier is attempting to give Trainees super seniority over qualified Mechanics based on project work. The Organization asserts that Trainees do not have awarded positions within a territory and are subject to daily assignment at the Carrier's discretion. The Organization takes issue with the Carrier's defenses that the work was continuous or was properly reserved to a specific gang, noting that the work fell within the Claimant's advertised territory. It requests appropriate compensation at the overtime rate.

On the property, the Carrier contended that employees assigned to a specific project area or work location are asked to work overtime in that area before employees from other locations. The Carrier noted that the Trainee worked overtime with the rest of the gang assigned to the Airport/Hunter project. It argued that the overtime was part of their normal work assignment; a project performed on straight time as well as on overtime. The Carrier further averred that the Trainee was working with fully qualified Linemen that it had no need for additional Linemen on that project, and that the Trainee was not working "in lieu of" another qualified Lineman. The Carrier noted that it properly filled the overtime in seniority order, and asserted that the MOA did not limit Trainee overtime only to situations where all senior qualified employees are canvassed first within the territory.

Before the Board, the Carrier expanded its argument to state that Gang P-106 was the gang that ordinarily and customarily performed the work on that project, and was properly assigned it under Rule 55. It argued that the MOA provision relied upon by the Organization was intended to preclude utilization of Trainees for work accruing to qualified Mechanics to take advantage of the lower wage rate, proffering a May 2, 1986 Interoffice Memo in which the Carrier set forth its interpretation of III(c)(1) as the Organization's attempt to keep the Carrier from using a gang with only Trainees. The Carrier also contended before the Board that the intent of the MOA was to have Trainees assigned to a gang work with them on all occasions, as an apprentice program, and that certain work could only be performed outside regular working hours when the power was shut off at the project, and Trainees must be allowed to learn this aspect as well.

Finally, the Carrier requests dismissal of this claim solely based upon the Organization seeking damages at the overtime rate, when it is well aware that the appropriate rate for a lost work opportunity on this property has been held to be the

straight time rate, citing Public Law Board No. 4549, Award 1; Third Division Awards 27701, 28180, 28181 and 28349.

A careful review of the record convinces the Board that, on the record properly before us, the Organization has sustained its burden of proving a violation of Rule 55 and the MOA herein. Initially we note that we cannot consider either the Carrier's documents or arguments raised for the first time before the Board. Thus, the record on the property does not present any contrary interpretation of the "in lieu of" language in the MOA than that asserted by the Organization or found in Third Division Award 30686. On the property the Carrier merely contended that the Trainee was not used "in lieu of" the Claimant because no additional Linemen were needed on the project for overtime.

The Carrier's argument is based upon its alleged practice of assigning an entire gang, including its Trainee(s), first to overtime work on the project they work on during normal hours. It apparently believes that, under Rule 55, a gang may have preference to project work as "work ordinarily and customarily performed by them." No evidence was offered to support such a practice, which the Organization contested. However, we need not decide the existence or bona fides of such a work assignment practice under Rule 55, because the terms of the MOA limiting the Carrier's ability to work Trainees in lieu of qualified Mechanics available for overtime on their advertised territories, do not make exception for gangs working together. The Carrier failed to present any proof that Trainees were always assigned overtime when their gang was, despite the existence of qualified Mechanics within the territory. While some of the arguments presented to the Board may have appeal with respect to the purpose and intent of the training program, these arguments were not properly put forward on the property and cannot form a basis for denying the claim. Because there is no dispute that the Claimant was a qualified, available Lineman with seniority on the territory of the disputed work, we find that the Carrier's overtime assignment to the Trainee herein violated the clear terms of the MOA.

With respect to the appropriate remedy, as noted by the Board in on-property Third Division Award 30686 relied upon by the Organization:

"... 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.”

Accordingly, the claim will be sustained for 40 hours’ pay at the Claimant’s 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 18th day of December, 2001.