

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37003
Docket No. MW-36654
04-3-01-3-191**

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))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Messrs. D. Cheever and J. Lawton for Saturday overtime service (flagging for contractors) at North Station commencing on October 16, 1999 and continuing and instead assigned junior employees G. Courtney and J. Crawford (Carrier's File BMW-407 NRP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. Cheever and J. Lawton shall now each be compensated for ten (10) hours' pay at their respective time and one-half rates of pay for Saturday, October 16, 1999 and each Claimant shall be compensated for all subsequent Saturday performance of such overtime service by the aforesaid junior employees at their respective time and one-half rates 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.

This claim raises the issue of which section of Rule 11 governing the assignment of overtime applies to the facts of this case and whether there was a proven Agreement on the property with respect to the overtime work in issue. Pertinent to a resolution of this dispute are the following two paragraphs of Rule 11, Overtime:

“4. When necessary to work employees under this Rule, the senior available qualified employees will be called according to the following:

- (a) Preference to overtime work on a regular work day which precedes or follows and is continuous with a regular assignment shall be to the senior available qualified employee of the gang or the employee assigned to that work.
- (b) Preference to overtime work other than in (a) above, shall be to the senior available qualified employee at the headquarters who ordinarily and customarily performs such work.”

The disputed overtime work herein involves flagging for contractors on the Central Artery Project in and around North Station, Boston, Massachusetts, the headquarters of both Claimants and the junior employees assigned the work. The Claimants' normal workweek consisted of Monday through Friday, 7:00 A.M. to 3:30 P.M., and immediately prior to this dispute, they ordinarily and customarily flagged for the outside contractor's day crew. The junior employees assigned the disputed Saturday overtime work normally worked Monday through Friday, 10:30 P.M. to 7:00 A.M., flagging for the outside contractor's night crew. There is no

dispute that all employees were qualified and available to perform the work and that the Claimants were senior to those assigned.

The record reveals that the contractor for which flagging protection was provided on Saturday, October 16, 1999, and possibly other Saturdays thereafter as alleged by the Organization, brought in its day crew to work the subject rest day overtime, and that its night crew went home at 7:00 A.M. on Saturday morning, prior to the commencement of the overtime work. The Carrier assigned its junior night crew to remain and perform the flagging work for the contractor's day crew as a continuation of their normal assignment, and in compliance with an alleged understanding and agreement reached between the Project Engineer and the First Vice Chairman a year previous that Saturday morning work was to be considered a continuation of Friday night work for overtime assignment purposes. The Organization contested the existence of any such understanding between the parties regarding the application of Rule 11, noting that such an agreement must be between the General Chairman and Carrier's highest designated officer, it had no record of it, and requested a copy of any such agreement in writing, which was not produced by the Carrier.

The Organization argues that this was planned overtime, not a continuation of night shift work, and that it is obvious that the Carrier and the contractor understood and knew this ahead of time, inasmuch as the contractor brought in its day crew to perform this scheduled work, which was a discreet assignment. It asserts that because the Claimants ordinarily and customarily provided flagging for the contractor's day crew, they were entitled to this overtime assignment under Rule 11.4(b) citing Third Division Awards 30448 and 35425. The Organization states that the Carrier failed to prove any Agreement concerning the application of the terms of Rule 11 to this work, despite being requested to produce same, noting that any such understanding could not have applied to planned, discreet overtime work rather than a true continuation of an assignment. The Organization requests compensation for the Claimants at the overtime rate, asserting that such has been held to be proper for a missed overtime opportunity, citing Third Division Awards 30448, 32226 and 32371, among others, and for additional Saturdays after October 16, 1999 when the Carrier made a similar assignment based upon this being a continuing claim as noted on the property.

The Carrier contends that Rule 11.4(a) was properly applied to assign this overtime work to the night crew as a continuation of their assignment, which was

consistent with the understanding reached by the parties at the commencement of this project that Saturday morning overtime would be assigned in this fashion. The Carrier notes that the Organization never really denied the existence of such Agreement on the property. The Carrier argues that this is not a continuing claim, because the Organization failed to prove or allege any additional dates when its overtime assignment was shown to violate Rule 11, and asserts that the overtime rate claimed is excessive, because there is a long-standing practice on this property to pay claims for missed overtime at the straight time rate, relying upon Public Law Board No. 4549, Award 1 and Third Division Awards 26235 and 26534.

A careful review of the record convinces the Board that this dispute should be governed by the application of Rule 11.4(b) rather than 11.4(a) as alleged by the Carrier. The undisputed facts reveal that the Saturday overtime work performed by the contractor which necessitated the need for the Carrier's flagging operation was pre-planned. Thus, the Carrier had knowledge ahead of time that the contractor intended to work for the entire shift on Saturday, October 16, 1999, and it did so by bringing in its day shift crew. This was not a situation where the Carrier was advised at the end of the shift that the employees it was providing protection services for were going to continue working on overtime to complete a section of the project, permitting its overtime assignment to be governed by Rule 11.4(a). Because the Claimants ordinarily and customarily performed flagging for the contractor's day shift crew, and were senior, available and qualified to perform it on overtime on Saturday, October 16, 1999, the Organization sustained its burden of proving that they were entitled to such assignment under the clear terms of Rule 11.4(b). The Carrier failed to prove any Agreement or understanding that it had with the Organization which would vary the application of Rule 11 in a case involving pre-planned overtime.

With respect to the appropriate remedy, there are two issues raised by the Carrier. The first concerns the number of days covered by this claim; the second concerns the appropriate rate to be applied to payment for time not worked during a missed overtime opportunity. The claim was filed and progressed as a continuing claim, identifying the flagging work involved and the Carrier's ongoing assignment of Saturday overtime to the named junior employees as a continuation of their Friday night shifts, but not identifying specific dates. As noted by the Organization, the Carrier is in possession of the records which reveal the dates of such Saturday assignments to the named junior employees, and whether the overtime was pre-planned, as evidenced by the assignment of the contractor's day shift crew to

perform it. Accordingly, we find the claim to be specific enough in content to permit the parties to review appropriate records to ascertain additional dates of the same overtime assignment violation.

However, we agree with the Carrier that the parties established Public Law Board No. 4549 to determine whether the punitive rate of pay is appropriate for overtime hours missed, and that Award 1 of such Board, after reviewing the two divergent lines of precedent supporting each parties' view and the prior holdings by Referees on the property, held that "on this property this Carrier is only obligated to pay straight time compensation to BMW employees who are bypassed improperly and miss overtime opportunities." Also see Third Division Awards 26235 and 26534. To hold otherwise in this case would be to disregard this clear precedent on the property, which we are not prepared to do. Accordingly, the Claimants are to be compensated for the missed Saturday overtime opportunity on October 16, 1999 at their pro rata rate of pay, as well as for those additional Saturday flagging assignments on this highway project that the Organization can prove, by resort to the Carrier's records, specifically fall within the purview of our findings in this case.

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 May 2004.