

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37699
Docket No. MW-37840
06-3-03-3-216**

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 Mr. J. Bates to perform watchman duties at New York Avenue in Washington, D.C. starting on March 25 through May 9, 2002, instead of senior qualified employee O. Higgins (System File NEC-BMWE-SD-4215 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant O. Higgins shall now be compensated for ' . . . for 261 hours of pay at the Watchman 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 Bates to perform Watchman duties during a time period when he had let his Roadway Worker Protection (RWP) qualification lapse. It seeks the total number of hours worked by Bates in the Trackman position on behalf of the Claimant, another Trackman, who the Organization asserts should have been assigned to perform these additional Watchman duties on overtime. It involves the application of Rules 1, Assignment to Positions, and 55, Preference for Overtime Work. The applicable parts of those Rules follow.

"Rule 1 - Assignment to Positions

In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern.

Rule 55 - Preference for Overtime

(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."

The facts establish that Bates was awarded the Trackman position on Gang A083 effective January 16, 2001. His hours were 11:00 P.M. - 7:00 A.M., Sunday through Thursday. There is no contention that Bates was not the senior qualified applicant on that job. The Claimant is the Trackman on Gang A082, with work hours of 7:00 A.M. to 3:30 P.M., Monday through Friday. During periods of Bates' absence, the Claimant performed Watchman duties in his stead on an overtime basis. Unknown to the Carrier until a spot check on May 12, 2002, Bates had let his RWP qualifications lapse. The Carrier immediately removed him from his position as Trackman on Gang A083; that gang was abolished on May 17, 2002. Bates was paid 272 hours of straight time, eight hours of holiday pay and 35 hours of overtime during the claim period. During the same period, the Claimant received 211 hours of straight time, 56 hours of vacation pay and 60.5 hours of overtime.

This case is almost identical to that presented to the Board in Third Division Award 37698. It involves the Trackmen on Gangs A082 and A083 rather than the Foremen. The arguments made by the parties in that case, and the precedent relied

upon, are substantially the same as the ones made here. For the reasons stated by the Board in Third Division Award 37698, we find that the Organization failed to show a violation of Rule 1, but has made out a prima facie violation of Rule 55. The Board agrees with the Organization that the Carrier cannot escape liability for its overtime assignments to technically unqualified employees by shifting the entire responsibility to employees for maintaining their qualifications. It is incumbent upon the Carrier to maintain adequate records of when employees' qualifications it deems necessary for specific positions are due to expire and to timely check whether they have been updated. Its failure to do so results in a technical violation of Rule 55 when overtime assignments are involved. The Board also agrees with the Carrier that the Organization cannot be permitted to await discovery of a disqualification, and then initiate claims for the period of work performed by an employee whose qualifications had lapsed up to the contractual 60-day limit, under the theory that all such work should have been performed by a qualified employee on an overtime basis when no challenge to the award of the position was timely made. As argued by the Carrier on the property, the showing of a lapse in qualification does not automatically prove that the Carrier is required under the Agreement to fill the position on overtime. It may choose to fill it as a temporary vacancy for up to 30 days without advertisement, during which time the employee may reestablish his qualification.

For the reasons stated in Third Division Award 37698, the Board concludes that the appropriate remedy in this case would be to direct the parties to determine when the overtime worked by Bates occurred and whether the Claimant was available for such overtime assignment during the claim period. On the property the Carrier raised the issue of the Claimant's unavailability during the period of his vacation on April 17 and from April 26 - May 3, 2002. While the Organization disputed the fact that the Claimant's being on vacation automatically rendered him an improper Claimant, citing Third Division Awards 25964, 29538, 33631, 33850 and the Interpretation of Third Division Award 32748, the Board finds those Awards inapposite as this is neither a Scope Rule nor a seniority district violation, and involves more than a one day assignment of overtime. As was the case in Third Division Award 37698, the time records reveal that the overtime here involved was only for a one hour period at a time, and was not for an entire shift. Accordingly, we accept the Carrier's argument that the Claimant was unavailable to be called for such overtime during the extended period of his vacation. The Claimant shall be compensated for the hours of overtime worked by Bates for which he is shown to be

available at the straight time rate of pay. See Third Division Awards 31129 and 35863.

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 30th day of January 2006.