Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38191
Docket No. MW-38579
07-3-04-3-605

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)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier called and assigned junior Foreman G. Partlowe to perform overtime service (contractor protection on the parking lot project) instead of Foreman A. Alessi (System File NEC-BMWE-SD-4376 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. Alessi shall now be allowed compensation for all overtime hours expended by junior employe G. Partlowe in the performance of the aforesaid work from sixty (60) days retroactively of August 27, 2003 and continuing."

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.

At the time this dispute arose, the Claimant and G. Partlowe were Foremen on different gangs at Penn Coach Yard with the Claimant holding greater seniority than Partlowe. The Claimant's schedule on Gang G-413 was 10:00 P.M. to 6:00 A.M., Sunday through Thursday. Partlowe's schedule on Gang G-052 was 7:00 A.M. to 3:30 P.M. Monday through Friday.

On the dates in dispute, a contractor performed work on a parking lot project and did so during daylight hours, Monday through Friday. The contractor began work at approximately 6:00 A.M. The Carrier provided protection for the contractor, which required a Foreman to report to work or be present at 5:30 A.M. Junior Foreman Partlowe was assigned that work over the Claimant. The claim followed.

Rule 55 provides:

"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."

* * *

Because the Claimant's regular hours were 10:00 P.M. to 6:00 A.M., Sunday through Thursday, he was not "available" under Rule 55 to begin a different assignment at 5:30 A.M. on those days. Partlowe, who began his tour of duty at 7:00 A.M. on those days was available for the assignment, which necessitated that he start early. Because the Claimant was not "available" on Mondays through Thursdays during the period covered by the claim, no violation of Rule 55 has been shown for those days.

However, because the Claimant's schedule was for work on Mondays through Thursdays, the Claimant was not scheduled to work on Fridays and, therefore, was "available" for overtime on those Fridays during the period covered by the claim. The Claimant's seniority over Partlowe entitled the Claimant to the work on those Fridays Partlowe worked and the Claimant did not. The assignments to Partlowe

on those Fridays during the period covered by the claim therefore violated Rule 55's requirement that "[e]mployees 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."

With respect to the remedy, the Claimant shall be made whole. The Organization seeks compensation at the overtime rate, while the Carrier argues that precedent on the property is for a remedy at the straight-time rate. The Awards between the parties go both ways. See Third Division Awards 35863, 37003, 37094, 37658 (fashioning the remedy at the straight time rate). Compare Third Division Awards 26690, 30448, 30586 (fashioning the remedy at the overtime rate). The better reasoned Awards are those fashioning the remedy at the overtime rate for lost work opportunities. As stated in Third Division Award 30586:

> ". . . The function of a remedy is to restore the status quo and put the parties back to where they would have been before the violation of the Agreement and further to not allow the party violating the Agreement to benefit from that violation. . . ."

Further, as stated in Third Division Award 30448:

> ". . . In order to make Claimants whole for the lost overtime opportunities, Claimants shall be compensated at the applicable overtime rate consistent with the number of hours worked by the junior employees on the dates set forth in the claim. . . ."

The Claimant lost overtime opportunities on the Fridays covered by the claim. Had the Claimant been allowed to work on those days, he would have been paid overtime. To make the Claimant whole and to not allow the Carrier to benefit from depriving the Claimant of those lost overtime opportunities, the Claimant shall be made whole at the applicable overtime rate on those Fridays covered by the claim provided he did not otherwise work on those days.

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 2007.

CARRIER MEMBER'S DISSENTING OPINION -
NRAB THIRD DIVISION AWARD NO. 38191, DOCKET MW-38579

Exception must be taken to the decision of the majority to pay the instant claim at the overtime rate, as well as to the decision that the agreement was violated.

In order to resolve the dispute between these parties over the issue of whether penalty payments for missed overtime work opportunities on Amtrak were to be paid at the straight time rate or the overtime rate, it was agreed to submit the matter to Public Law Board No. 4549 for adjudication. The Board determined that on Amtrak, the proper remedy was payment of the time lost at the straight time rate.

Despite what was agreed to be a final and binding decision on the issue, the BMWE continues to seek payment at the overtime rate and, on occasion, has been successful in this inappropriate pursuit. The last award of this Division to pay such a claim at the overtime rate was in 1994. Since that time every award of this Division has consistently upheld the decision of Public Law Board No. 4549 and paid the claims at the straight time rate. For example, In Award 31129, Referee Eischen stated:

> "... the controversy over damages at the punitive rate has been addressed and laid to rest on this property. See Public Law Board No. 4549, Award 1 and Awards cited therein."

Subsequent awards, including 30686 and 35863, specifically noted:

> "... 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."

For more than 12 years now, the organization has accepted those decisions without complaint or protest. The decision in this case answers the question as to why the issue continues to arise.

The majority and this Division should have followed the principle set forth in Award 32141, where Referee Eischen ruled:

> "This is not a case of first impression. In Third Division Award 29753 we denied a virtually identical claim, holding: 'Since the Carrier had no obligation to provide the services, the provisions of Rule 52 are not operative in this matter and we find that the Carrier is not in violation of the Agreement.' Again, in Third Division Award 31282, the same dispute involving the same school crossing duties at the same intersection in Lawrence, Kansas, again resulted in a denial 'in the interest of stability.' Now, all undaunted, like the Phoenix rising from the ashes, another identical claim is presented for our edification and determination. In paraphrase of Justice Oliver Wendell Holmes' observation on the subject of finality and authoritative precedent, we conclude that even the most protracted litigation between the most adamant of protagonists eventually must come to a conclusion."

The decision of the majority to pay the instant claim at the overtime rate does not alter the findings of Public Law Board No. 4549, and does not reflect the accepted and acknowledged practice on this property, which as noted above, can only be changed by mutual agreement of the parties. This decision not only fails to aid in the resolution of disputes, but gives new life to one already resolved.

Not to be overshadowed in this case is the fact that the overtime in dispute was in advance of the regular straight time tour of duty of the employee assigned the contractor protection work. It is well established in this industry that the incumbent of the position to which the work accrues has first rights to overtime continuous with the regular tour of

duty. The claimant here was not the incumbent, was not assigned to perform protection work and had absolutely no right to the overtime in question. In fact, because of his 10:00 p.m. to 6:00 a.m. tour of duty Sunday to Thursday, on which he was still working at the time the overtime work started on Friday morning, he was no more available for overtime at 5:30 a.m. on Friday than he was Monday through Thursday, on which days the majority found he was not entitled to the work under the overtime rule. It can only be concluded that the majority missed the mark entirely in this dispute.

For this reason, we dissent to the decision of the majority in this case.

R. F. Palmer
Amtrak
June 5, 2007