Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38212
Docket No. MW-38906
07-3-05-3-189

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 Division –
(IBT Rail Conference
(
(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 called and assigned junior Foremen C. Kulesa and H. Thomas to perform overtime service on maintenance projects in the area of Radnor, Pennsylvania on January 2 and 4, 2004 instead of Foreman A. Alessi (System File NEC-BMWE-SD-4420 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. Alessi shall now be allowed compensation for a total of twenty-eight (28) hours at the overtime rate of pay for this lost work opportunity."

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, C. Kulesa was a Foreman on Gang G-042 headquartered at Penn Coach Yard, working 7:00 A.M. - 3:30 P.M., Saturday and Sunday rest days; H. Thomas was a Foreman on Gang G-062, headquartered at North Philadelphia, working 7:00 A.M. - 3:30 P.M., Saturday and Sunday rest days; and the Claimant was a Foreman on Gang G-413 headquartered at Penn Coach Yard, working 10:00 P.M. - 6:00 A.M., Friday and Saturday rest days. The Claimant was senior to Kulesa and Thomas.

This dispute is about overtime assignments given to junior Foremen Kulesa and Thomas rather than the Claimant on January 2 and 4, 2004. A sign-up register for the overtime was posted on December 31, 2003. Kulesa and Thomas indicated a desire to work the overtime. Because of scheduling around the holiday, the Claimant did not see the sign-up register and therefore did not sign it.

According to the Organization, several weeks prior to the Christmas 2003 holiday, the night gang at Penn Coach Yard requested to observe New Year's on Wednesday, December 31, 2003 rather than January 1, 2004, which was approved. The problem for the Claimant (who was on the night gang) was that he had previously scheduled Wednesday, December 31, 2003 as a vacation day. The Organization states that the night gang supervisor allowed the Claimant to observe January 1, 2004 as the holiday, rather than the switch of the holiday to December 31, 2003 with the rest of the night gang. The Organization states that as a result of the holiday switch for the night gang and the Claimant's schedule, the Claimant did not see the overtime sign-up register on December 31, 2003; was therefore not advised of the overtime opportunities for January 2 and 4, 2004; and was therefore deprived of the opportunity to utilize his superior seniority over Kulesa and Thomas to work the overtime on January 2 and 4, 2004.

According to the Carrier, because the Claimant was on a vacation day on December 31, 2003, he was unavailable for the overtime assignments in question and would not have been considered available until his return following his vacation and the holiday weekend. Further, according to the Carrier, the Claimant made no effort to advise the Carrier that he would be available for overtime surrounding the holiday.

Rule 55(a) 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."

The bottom line after all of this is that the record sufficiently shows that the Claimant did not see the overtime sign-up register, which the Carrier waited to post until December 31, 2003 - a day which was a switched holiday for the night gang. The Carrier's posting the sign-up register on December 31, 2003 was the cause of the Claimant's inability to indicate whether he desired to work the offered overtime on January 2 and 4, 2004. There is no reason found in the record concerning why the Carrier waited until December 31, 2003 to post the sign-up register. Whether the Claimant was technically on a previously scheduled vacation day on December 31, 2003 rather than observing the switched holiday is irrelevant. What is relevant is that the Carrier did not post the sign-up register in a fashion that would have allowed the Claimant to see information upon which he could decide whether to exercise his seniority. Given the timing of the posting of the sign-up register, the Claimant's statement that "[t]here was no way of me knowing about the overtime . . . there was no way I could have known or signed, the overtime sheets . . ." is understandable. Under the particular facts of this case, without an explanation in the record why the Carrier waited until December 31, 2003 to post the sign-up register, we find that the Claimant was not allowed to exercise his seniority rights under Rule 55. Had the Carrier offered a reasonable explanation why it waited until December 31, 2003 to post the sign-up register, perhaps the result would have been different. But the Carrier did not do so. A violation of Rule 55 has been proven.

According to the Carrier's April 5, 2004 letter, its records show that on January 2, 2004, Kulesa worked two hours overtime at Penn Interlocking and Thomas worked three hours overtime at Radnor Bridge. On January 4, 2004, Kulesa and Thomas both worked 12 hours at Radnor Bridge. The Claimant could not have worked at two places on January 2 or covered both of the assignments on January 4, 2004. Giving the Claimant the benefit of the doubt (and also noting that the claim only addresses overtime work at Radnor where Thomas worked three hours on January 2, 2004 and not work at Penn Interlocking where Kulesa worked two hours on that date) we find that the Claimant was deprived of three hours of

overtime on January 2 and 12 hours of overtime on January 4, 2004, for a total of 15 hours of overtime at Radnor Bridge. Because the Claimant was deprived of overtime opportunities for which he would have been paid at the overtime rate and in order to make the Claimant whole for the demonstrated violation of the Agreement and further to not permit the Carrier to benefit from the demonstrated breach of the Agreement, the Claimant shall be compensated for those 15 hours at the overtime rate. See Third Division Award 38191.

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 25th day of June 2007.

CARRIER MEMBER'S DISSENTING OPINION -
NRAB THIRD DIVISION AWARD NO. 38212, DOCKET MW-38906

Exception must be taken to the decision of the majority to pay the instant claim at the overtime rate.

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.

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

R. F. Palmer
Amtrak
July 5, 2007