

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39953
Docket No. MW-40273
09-3-NRAB-00003-080074**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 failed to offer or assign the work opportunity of a watchman protecting the TLS unit to Mr. E. Wiseley and instead assigned junior employee F. Graves (System File NEC-BMWE-SD-4634 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, ‘Claim is herein presented for an equal number of overtime hours, at the overtime rate of pay, for the Claimant Mr. Wiseley. The actual amount of hours to be determined by a joint review of the pay roll records. . . .’”**

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.

During the period in question, the Claimant was assigned as a Watchman to walk with a Track Inspector in Gang G-032, headquartered at Penn Coach Yard. His tour of duty was Monday through Friday, 7:00 A.M. to 3:30 P.M. F. Graves was assigned as a Watchman to walk with a Track Inspector on Gang G-042, headquartered at Penn Coach Yard. His tour of duty was Monday through Friday, 7:00 A.M. to 3:30 P.M. The Track Inspector position on Gang G-042 was vacant, so Carrier assigned Graves to assist Gang G-122 supporting the Track Laying System (TLS). In this capacity, Graves worked overtime that was continuous with his regular tour of duty, including reporting for duty one hour early each day, and also performed rest day overtime. There is no dispute that the Claimant had greater seniority than Graves.

The overtime performed by Graves that was continuous with his regular tour of duty was in accordance with Agreement Rule 44. The Claimant had no right to perform it.

The rest day overtime was governed by Rule 55. Rule 55(a) provides:

“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.”

It is well established that the term “ordinarily and customarily performed,” as used in Rule 55, refers not to the type of work, but rather to the continuation and completion of work. See, e.g., Third Division Awards 35860 and 32154. The rest day overtime performed by Graves was also performed with Gang G-122 in support of the TLS. Thus, that work was a continuation of his regular duties and, under Rule 55(a) was ordinarily and customarily performed by him rather than by the Claimant.

The Organization argues that the Division Engineer denied the claim on the ground that the Claimant had been offered the assignment if he would report every day at 6:00 A.M., but did not so report. The position was reiterated at the first appeal level, but in response the Claimant submitted a signed statement attesting that he was never offered the opportunity to take the assignment or advised of the overtime. Thereafter, the Carrier dropped that defense.

We agree that the Carrier abandoned the defense. Thus, we assume that the Claimant was never offered the opportunity to work on Gang G-122. That, however, does not change the fact that the overtime performed by Graves was in accordance with Rules 44 and 55(a).

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 30th day of September 2009.