

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39959
Docket No. MW-40721
09-3-NRAB-00003-080597**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division
(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 did not give Work Equipment Operator S. Di Iorio preference for the overtime work equipment operator work (operate vacuum truck) at Mile Post 183 in Cranston, Rhode Island on March 25, 2007 and instead gave preference to, and assigned, junior employee K. Cavanaugh to said overtime work (System File NEC-BMWE-SD-4685 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Di Iorio shall now be compensated at the overtime rate for all overtime hours worked by junior employee K. Cavanaugh in the performance of the aforesaid overtime work.”**

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.

The basic facts underlying the instant claim are not in dispute. The Claimant was assigned as a Work Equipment Operator (Vacuum Truck) on Surfacing Gang S-050, headquartered at Providence, Rhode Island, with a regular tour of duty of 10:00 P.M. - 6:30 A.M., Sunday through Thursday. The Claimant had greater seniority than K. Cavanaugh, who was assigned as Truck Driver (CDL-Grapple) Tie and Timber Gang S-4125 headquartered in Providence, with a regular tour of duty 10:00 P.M. - 6:30 A.M., Monday through Friday. The Claimant worked overtime on his rest days of Friday, March 24, 2007 from 10:00 P.M. to 7:00 A.M. and Saturday, March 25, 2007, from 10:00 P.M. to 8:00 A.M. Cavanaugh worked overtime on Sunday, March 26, 2007, from 6:00 A.M. to 4:00 P.M. The Claimant was not offered the opportunity to work the overtime that Cavanaugh worked. All overtime involved operating the vacuum truck.

The Organization contends that the Carrier violated Rule 55(a) when it failed to offer the overtime to the Claimant because, unlike Cavanaugh, the Claimant ordinarily and customarily operated the vacuum truck and because the Claimant had greater seniority than Cavanaugh. 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 seniority.”

The Carrier denies violating Rule 55(a) arguing that the Claimant was not available to work the overtime that Cavanaugh worked. The Carrier relies on regulations of the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 49 C.F.R. § 395.2(a)(2) which prohibit permitting or requiring a driver to drive a property-carrying commercial motor vehicle for any period after

the 14th hour after coming on duty following ten consecutive hours off duty. The Carrier urges that if it allowed the Claimant to work the overtime that Cavanaugh worked, the Claimant would have operated the vacuum truck for 18 consecutive hours in violation of the federal regulation.

During handling on the property, the Organization asserted that the DOT regulation did not render the Claimant unavailable because it covered driving a vehicle on public roadways and the vacuum truck was operated on the rails. Carrier responded that the vacuum truck was operated on public roadways between the MOW Base at Providence and Atwells where it was placed on the rails. We are thus faced with conflicting assertions, neither of which was backed by evidence. As the moving party, the Organization had the burden of proof. The Organization offered no evidence to prove that the truck was not operated on public roadways or that the DOT regulation did not render the Claimant unavailable to work the overtime worked by Cavanaugh. Accordingly, the claim must be denied.

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.