Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40622
Docket No. SG-38872
10-3-NRAB-00003-050310
(05-3-310)

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:

Claim on behalf of J. A. Dowd Jr., for 12 hours at his time and one-half rate of pay, account Carrier violated the current Signalmen's Agreement, particularly Appendix B-3, when it allowed junior employees to work an overtime assignment at Penn Coach Yard on November 29, 2003, from 9:00 p.m. to 9:00 a.m. and denied the Claimant this work opportunity. Carrier's File No. NEC-BRS(S)-SD-1035. General Chairman's File No. JY32101081-18046. BRS File Case No. 13187-NRPC(S)."

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 involves work that was planned on an overtime basis to relocate communication cables for Shoemaker Construction Company at Penn Coach Yard.

The Organization argues that the work accrued to the Claimant because he had the seniority and was previously utilized to support contractors working at the 30th Street Station. The Claimant was qualified and should have been offered the work based on seniority.

The Board finds that there is a prima facie case. Certainly, this was work that was previously assigned. The Board also takes careful note that the work was relocating communications cables; work never denied on the property that could have been performed by the Claimant. In fact, there is no denial to the Organization's background statement that:

> ". . . the claimants were asked to work by Pete Lach, the Communication Supervisor on November 28, 2003, to perform this work on November 29, 2003. Mr. William Bryan, the Senior Engineer in charge of approving overtime, refused to allow the claimants to work on the holiday weekend. Then all of a sudden, he approved another gang to perform the work."

The Carrier's position on the property is that the rerouting of existing communication cables was assigned to Construction Gang R-961 in full compliance with the Agreement, supra, because the gang had originally installed the cables and was familiar with the installation, connection and location of the cables to be relocated. The Carrier argues that the work is neither reserved for the Technician class, nor accrued to them.

The Board does not agree. There is no showing on the property that the Technician Gang should not have performed the work. The work was given to the Construction Gang due to the fact that "members of gang R961 had performed work prior to the overtime and made the additional work assignment in accordance with the agreement."

The fact that Gang R-961 had originally installed the cables does not give them a demand right to relocate the cables at a later date. The Carrier's defense is that the Construction Gang had originally installed the cables and further that the work accrued to those ". . . who were actually performing the work prior to the overtime."

The Board finds no proof in the record to support this assertion. The Division Engineer's rebuttal and all others reiterate that the Construction Gang did the initial work and, therefore, it accrued to the junior Construction Gang members because they "were actually performing the work prior to the overtime."

The record indicates that both Gangs have and could have performed the work. Appendix B-3 (a) and (b) support the Carrier if proof is provided that the junior employees were in fact, working on the project immediately prior to the overtime assignment or "continuous with the current tour of duty." No proof was provided to support this affirmative defense. If they were not working on the project, the fact that they initially installed the cables is not supported by any language in the Appendix. What is negotiated is language that, absent the first condition, gives preference to seniority for the overtime.

The Board finds that the Carrier violated the Agreement. The Carrier argues that the claim for the time and one-half rate of pay is improper and excessive, because there is no provision for allowing punitive rate payments for work not performed. While the Board has disagreed with the Carrier's position numerous times and for various reasons; when, as here, the Carrier states, "It is well established that the proper penalty on this property for loss of work opportunity is payment at the straight time rate" and no rebuttal is forthcoming from the Organization, it must stand as fact. The claim is sustained at the straight time rate of pay.

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 27th day of August 2010.