

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41096
Docket No. MW-40931
11-3-NRAB-00003-090224**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Engineer Work Equipment ‘A’ Operator S. Di Iorio to perform overtime service (operate vacuum truck) on January 19, 2008 and instead assigned Engineer Work Equipment ‘B’ Operator C. Allen (Carrier’s File NEC-BMWE-SD-4731 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Di Iorio shall now be compensated for all overtime hours that Mr. Allen expended in connection with operating the vacuum truck on January 19, 2008.”

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.

Gang S-062 was scheduled for overtime work on January 19, 2008 to install plug rails on Track No. 3 in the vicinity of Mile Post 177. Upon reporting to the job site on that day, the gang discovered two dislodged concrete ties. The Supervisor directed the Engineer Work Equipment (EWE) 'B' Crane Operator to obtain and operate a vacuum truck to excavate ballast by the dislodged ties.

The claim, dated January 25, 2008, alleges that the Carrier violated Rule 55 when, instead of contacting the Claimant, the Supervisor used the EWE 'B' Crane Operator to operate the vacuum truck. Notwithstanding Rule 55, the Carrier asserts that it may temporarily or intermittently assign a qualified employee to operate the vacuum truck because it was within the range of that employee's abilities (Rule 58).

The progression of the claim on property shows that it was processed in the usual and customary manner including placement before the highest officer of the Carrier designated to handle it. Following a conference discussion on July 31, 2008, the claim is now properly before the Board for adjudication.

Rule 55, Preference for Overtime Work, states "[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."

The Claimant operates a vacuum truck in the ordinary and customary performance of his duties as a EWE 'A' Vacuum Truck Operator. Thus, he is qualified and was available on January 19, 2008, but the Carrier did not contact him for the contested work. The EWE 'B' Crane Operator is also qualified to operate a vacuum truck; operation of it was within the Crane Operator's range of abilities. Both employees hold the position EWE Operator, but the Claimant is the junior employee.

The record does not show the time or hours dedicated by the Crane Operator who operated the vacuum truck on January 19, 2008. This unknown fact would, more likely than not, show whether the Carrier used the Crane Operator to (1) entirely supplant the Claimant such that the Claimant was impermissibly dislodged from overtime work or (2) supplement the gang's work in a de minimus manner with his temporary or intermittent operation of the vacuum truck as described in Rule 58.

Without a record showing the amount of time dedicated to vacuum operation, the Organization's and Carrier's competing explanations remain unresolved. That is, BMW claims that all the work operating the vacuum truck falls to the Claimant under Rule 55 and the Carrier counter-claims that under the circumstances of this claim, Rule 58 controls for temporary or intermittent performance of vacuum operations. The Board accepts the Carrier's interpretation of Rule 58 in the absence of any countervailing response.

Notwithstanding the claim and counter-claim, the Organization is the moving party with the burden of proof to establish the relevant facts and it falls short in this proceeding. Given these findings, the Board concludes the allegation was not established. Consequently, we find no violation of the Agreement and the claim is 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 18th day of October 2011.