Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41147
Docket No. MW-40755
11-3-NRAB-00003-090038

The Third Division consisted of the regular members and in addition Referee Patrick Halter 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 Carrier violated the Agreement when it assigned Supervisor R. Gray to perform Maintenance of Way Electrician-Electrolysis work in Penn Station, New York on September 5 and 6, 2007 instead of Metropolitan Division Electric Traction Electrolysis Electrician L. Martinho (Carrier's File NEC-BMWE-SD-4702 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Martinho shall now be compensated for ten (10) hours at his respective time and one-half rate of pay."

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 claim, dated September 18, 2007, alleges that the Carrier violated the Scope and Work Classification Rules, as well as Rule 55 when, instead of contacting the Claimant, it assigned a Supervisor to inspect the groundings on the stand pipe rail return on Lines 1 and 4 at Penn Station, New York, between 9:00 P.M. and 7:00 A.M. on September 5 - 6, 2007.

The Carrier contended that the work performed was a visual inspection of the groundings to confirm that a contractor satisfactorily completed the installation work it had been assigned to perform whereupon the Assistant Division Engineer – Electric Traction (ADE-ET) would sign the acceptance form to release the Fire/Line Safety Department. This visual inspection was de minimus in nature and not a violation of the Scope and Work Classification Rules or Rule 55.

The progression of the claim on the property reveals 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 March 20, 2008, the claim is now properly before the Board for adjudication.

Based on the Supervisor's Work Report (NEC 661), he performed an "inspection of grounds" on Lines 1 and 4 to ensure that the installation was completed such that the ADE-ET could sign the acceptance form to release the Fire/Line Safety Department. The Supervisor examined the physical connection at each contact point to determine that the connections met certification electrolysis standards.

The Board finds that the work in question falls within the Scope and Work Classification Rules. As an Electric Traction Electrolysis Electrician, the Claimant ordinarily and customarily performs the type of work performed by the Supervisor in this case. The Claimant was qualified and available for the work, but was not contacted. Given the circumstances established, the assignment violated the Scope and Work Classification Rules, as well as Rule 55.

Although asserted by the Carrier as a cursory visual inspection with a de minimus impact, the Supervisor's work report reveals that he expended ten hours performing the work, including "gather[ing] tools and materials" and "putting

away tools and materials." Time expended and materials used exceed the boundary of reasonableness for a cursory inspection with de minimus impact.

Given these circumstances, the Board finds a violation of the Agreement and sustains the claim. The remedy to cure the violation is appropriate compensation in the amount the Claimant would have received had the Carrier assigned the work in accordance with the Agreement.

AWARD

Claim sustained.

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 21st day of November 2011.

CARRIER MEMBERS' DISSENT

TO

THIRD DIVISION AWARDS 41098, 41099 AND 41147
DOCKETS MW-41322, MW-41323 AND MW-40755

(Referee Patrick Halter)

Exception must be taken to the decision of the Majority to pay the referenced claims at the overtime rate.

In order to resolve a long-standing dispute between these parties over the question of whether penalty payments for missed overtime work opportunities on Amtrak were to be paid at the straight time rate or the overtime rate, the parties agreed to submit the issue to Public Law Board No. 4549 for adjudication. PLB 4549, with Referee Richard R. Kasher participating, 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 rendered by PLB 4549 on July 14, 1988, the Organization continues to seek payment at the overtime rate and, on two occasions, has been successful in this inappropriate pursuit. Stated differently, the Third Division has consistently upheld the precedent established by PLB 4549 and paid claims at the straight time rate with the exception of Awards 38191 and 38212, which were rendered in 2007 with Referee Edwin H. Benn participating. Both of those decisions can be considered as anomalies, however, as evidenced by the following passage from Referee Benn's earlier Award 26534 which specifically dealt with the "pro rata vs. punitive" rate of pay issue:

> **"First, although dissented to by the Organization in both cases, the issue in this case has been recently decided in Third Division Award 26235 and Public Law Board No. 3932, Award No. 14 holding that the appropriate remedy for improper assignment of overtime work under this Agreement on this property is payment at the pro rata rate. For us to agree with the Organization in this case, we would be required to ignore those prior Awards. The Organization's arguments in this case essentially reiterate the basic arguments made in the prior cases. We can find no compelling reason in this record to disregard the prior Awards that have decided this identical issue and have given finality to the dispute. See Fourth Division Award 4527." (Emphasis added)**

In this vein, also see Award 31129, with Referee Dana Edward Eischen participating, wherein the Division held:

> **". . . 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."**

Subsequently, Award 35863 (Referee Margo R. Newman) not only cited, but also quoted the following passage from Award 30686 (Referee Herbert L. Marx, Jr.):

> **"... 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 23 years now, the Organization accepted those decisions without complaint or protest. The palpably erroneous decisions in these cases answer the question as to why the issue continues to arise.

The Majority should have followed the principle set forth in Award 32141, where Referee Dana Edward 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 claims at the overtime rate does not alter the well-reasoned findings of PLB 4549, and does not reflect the accepted and acknowledged long-standing historical practice on Amtrak 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 threatens to breathe new life into one already resolved.

For this reason, we vigorously dissent to the decision of the Majority in these cases.

Richard F. Palmer
Carrier Member

Michael C. Lesnik
Carrier Member

November 21, 2011

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT TO
THIRD DIVISION AWARDS 41098, 41099 and 41147
DOCKETS MW-41322, MW-41323 and MW-40755
(Referee Halter)

The Carrier Members' Dissent in this case mischaracterizes the history between the parties over the payment of damages to compensate for overtime opportunities and, therefore, a response is required. Despite the Carrier Members' efforts in creative rewriting of history, suffice it to say that PLB No. 4549 was created because the Carrier engaged in a blatant exercise in forum shopping when it exercised its statutory right to withdraw eight (8) cases from the NRAB after the parties had already scheduled the cases to be heard by the Third Division with Referee McAllister selected to sit with the Division as the neutral party. The Carrier's contention that it was agreed that Award 1 of PLB No. 4549 was to be a final and binding decision on the issue is belied by the award itself in its summary of the background facts. In the words of the award:

> "After resolving certain procedural disputes, the parties agreed to the establishment of this Board for the purpose of rendering a single decision which would be applicable to the eight (8) dockets which had been withdrawn from the Third Division."

The jurisdiction of PLB No. 4549 could hardly have been more clearly stated. However, since the issuance of that award, the Carrier henceforth has argued that said decision should be regarded as a final and binding decision not only on the eight (8) cases decided thereby, but has also argued that it decided forevermore the issue of the rate of compensation to be paid when overtime work opportunity was improperly denied. The (perhaps unintentional) irony of the Carrier Members' position is apparent when one considers that had the Carrier accepted Awards 26508 and 26690 of this Division as having finally decided the issue, it would never have engaged in its forum shopping adventure and the Board would now be spared the eternal revisitation of this issue.

Since the issuance of the award of PLB No. 4549 in 1988, this Board has had the opportunity to revisit this particular controversy on multiple occasions. In certain cases, cited within the Carrier Members' Dissent, the Carrier has been able to lead a majority to accept its inaccurate representation of the circumstances surrounding the establishment of PLB No. 4549 and its jurisdiction, with the result that the Majorities therein gave undo deference to the decision of that Public Law Board. In other instances, the Board has adopted the well-reasoned position that the purpose of an award of damages is to compensate the claimant in the amount he would have received from the Carrier had the Agreement not been violated. As this Division held in Award 26508, quoting from Award 25601:

> "'Better reasoned opinions remedy an overtime violation with a make whole payment. Here the evidence shows that Claimant, if he had worked, would have earned 8 hours and 20 minutes at time-and-one-half. There is no element of retribution or punishment

> "'in such a remedy. Carrier and Claimant are placed in the same position they would have been had not Carrier violated the Agreement. Payment would have been made at the overtime rates. It is Claimant who would be penalized if he were reimbursed at straight time or only for actual hours worked. The payment to the junior employee is the result of the Carrier's improper assignment and does not make a remedy which makes Claimant whole a penalty.
>
> On the basis of the foregoing authority, the Board concludes that payment of this Claim at the time and one half rate is appropriate."

In this connection, in addition to Third Division Awards 38191 and 38192 cited by the Carrier, attention is invited to Third Division Awards 30448, 32223, 32371 and 38212, all of which sustained claims for the loss of overtime work opportunities at the overtime rate. In addition, we would invite attention to Third Division Award 30586, Awards 9 and 61 of PLB No. 4979 and Awards 113 and 159 of SBA No. 986, wherein the Boards involved awarded compensation at the overtime rate when the claimant therein had been deprived of overtime work opportunities because of an unjust disqualification, suspension or dismissal.

While asserting a longstanding and historical practice of awarding compensation in these cases at the straight time rate, the Carrier Members contended that the Organization accepted decisions denying compensation at the overtime rate "without complaint or protest" for more than twenty-three (23) years. Of course, such contention is absurd. In this connection, an unbiased review of the awards cited by both parties will reveal that the Organization has continued to claim compensation at the overtime rate in every instance involving the loss of an overtime work opportunity. It would defy logic to imply therefrom that the Organization had acquiesced to the asserted practice.

Moreover, we note that the Carrier continues to attempt to frame the issue involved as one of awarding compensation at the "pro rata vs. punitive" rate of pay. Of course, as previously noted, the award of damages in the amount the Claimant would have received from the Carrier had there been no violation of the Agreement merely compensates the Claimant for his loss of work opportunity. There can be no question but that such a result is compensatory and not punitive.

Finally, even as each side attempts to stack up lists of "precedent" awards, it must be remembered that the value of an award as precedent depends on the quality of the reasoning therein. It should be noted that in Award 1 of PLB No. 4549, that Board specifically stated that it did not find the rationale of the Carrier was superior to the rationale argued by the Organization. Nonetheless,

that Board found for the Carrier based on which side had the longest list of awards. Inasmuch as PLB No. 4549 essentially decided to ignore the facts of the eight (8) cases, the issues raised therein and the substantive arguments presented in the cases before it, it is essentially worthless as precedent in deciding subsequent cases. To the contrary, however, within awards sustaining the Organization's position, as in the instant cases as well as in Third Division Award 26508 (quoted above), the Board has clearly enunciated its reasoning in upholding compensation at the appropriate overtime rate, that the remedy to compensate the Claimant for the violation is appropriate compensation in the amount the Claimant would have received from the Carrier had there been no violation of the Agreement. In view of the foregoing, Awards 41098, 41099 and 41147 stand as clear precedent for consideration in deciding any future disputes that may arise.

Respectfully submitted,

Gary L. Hart
Labor Member