

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41157
Docket No. MW-41324
11-3-NRAB-00003-100207**

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)
(– Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call Maintenance of Way Pilots B. Sabat, J. McAteer, I. Fluellen and A. Loran for overtime service on various dates between July 11 and 27, 2008 and instead assigned junior employees G. Anirina, M. Dunn, T. Coward, S. Swain, C. Allen, D. Lewis, G. Amos, T. Bourke, S. Conyers, R. Callender, R. King and D. Rollins or otherwise failed to properly fill pilot duties (System File NEC-BMWE-SD-4807 AMT).**
- (2) The Agreement was violated when the Carrier failed to call Maintenance of Way Pilots J. McAteer, B. Sabat, I. Fluellen, A. Loran, W. Bryant and B. Thompson for overtime service on August 8, 9 and 10, 2008 and instead assigned junior employees M. Brickhouse, N. Oliveira, T. Hardy, R. Brown and R. Belle or otherwise failed to properly fill pilot duties (System File NEC-BMWE-SD-4808).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimants B. Sabat and A. Loran shall now each be**

compensated for a total of seventy-three (73) hours at their respective time and one-half rate of pay, Claimant J. McAteer shall now be compensated for a total of one hundred fifteen (115) hours at his respective time and one-half rate of pay and Claimant I. Fluellen shall now be compensated for a total of eighty-six (86) hours at his respective time and one-half rate of pay.

- (4) As a consequence of the violation referred to in Part (2) above, Claimant J. McAteer shall now be compensated for a total of forty (40) hours at his respective time and one-half rate of pay, Claimant B. Sabat shall now be compensated for a total of thirty-eight (38) hours at his respective time and one-half rate of pay, Claimants I. Fluellen and A. Loran shall now each be compensated for a total of twenty-eight (28) hours at their respective time and one-half rate of pay and Claimants W. Bryant and B. Thompson shall now each be compensated for a total of twenty-four (24) hours at their respective time and one-half rates 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.

These claims, dated September 7 and October 2, 2008, allege that the Carrier violated Rules on Scope, Seniority, Overtime and the Pilot Agreement (November 2, 2001) when overtime work was not assigned to the Claimants on 21 occasions, and on another five occasions, the Carrier did not assign a pilot for the safe operation of equipment, resulting in lost work opportunities. .

According to the Organization, the core of the dispute is that “all the hours claimed involved work that the claimants ordinarily and customarily performed at the time of violation and still perform on a daily basis at present. . . . The claimants were entitled to work the hours claimed, just as Mr. Strallow was, not other junior employees who are not holding pilot positions and ordinarily and customarily perform other maintenance duties, not piloting.”

The Organization argues that the Carrier’s letter dated July 28, 2009 acknowledged the work is covered by the Pilot Agreement, because the Carrier states that pilots were assigned “on each piece of equipment while moving or transporting contractor equipment into and out of the tunnel” and “the Carrier only utilized an M/W pilot on the lead and end pieces of equipment.”

In response the Carrier notes that all Claimants worked their regular schedule and overtime on the disputed dates. They could not work additional overtime because Engineering Department policy does not allow a pilot to work more than 16 hours in a 24-hour period. Accordingly, the Claimants were not available. Moreover, all overtime hours claimed involve ongoing ventilation, waterproofing, and FEMA project work in the East River Tunnels. In this regard, the disputed work is not covered by the Pilot Agreement.

The progression of the claims on the property reveal it was processed in the usual and customary manner, including placement before the highest officer of the Carrier designated to handle them. Following a conference discussion on June 18, 2009, the claims are now properly before the Board for adjudication.

There is no dispute that the Carrier used Foremen other than the Claimants to pilot equipment into and out of the East River Tunnels on the dates in question.

The question before the Board is whether that action constitutes a breach of the Pilot Agreement and the various Rules cited by the Organization.

The Pilot Agreement reads, in pertinent part, as follows:

“(1) The following projects shall be covered by this agreement:

- Standpipe Project - December 2001 through August 2003**
- JO Interlocking Project - February 2002 through April 2003**
- Ventilation Project - March 2002 through August 2006”**

It is understood that Amtrak will advise BMWE should the estimated start or completion dates of the above projects be changed by more than ninety (90) days. It is further understood that additional projects may be included under this agreement by written concurrence of the parties.”

Furthermore, the parties agreed that employees working under the Pilot Agreement will not be used on projects other than those identified on the list unless all other qualified employees on the Division have been exhausted. In keeping with that limitation, the Carrier provided work reports for the Organization’s review to ensure that pilots were used only on the itemized projects in the Pilot Agreement.

The disputed work involves waterproofing and FEMA projects, including the “ongoing ventilation project” at the East River Tunnels. Although the “Ventilation Project” is listed in the Pilot Agreement, it was for the period of March 2002 through August 2006. The claimed work occurred in 2008. The Organization provides no evidence of any written concurrences of the parties to demonstrate that they extended the Ventilation Project referred to within the Pilot Agreement into 2008. Moreover, even assuming the ventilation work involved here was connected with the ventilation project referred to within the Pilot Agreement, there is nothing in the record to show that the parties had reached executed written concurrence that such project would be included under said Agreement.

The other work - waterproofing and FEMA projects - are not listed within the Pilot Agreement and without "written concurrences of the parties" the Board finds such work falls outside of the Pilot Agreement. The Board notes that it is unrefuted in the record that in a prior claim (NEC-BMWE-SD-4524) the Organization accepted the Carrier's use of pilots for jobs and work not itemized in the Pilot Agreement. Therefore, it is the Organization's burden to prove Agreement support for its claims to this work. It failed to meet that burden.

The Carrier asserts, and the Organization does not contend otherwise, that the Carrier was willing to add these projects to the list of projects covered by the Pilot Agreement and the Organization did not agree to their addition. The Board concurs that the Organization cannot now argue that the Maintenance of Way personnel have any demand right to projects not specifically covered by the Pilot Agreement.

In short there were a total of 26 occasions on which the Claimants were not assigned the disputed work. The Board finds that the Carrier's actions were consistent with the Pilot Agreement in making those assignments and the Agreement was not violated.

Based on these findings and conclusions, the claims will be denied.

AWARD

Claims 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 21st day of November 2011.