

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41687
Docket No. MW-41743
13-3-NRAB-00003-110360**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 Agreement was violated when the Carrier failed to call and assign Truck Driver D. Battista to perform overtime truck driver service (operate swivel dump truck) on March 28, 2010 and instead called and assigned junior employee D. Gomes (Carrier’s File NEC-BMWE-SD-4923 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Battista shall now be compensated at his applicable overtime rate of pay for all overtime hours worked by junior employee D. Gomes on March 28, 2010.”**

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 overtime assignment claim involves the issue of which overtime call order Rule applies to the facts of this case. If the work involved Production Gang overtime, then the March 29, 1996 Call Out Agreement applies and the order of call for Operators would be (1) the closest qualified production operator by existing bulletin and (2) the senior rostered qualified operator working on the Subdivision. If it was not production gang work, then the following provision of Rule 55, Preference for Overtime Work, would apply:

“(a) 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 their seniority.”

At the time of this dispute, the Claimant was assigned as a Truck Driver (CDL-Fuel) in Maintenance Gang S-952, and Gomes was assigned as a Truck Driver (CDL-Swivel Dump) on the same gang. The Claimant's Truck Driver seniority is senior to Gomes'. During the week prior to the Sunday overtime call challenged in this claim, the Claimant and Gomes (along with the rest of Gang S-952) were assigned to support bridge timber replacement work, which included Saturday overtime, on their respective track maintenance positions. On Sunday, March 28, 2010 the Carrier utilized Surfacing Gang S-142 to surface the approaches to the bridge. Because that gang does not have a swivel dump truck position, and the Carrier needed a Swivel Dump Truck Operator to provide stone, it assigned Gomes to perform this overtime rather than the Claimant, who had not been operating the swivel dump truck on this project during the prior week.

The Organization argues that the overtime work in question was production work, because it was performed by Surfacing Gang S-142, and that when the Carrier decided to assign a rostered Truck Driver working on the Providence Subdivision to operate a swivel dump truck in support of the production surfacing gang, it was required by Agreement to utilize the Claimant, who was qualified, available and senior to Gomes. It asserts that its failure to do so violated the

Claimant's important seniority rights, citing Third Division Awards 19758, 20310, 24480 and 35572. The Organization contends that Gomes was not the regularly assigned employee to perform this Truck Driver work, because the work on Sunday was production overtime, and was not part of what he had performed during his regular assignment from Monday through Saturday that week. The Organization notes that the appropriate remedy for the loss of an overtime opportunity in these circumstances, and in order to protect the integrity of the Agreement, is payment at the overtime rate, relying on Third Division Awards 38191 and 38212.

The Carrier contends that the bridge timber replacement project was a maintenance project supported by track maintenance personnel, and the fact that a surfacing gang was used on Sunday, March 28 to support the project does not change the character of the work or convert it into a production project. It asserts that Gomes was the active Swivel Dump Truck Operator who had ordinarily and customarily performed this work during the prior week on this project, and that it complied with Rule 55(a) in assigning him the overtime work in that classification, citing Third Division Awards 27090, 28782, 32154, 35860, 38126 and 38211. The Carrier points out that, in any event, because there was no Swivel Dump Truck Operator position on Surfacing Gang S-142, the production overtime Rules would not apply. Additionally, the Carrier argues that the requested remedy is excessive, because it has been held on this property that the proper rate for a lost overtime opportunity is the straight time rate, relying on Third Division Awards 30686 and 35863.

A careful review of the record convinces the Board that the Organization failed to meet its burden of proving a violation of the Agreement. There is no evidence to support the Organization's contention that the bridge timber replacement project, of which the disputed Sunday overtime assignment was a part, was production gang work, or became so when Surfacing Gang S-142 was called in on Sunday to surface the approach to the bridge. Thus, the Board concludes that the applicable overtime Rule in this case is Rule 55(a) which gives preference for an overtime assignment to the qualified and available employee who "ordinarily and customarily" performs the work. Because the overtime work involved operating the swivel dump truck, which was Gomes' bulletined position on Maintenance Gang S-952, and was the work he ordinarily and customarily performed on this project during the prior week, the Carrier did not violate Rule 55(a) by giving him

preference to the overtime despite the Claimant's availability, qualification and superior Truck Driver seniority. See, Third Division Awards 32154, 35860 and 38211.

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 June 2013.