

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42068
Docket No. MW-42221
15-3-NRAB-00003-130204**

The Third Division consisted of the regular members and in addition Referee Michael Capone 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 Gang Foreman M. Miller on October 5, 2011 to perform gang foreman duties between 10:00 P.M. and 6:00 A.M. at Broomall Street in Chester, Pennsylvania and instead called Lineman R. Groeber (System File NEC-BMWE-SD-5003 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Miller shall now be compensated for eight (8) 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.

On October 13, the Organization filed this claim asserting that the Carrier had violated Article 3 and Rule 55 of the Agreement on October 5, 2011, when it assigned Lineman R. Groeber instead of Gang Foreman M. Miller to perform Gang Foreman functions on an overtime basis between 10:00 P.M. and 6:00 A.M. In a letter dated December 12, 2011, the Carrier denied the claim asserting that the Organization did not meet its burden to prove that the Claimant was entitled to work the overtime assignment. The on-property record of the Carrier's denials of the claim and subsequent appeals by the Organization indicates that the final decision by the Carrier was issued on August 14, 2012.

The Organization argues that as a Gang Foreman, the Claimant was qualified and available to perform the overtime work that was ordinarily and customarily performed by Foremen. Further, there is no dispute that the Claimant has greater seniority than Lineman Groeber. Therefore, the Organization maintains that Rule 55 and other applicable provisions of the Agreement, as well as numerous NRAB Awards, recognize that seniority must be the guiding principle when assigning overtime.

The Organization cites the written statement submitted by Lineman Groeber wherein he states that he performed Foreman duties on October 5, 2011, but was paid as a Lineman, as evidence that the Carrier violated the Agreement. Further, contends the Organization, the Electric Traction Job Briefing Documentation Sheet for the overtime assignment indicates that Lineman Groeber performed the job briefing as the Gang Foremen. The Organization strenuously asserts, with ample arbitral authority, that the failure to rebut the written statement from Lineman Groeber with reliable statements from other employees leads to the conclusion that because his statement was not refuted, it must be true. The Organization argues that the Board must apply the "negative inference principle" to the lack of any written statement refuting Lineman Groeber's assertion that he was performing the Gang Foreman function on October 5, 2011.

Conversely, the Carrier contends that the Organization failed to satisfy its burden of proof in establishing the essential elements of its claim. Specifically, the Carrier asserts that the Claimant was assigned as a Gang Foreman (Line Maintenance) on Gang J-023, headquartered at Penn Coach Yard in Philadelphia, Pennsylvania, and as such, does not normally and customarily perform construction

work. On the other hand, Groeber was assigned as a Lineman (HRO Construction) on Gang J-122, headquartered at the Lamokin Substation in Chester, Pennsylvania. The Carrier contends that the overtime assignment on October 5, 2011 was part of ongoing work ordinarily and customarily performed by Gang J-122 for several months during its regularly assigned tour of duty. Therefore, contends the Carrier, Gang J-122 was entitled to the overtime in accordance with Rule 55 - PREFERENCE FOR OVERTIME WORK, which reads, in pertinent part, as follows:

“(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.”

The Carrier also cites documentary evidence in the on-property record, which it contends refutes the Claimant’s allegations and the statement by Lineman Groeber that he performed Foreman duties. The Carrier asserts that the Electric Traction Work Report for the overtime assignment in question clearly indicates that the Gang Foreman on duty was G. Verna and not Lineman Groeber. In addition, the Carrier cites the Labor Detail Report for both Verna and Groeber, which confirms their earnings, which were paid at the Gang Foreman and Lineman rate, respectively. It also argues that Lineman Groeber did not pursue a claim for a pay adjustment to the higher Foreman rate of pay as evidence that he was on duty as a Lineman.

The Carrier also avers that the fact that Lineman Groeber filled out the job briefing report is not substantial evidence that he was the Gang Foreman on duty. It contends that job briefings done as part of “Roadway Worker Protection” requirements and can be assigned to any craft or class, including management positions. The Carrier further contends that there is no restriction in the parties’ Agreement specifying that job briefings are the exclusive function of a Foreman and cites NRAB Awards in support of its position.

The Board finds that the Organization failed to submit substantial evidence in support of its position that the Claimant was entitled to work the disputed overtime assignment on October 11, 2011 instead of Lineman Groeber. The overtime was assigned to Groeber as a Lineman assigned to Gang J-122 who

“ordinarily and customarily” performed the type of work involved as described in Rule 55. The record contains sufficient evidence that the Gang Foreman on duty during the overtime assignment was not Lineman Groeber. The job briefing documentation filled out by Lineman Groeber, as well as his written statement, do not suffice as evidence when compared to the Electric Traction Work Report and the payroll records which confirm that Groeber was, in fact, assigned as a Lineman. The Carrier had no need to produce any other written statements given the weight of the evidence it introduced into the record.

The Board here also confirms its prior rulings that job briefings as described herein are not exclusive to the Foreman function. See Third Division Awards 38127 and 38129.

Based on the foregoing, we find that the record lacks the requisite substantial evidence that the Carrier violated Rule 55 or any of the other Rules cited.

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 19th day of March 2015.