

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42795
Docket No. MW-42625
17-3-NRAB-00003-140329**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna 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 assign Mr. J. Kessler to perform overtime service between Mile Posts 72.9 and 158 on November 7, 2012 and instead assigned Mr. M. Butler (Carrier's File NEC-BMWE-SD-5189 AMT)**
- (2) As a consequence of the Carrier's violation referred to in Part (1) above, Claimant J. Kessler must now be compensated for two (2) 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.

Claimant J. Kessler has established and holds seniority in various classifications within the Maintenance of Way and Structures Department. At all relevant times associated with this dispute, the Claimant was regularly assigned as a trackman on Maintenance Gang S855, which is regularly assigned and located on Subdivision #2 Midway with a scheduled workweek of Monday through Friday, 7:00 A.M. to 3:30 P.M. with rest days of Saturday and Sunday. Claimant also performs track maintenance duties, including, when required, removing snow from switches. M. Butler was assigned as an EWE "C" (Ballast Regulator-Kershaw) in Gang S656, a Production Surfacing Gang, headquarters listed as Variable, Midway, Groton, Ct, with a tour of duty from 10:00 P.M. to 6:30 A.M. Sunday through Thursday and rest days of Friday and Saturday. Mr. Butler has a seniority date of August 25, 2008, as an EWE on the Northern District-Engineer Work Equipment. The relevant facts giving rise to this matter are not in dispute.

On November 7, 2012, Mr. Butler and his gang (S-646) were directed to report to their assigned headquarters two hours in advance of their regular starting time at 8:00 P.M. to allow for additional travel time to the CDOT shop where they were instructed to relieve a daylight crew and perform snow duty during their regular assigned tour of duty, and during his regular assigned tour of duty, Mr. Butler was temporarily or intermittently assigned to clean switches. For the time spent traveling prior to the start of his assigned tour of duty, Mr. Butler was compensated at the overtime rate of pay.

By letter dated December 4, 2012, the Claimant submitted a claim on his own behalf to the Division Engineer for "all time made by Marc Butler," i.e. two hours' pay at the overtime rate, alleging that the Carrier violated Rules 1, 10, 55 and the Northern District Overtime Call Order/Track Department List, when the Carrier allegedly utilized an EWE "C" Operator, Marc Butler, from a Production gang to perform snow duty on overtime on November 7, 2012, ahead of the Claimant, who was assigned as a Trackman in a Maintenance gang (Lubricator Gang). The Division Engineer denied the claim in letter dated January 29, 2013. Thereafter, the claim was appealed in the usual and customary manner on the property up to and including the Director-Labor Relations, the highest officer of the Carrier designated to handle such disputes. Following conference discussion of these cases on October

1, 2013, the Director-Labor Relations denied the appeal by letter dated November 20, 2013. By letter dated May 19, 2014, the National Railroad Adjustment Board advised the Carrier that the Organization had filed a notice of intent to file a submission with the Third Division in connection with this case.

Following our careful review of the record in this matter, the Board must respectfully deny this claim. In this regard, the uncontroverted evidence established that Mr. Butler and his gang (S-646) were directed to report to their assigned headquarters two hours in advance of their regular starting time at 8:00 p.m. to allow for additional travel time to the CDOT shop where they were instructed to relieve a daylight crew and perform snow duty and, in addition, Mr. Butler performed the temporary or intermittent work, within the range of his ability, of cleaning switches during his regular assigned tour of duty. While Mr. Butler did, in fact receive some overtime pay, it was clear that such overtime was paid for the time Mr. Butler spent traveling prior to the start of his regular assigned tour of duty. Under these facts, we find that such compensation at the overtime rate was commensurate with Rule 63, Example No. 4 of the Agreement. In reaching this conclusion, the Board finds that its decision is consistent with other NRAB Third Division Awards holding that the use of a qualified employee to perform work during his regular tour rather than assigning such work on an overtime basis is permissible and does not, in and of itself, overrule the precedent of awarding overtime to qualified and more senior employees on an overtime basis pursuant to Rule 55. See NRAB Third Division Award 37145 wherein the Board concluded, in relevant part:

“By holding that this case is distinguishable from Third Division Award 36233, the Board is not overruling the precedent therein established. As stated in Third Division Award 36233, there is no doubt that the Carrier need not assign an employee at the overtime rate when a qualified employee is available to be temporarily upgraded to perform the disputed work at the straight time rate. See Third Division Award 31003. In this case there has been no showing that overtime was worked. The language of Rule 58 permits the Carrier to temporarily assign an employee to different classes of work based upon its determination that such work falls within the range of his ability. This is different from the 'qualification' language found in the Rules

governing permanent assignments, as an employee temporarily upgraded under Rule 58 accrues no seniority in the class to which assigned. To the extent that Third Division Award 36233 implied otherwise, it is herein clarified.”

See also NRAB Third Division Award 39949 where the Board noted:

“Reading Awards 36233 and 37145 together, we hold that the temporary upgrade of an employee pursuant to Rule 58 to fill a vacancy instead of calling a qualified employee on overtime does not violate Rule 55 as long as the temporary upgrade falls within the range of the employee's abilities. The Organization has the burden to prove that the Carrier's determination that the temporary upgrade fell within the range of the employee's abilities was arbitrary. The mere fact that the temporarily upgraded employee did not meet all of the qualifications to hold the position permanently does not meet the Organization's burden of proof.”

We have carefully reviewed the Organization's position in this matter but find that it does not change our ultimate conclusion noted above, and as a result, the instant claim will be dismissed.

AWARD

Claim dismissed.

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 28th day of November 2017.