

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42803
Docket No. MW-42986
17-3-NRAB-00003-150199**

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 Agreement was violated when the Carrier failed to call and assign senior Foreman S. Di Iorio to perform overtime work on September 7 and September 8, 2013 in connection with the performance of work in the Davisville Yard, North Kingston, Rhode Island and instead utilized Foreman M. Maliff (Carrier's File NEC-BMWE-SD-5285 AMT)**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Di Iorio shall now be compensated for all hours worked by Foreman M. Maliff on September 7 and 8, 2013 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 S. Di Lorio has established and holds seniority in various classifications within the Maintenance of Way and Structures Department. During the time period involved here, he was regularly assigned as a foreman on Gang S-162 headquartered in the Davisville Yard, located in North Kingston, Rhode Island. Employee M. Maliff has also established and holds seniority in various classifications within the Maintenance of Way and Structures Department. During the time period involved here, he was regularly assigned as a foreman on Gang S-141 headquartered in Grouton, Connecticut. There is no dispute that Mr. Maliff is junior to the Claimant. The circumstances giving rise to the instant claim are not in serious dispute.

The record reveals that on Thursday, September 5, 2013, four gangs (S-112, S-172, S-141 and S-075), were scheduled to perform overtime work from Thursday night into Friday, September 6, 2013. Such overtime duties included overseeing and protecting the CANAC contractors as the track laying machine ("TLM") traveled throughout the division in connection with tie rehabilitation work and giving a job briefing to CANAC contractors making repairs on their gantry machine, a machine that works in conjunction with the TLM machine, in the Davisville yard. The Gang 141 foreman, Mr. Maliff, who normally performs these duties during his regular working hours, was asked to perform the overtime duties on September 5, 2013. However, because Mr. Maliff had already been offered and accepted a different overtime opportunity on September 6, 2013, he was unavailable for the September 5th overtime assignment and the overtime opportunity was offered to Claimant, who also declined the opportunity to work.

On Saturday, September 7, 2013 and Sunday, September 8, 2013, Gang 141 Foreman Maliff worked overtime including overseeing and protecting CANAC contractors as the TLM machine travelled throughout division in connection with tie rehabilitation work and providing a job briefing to the CANAC contractors continuing to make repairs on their gantry machine in the Davisville yard. The Claimant, a Foreman, assigned to Gang S-162 was not offered the overtime opportunity.

On or about November 2, 2013, Mr. Dilorio submitted a claim on behalf of himself citing a violation of Rule 55 of the Agreement for the overtime work

performed by Foreman Maliff on September 7, 2013 and September 8, 2013. The Superintendent Engineering Production denied the claim in letter dated December 27, 2013. Thereafter, the claim was appealed in the usual and customary manner on property up to and including the Director- Labor Relations, the highest officer of the Carrier designated to handle such disputes. Following conference discussion of this case, the Director-Labor Relations denied the appeal by letter dated August 6, 2014.

By letter dated February 13, 2015, the National Railroad Adjustment Board advised the Carrier that the Organization had filed notice of intent to file a submission with the Third Division in connection with this case.

It is the Organization's position that the overtime assignment should have been offered to the Claimant because it is work that Claimant ordinarily and customarily performs and that the Claimant is senior to Foreman Maliff. As noted above, there is no dispute that Claimant is senior to Foreman Maliff.

Upon our review of the record, the Board observes that the Claimant was regularly assigned to provide track protection for CANAC Railway Services in connection with their activities in the Davisville Yard and, as noted above, is senior to Mr. Maliff. Moreover, it is also clear to this Board that the Claimant was available, fully qualified and willing to perform the subject overtime work and would have performed such had the Carrier afforded him the opportunity to do so. In this regard, there is no dispute that the Claimant was offered the opportunity to provide protection for the CANAC employees while they were performing the work in the Davisville Yard on September 6, 2013 but was forced to decline the overtime opportunity due to other obligations. The fact that the Carrier offered the Claimant this overtime opportunity is proof positive that the Carrier was aware of the fact that the Claimant was capable of performing this work. Accordingly, it is beyond dispute that Claimant was fully qualified and was entitled to perform the disputed work by virtue of his regular assignment and his seniority over Mr. Maliff. The fact that such work was not offered to the Claimant represents a violation of the Agreement.

As a remedy, the Claimant should be compensated for all hours worked by Foreman Maliff on September 7th and 8th, 2013. The only question is whether the Claimant should be compensated at his straight time or overtime rate. In reviewing the record, it appears that this question has been addressed and

answered by previous Boards. In this regard, the substantially identical issue before PLB 4549 was framed as follows:

“When the Carrier improperly bypasses an employee for an overtime opportunity, is that employee entitled to the premium (punitive) rate of pay for the overtime hours missed, or is that employee entitled to the straight time rate for the overtime hours missed?”

On July 14, 1988, in Award No. 1 Referee Kasher concluded as follows:

"In this Board's experience, we cannot recall considering another case where the 'line of precedent' on the property has been so well-established as the result of numerous, recent arbitration awards.

Six (6) different neutrals in the last four to five years have rendered thirteen (13) awards involving what are essentially the identical facts, issues and arguments. The present score is the Carrier 5 (neutrals) and 11 (awards) and the Organization 1 (neutral) and 2 (awards).

While this Board is not persuaded that the rationale of the Carrier is superior to the rationale argued by the Organization, we are persuaded that this dispute, on this property, has reached the point where further litigation serves no purpose. In our opinion, this dispute should have ended with the decision by Referee Marx (Award No. 27088). Referee Marx considered the two (2) McAllister awards that sustained the Organization's position. He also recognized that innumerable awards have been issued in favor of each of the conflicting theories of compensation. He observed that counting the number of awards or reviewing the arguments in favor of either position would be to no avail, except to highlight one obvious conclusion: that being that 'agreement language does not clearly and unambiguously specify which position is correct.' Referee Marx then concluded, after reviewing the history of claim handling on this property and the awards involving these same parties and this same issue, that payment of straight time 'is the more consistent result.

*****we must agree with Arbitrator Marx that an award of straight time is the 'more consistent result' on this property.**

*****As noted above, this Board is going to sustain the Carrier's position, since in our opinion the Carrier's position has some merit, and since the Carrier's arguments have been sustained more consistently by more neutrals on this property.**

Award: This Board concludes that on this property the Carrier is only obligated to pay straight time compensation to BMW employees who are bypassed improperly and miss overtime opportunities."

In a recent decision of the National Railroad Adjustment Board in Third Division Award No. 35863, Referee Newman ruled as follows:

"With respect to the appropriate remedy, as noted by the Board in on-property Third Division Award No. 30686:

'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'."

While this Board may be of a different opinion, it is apparent that the weight of authority has consistently determined that payment at the straight time rate represents an appropriate remedy for missed overtime opportunities. Accordingly, it is the conclusion of this Board that the Claimant should be compensated for all hours worked by Foreman Maliff on September 7th and 8th, 2013 at the Claimant's then straight time rate of pay.

Claim sustained to the extent noted and discussed above.

AWARD

Claim sustained in accordance with the Findings.

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 28th day of November 2017.

LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
TO
AWARD 42803, DOCKET MW-42986
AWARD 42804, DOCKET MW-42987
(Referee D. Campagna)

In these cases, the Majority correctly determined the Carrier violated the Agreement. However, the Majority incorrectly awarded the remedy at the straight time rate instead of the overtime rate. The Majority relied on two (2) awards cited by the Carrier to reach its conclusion. Specifically, the Majority held that it disagreed with awarding straight time instead of overtime, but stated the weight of authority has consistently determined that straight time is the appropriate remedy. This Board failed to consider or distinguish the awards cited by the Organization. Specifically, the Organization cited Awards 26508, 26690, 28656, 30448, 32371, 38191, 38192, 38212, 41098, 41099, 41147, 41148 and 41149 within its submission and at the oral hearing. It should be noted that eight (8) of these awards were rendered after the awards relied on by this Board. Most notably, the Carrier dissented to Awards 38191, 38192, 38212, 41098, 41099, 41147, 41148 and 41149 relying on the very award cited by this Board, all of which rejected the Carrier's argument and awarded the overtime rate as the remedy. This Board should have followed the precedent established by the most recent awards. For this reason, I strongly dissent to the Majority's findings in this case.

Respectfully submitted,



Zachary C. Voegel
Labor Member