

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42804
Docket No. MW-42987
17-3-NRAB-00003-150200**

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 J. O'Donnell to perform overtime work at the High Street Interlocking and Kingstown Interlocking on June 23, 2013 and instead utilized junior Foreman K. Riley (Carrier's File NEC-BMWE-SD-5266 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. O'Donnell shall now be compensated for all hours worked by junior Foreman K. Riley on June 23 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.

J. O'Donnell, the Claimant herein, was assigned the position of Foreman on Gang S-141 headquartered at Groton, Connecticut with a tour of duty from 6:00 A.M. to 4:30 P.M. Monday through Thursday and rest days of Friday, Saturday and Sunday. Claimant has a seniority date of June 11, 1982 as a Foreman on the Northern District Foreman Roster. Ms. K. Riley was assigned as a Foreman on Gang S-840 headquartered at Groton, Connecticut with a tour of duty from 7:00 A.M. to 3:30 P.M. Monday through Friday and rest days of Saturday and Sunday. There is no dispute on the basis of this record that the Claimant was the senior foreman on the Northern District, as between himself and Ms. Riley. The circumstances giving rise to the instant claim are as follows.

The record reflects that the Claimant's gang, a TLS Material Handling Gang, was utilized in connection with tie replacement between High Street Interlocking and Kingstown Interlocking. After the TLS Green Unit had completed the tie replacement, the C&S Department, utilizing a hy-rail vehicle, was responsible for doing testing on the section of track that was being returned to service and required the assistance of a pilot who was qualified on the operating rules and on the physical characteristics of the involved territory. On Sunday, June 23, 2013, the Carrier determined it needed a Foreman to pilot a hy-rail vehicle on a section of track that was being returned to service. Notwithstanding the fact that the Claimant had performed overtime work piloting this hy-rail vehicle on the two previous days, i.e., on June 21 and 22, 2013, the Carrier assigned such work to Ms. Riley to pilot the hy-rail vehicle on the claim date.

By letter dated August 5, 2013, the Claimant submitted a claim on his own behalf for "all time made by Kerry Riley" on June 23, 2013. The Claimant maintained that Carrier violated Rule 55(a) when the Carrier assigned junior Foreman Kerri Riley on overtime to assist the C&S Department by piloting a hi-rail car to do testing on the section of track that was returned to service after the TLS Green Unit had finished performing tie replacement between High Street Interlocking and Kingston Interlocking. The Organization maintained that whereas the Claimant had performed this identical work on overtime on June 21 and 22, 2013, and since he was senior to Ms. Riley and the work was part of the tie replacement project, he, the Claimant, should have performed the work.

By letter dated October 2, 2013, Superintendent Engineering Production A. J. Keefe denied the claim. 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 this case held on May 16, 2014, 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 a notice of intent to file a submission with the Third Division in connection with this case.

Following our careful review of the record, the Board finds and concludes that this claim should be sustained. In this regard, the record reveals that the Claimant and Ms. Riley were both regularly assigned to their Foreman positions on their respective gangs during the time given rise to this dispute. Moreover, and significantly, there is no dispute, as noted above, that as part of Claimant's regularly assigned duties on the dates (June 21 and 22, 2013) prior to the claim date, the Claimant had been assigned to pilot the hy-rail vehicle as part of his regular assignment as a Foreman on Gang S-141. It is therefore evident that the Claimant was fully qualified and readily available to perform the overtime service at issue here. It is also relevant that on the dates prior to the claim date, Ms. Riley was not assigned to pilot the hy-rail vehicle involved here as part of her regular assignment as a Foreman on Gang S-840.

Rule 55 states in relevant part that employees who are qualified and available, shall be given preference in seniority order for overtime work ordinarily and customarily performed by them as part of their regular assignment. In the instant matter, and as noted above, there is no dispute that the Claimant ordinarily and customarily performed the subject work (i.e., piloting a hy-rail vehicle on a section of track that was being returned to service) as part of his regular assignment as a Foreman on S-141 on the dates (June 21 and 22, 2013) prior to the claim date. As a result, the Claimant was entitled preference to the work involved here over K. Riley, and there has been no credible showing by the Carrier to the contrary. Accordingly, the Board is compelled to conclude that the Carrier's failure to comply with Rule 55 in this case violated the Claimant's established seniority rights and caused him a loss of work opportunity as well as a loss of the monetary benefits associated with said work opportunity. As a result, the instant claim will be sustained.

As a remedy, the Claimant should be compensated for all hours worked by Ms. Riley on June 23, 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 Ms. Riley on June 23, 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