

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43068  
Docket No. MW-44183  
18-3-NRAB-00003-160602**

**The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(National Railroad Passenger Corporation (Amtrak) -  
(Northeast Corridor**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it failed to assign Mr. D. Riendeau to perform overtime service removing snow at the Providence Maintenance of Way Base in Providence, Rhode Island on February 4, 2015 and instead assigned Mr. M. Wills (Carrier’s File NEC-BMWE-SD-5367 AMT).**
- (2) As a consequence of the Carrier’s violation referred to in Part (1) above, Claimant D. Riendeau must now be compensated for five and one-half (5.5) hours at his respective overtime 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.**

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the Agreement when it assigned certain overtime work to a less senior employee rather than to the Claimant. The Carrier denied the claim.

The Organization contends that the instant claim should be sustained in its entirety because there is no dispute that the Claimant is senior to the employee assigned to perform the work in question; because the Claimant was available, fully qualified, and willing to perform the work; because the Carrier's defenses are without merit; and because the Claimant is entitled to the requested remedy. The Carrier contends that the instant claim should be denied in its entirety because the Carrier properly called employees for overtime in order of seniority, because the Claimant was called for the overtime in question but failed to respond to that call, because the Organization failed to meet its burden of proof, and because the requested remedy is excessive.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier violated the Agreement when it failed to assign the Claimant to perform overtime service removing snow at Providence Maintenance of Way Base in Providence, Rhode Island, on February 4, 2015. Therefore, this claim must be sustained.

The record reveals that on February 4, 2015, the Carrier determined that it needed a truck driver to perform overtime track maintenance duty of removing snow. The Carrier was required to call a truck driver for overtime in accordance with Rule 55. The Claimant was the person to be called and, yet, the Carrier called another employee, M. Wills, to perform the five and one-half hours of overtime that day. The record reveals that the Claimant was ready and available and fully qualified to perform the work at issue. The Claimant was higher on the seniority list than employee Wills, who was junior to the Claimant.

Although the Carrier contends that it made a call to reach the Claimant, it has provided insufficient evidence to prove that. The Claimant contends that his phone records do not show any attempt to call him that day. The Carrier's assistant supervisor's cell phone records failed to show that there was a call made to the Claimant.

Since the Carrier failed to prove with sufficient evidence its affirmative defense that it attempted to reach the Claimant on the day in question, the Board has no choice other than to sustain this claim.

**AWARD**

Claim sustained.

**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 2nd day of May 2018.

**CARRIER MEMBERS' DISSENT**

**to**

**THIRD DIVISION AWARD 43068 - DOCKET 44183**

**(Referee Peter Meyers)**

The Carrier strongly dissents to the excessive remedy in this matter. It has already been firmly established between these parties that missed overtime opportunities are paid at the straight time, not overtime, rate of pay. Numerous Third Division awards rendered in disputes between these parties have ruled in favor of straight time pay for missed overtime, including Award Nos. 31129, 35863, and 39924, all of which not only found straight time to be the appropriate pay for missed overtime opportunities, but also pointed out that the issue is a well-settled one.

The parties brought the specific question of the appropriate rate of pay for missed overtime opportunities before PLB No. 4549/Award No. 1 and that board disposed of the issue in the Carrier's favor, finding that missed overtime opportunities should be paid at the straight time rate and noting that the board could not "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...we are persuaded that this dispute, on this property, has reached the point where further litigation serves no purpose." The Carrier urges the Board to not create an anomaly that will encourage further litigation of a previously settled issue.

The Carrier also points out that the most recent Third Division cases between these parties have continued awarding straight time pay for missed overtime. In Award Nos. 42803 and 42804, the Board deferred to the myriad of awards settling the question, stating: "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."

As the great weight of authority on this issue, including in recent awards, has gone in favor of straight time pay for missed overtime opportunities, the remedy in this matter is excessive and erroneous. For these reasons, I respectfully dissent.

*Sharon Jindal*

Sharon Jindal

*Matthew R. Holt*

Matthew R. Holt

May 2, 2018