Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43619
Docket No. MW-44633
19-3-NRAB-00003-180121

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference (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 assign Mr. T. Chomko to overtime service on June 3, 5, 10 and 17, 2016 and instead assigned a junior employe (System Files NEC-BMWE-SD-5480, NEC-BMWE-SD-5481, NEC-BMWE-SD-5482 and NEC-BMWE-SD-5483 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Chomko must now be compensated for forty-three (43) hours at his 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.

On August 30, 2016, the Claimant, Electric Traction Electrician Thomas Chomko, filed four separate claims that were addressed together during the on-property handling of the dispute. The Organization alleges that the Carrier violated Rule 55 – Preference for Overtime Work and the Supplemental Agreement, dated May 19, 1976, governing overtime in the Electric Traction Department when on four occasions it assigned overtime to employees junior in seniority to the Claimant, who was available and qualified to work the assignments.

On April 17, 2017, the Carrier denied the claim asserting that the Organization had not met its burden of proof that the Agreement had been violated. It maintained that subject to its Letter of Instruction 2015-3, dated August 21, 2015, (hereinafter referred to as the "Policy") Engineering Department employees are prohibited from working in excess of 14 hours in a 24-hour period. The Carrier argues that the overtime assignments scheduled on the dates in dispute were for either 8 P.M. to 7 A.M. or 9 P.M. to 7 A.M. and therefore, since the Claimant's regular shift was 7 A.M. to 3 P.M., the total hours worked exceeded the 14-hour limit.

The on-property record indicates that the Carrier denied subsequent appeals by the Organization and issued its final decision on October 19, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division. The claim is now properly before the Board for adjudication.

Relevant Contract Language

RULE 55 PREFERENCE FOR OVERTIME WORK, in pertinent part, reads 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.

*** * ***

(c) When it is necessary to call employees for service in advance of their bulletined working hours, or after men have been released from work commenced during bulletined hours, the same preference will

be given on rest days as on other days to employees who are qualified, available and ordinarily and customarily perform the work."

Relevant Letters of Instruction

Letter of Instruction 2015-3, dated August 21, 2015, in pertinent part, reads as follows:

"Effective immediately to reduce the potential for placing our employees in situations where Fatigue could potentially limit one's ability to function safely both mentally and physically, working hours should be restricted to 14 hours per day. This includes working overtime."

Letter of Instruction 2013-03, dated December 5, 2013, in pertinent part, reads as follows:

"In order to provide a safe work environment for our employees working on or about high-speed tracks, no employee, agreement or non-agreement, should be required or allowed to work in excess of 16 hours in a 24-hour period, excluding travel time."

After a careful review of the record the Board finds that the Organization has met its burden of proof that the Carrier improperly denied the Claimant the opportunity to work overtime on June 3, 10, and 17, 2016. The record indicates there was no overtime assignment on June 5, 2016 and therefore, the claim related to that date is dismissed. The Organization presents a *prima facie* case that the Claimant was denied an exercise of seniority for an overtime opportunity as provided for by Rule 55 as a result of the Carrier's Policy. As such, the Carrier must demonstrate that its Policy, which restricts employees from working in excess of 14 hours in a 24-hour period, has a legitimate and rational basis and that its application does not result in arbitrary and unreasonable interference with the benefits provided by the Agreement. See Third Division Award No. 31595. Here, the record confirms that the Carrier's Policy, as applied to the Claimant, arbitrarily deprived him of overtime opportunities in violation of Rule 55.

The Board holds that, where not restricted by the Agreement, the Carrier has the discretion to implement policies that further its interests especially when it seeks to insure employee and public safety. Our review is to determine whether the Policy, as applied here, is overly broad or vague and adversely impacts the protections and benefits provided to the Claimant by the Agreement. We find that the Carrier's Policy initiates a change to the meaning of "qualified" in Rule 55 that alters the negotiated benefit of giving preference to seniority when assigning overtime. The Board's role is to interpret the Agreement between the parties and not add a condition that would limit its meaning and intent.

The Policy, as applied, appears to be more of a restriction than a qualification where it unilaterally prohibits the Claimant from being eligible for overtime without a determination of his capabilities. Similarly, Carrier's conclusion that the Policy renders the Claimant unavailable is autarchic and not caused by objective mechanisms such as overlapping schedules, absenteeism, or government regulation. Such an application of the Policy, where it unreasonably deprives the Claimant's exercise of seniority, requires a heighten scrutiny of its affect.

This Board has previously addressed the Carrier's policy and found that there cannot be a rational basis to deny overtime where there is no specific determination that the Claimant is unfit, and therefore unavailable, to safely perform the assignment. We find the dispute here parallels our previous decisions and find no basis in the record to stray from those findings. Third Division Award No. 35495 reads as follow:

> **"A 19 hour work day is a long one. But, as the Organization points out, the Claimant would have had five hours of rest between assignments. Moreover, and most important, there is nothing in the record to show that aside from counting the number of hours in the 24 hour period that the Claimant would have worked, the Carrier made any objective evaluation of the Claimant's physical or mental abilities on that day to perform the duties of the overtime assignment . . . The Claimant was simply bypassed for the overtime call. Accepting the Carrier's argument in this case would, in effect, cause the Board to amend Rule 55 to insert a provision that employees cannot work 19 hours in a 24 hour period and that five hours of rest between assignments is not enough. That is not the Board's function. Only the parties can do that. If five hours between assignments**

is not enough rest, is six, seven, eight or nine? Where and how do we draw the line?

*** * ***

Without more from the Carrier concerning its assessment of the Claimant's individual circumstances, we choose not to get on what in effect is a slippery slope which would cause the Board to establish by fiat a limit on hours where the parties have not done so by agreement. Without more from the Carrier concerning the Claimant's individual circumstances, we cannot find a rational basis for the Carrier's determination that the Claimant was unavailable - in effect, unfit - to perform the overtime assignment given to junior Foreman Alessi. That decision by the Carrier was therefore arbitrary. On the merits, we find the Carrier violated Rule 55 by not calling the Claimant for the overtime assignment given to junior Foreman Alessi."

In another review of the Carrier's Policy, Third Division Award No. 35642, found that without evidence that the claimant was unfit he should not have been prevented from working 18 consecutive hours. The Award, in pertinent part, reads:

"Finally, the Carrier has not presented evidence showing that assigning the Claimant the overtime in dispute would have created a safety issue. Therefore, we find that the Carrier failed to rebut the Organization's prima facie case with respect to overtime hours assigned to Trauger for which the Claimant was physically available."

In addition, the Board in Award No. 37658, reviewing the effects of the Carrier's Policy, found that where there were only two hours of rest in between assignments, the Carrier had not presented " . . . a rational basis for its decision that the Claimant was unfit to perform the assignment due to the number of hours he would have worked."

Similarly here, in reviewing the specific circumstances involving the Claimant, we find that on the dates in dispute he would have had between five and six hours rest between his regularly scheduled assignment of 7 A.M. – 3 P.M. and the overtime assignments beginning at either 8 P.M. or 9 P.M. There is nothing in the record to

indicate that there was an assessment or objective determination that the Claimant was unfit to work overtime. There is no evidence that the Claimant was unfit to work and otherwise unavailable or unqualified. The Carrier's blanket policy restricting the Claimant's hours of work has an unreasonable effect on his exercise of seniority provided by Rule 55.

The Carrier supports its Policy with extensive data and analysis for the purpose of illustrating the potential impact of long uninterrupted hours of work and the resulting fatigue that compromises safety. The Board does not have the requisite knowledge or the necessary analytical capability to confirm or refute the supporting documentation. Such conclusions are best left to an authorized government agency or through mutual agreement of the parties. Irrespective of the cogent argument, in essence the Carrier is asking the Board to exceed our authority, which is limited to interpreting existing contract provisions and not to add conditions that interfere with a negotiated benefit.

We find the arbitral precedent relied upon by the Carrier to be distinguishable from facts presented here. In Public Law Board ("PLB") No. 5757, Award No. 3, the decision pertained to the carrier's policy regarding safety gear and not about depriving the employee of a benefit provided by the Agreement. It is worth noting that Award No. 3 found that requiring employees to wear hearing protection was acceptable where it was not ". . . unlawful, unreasonable, arbitrary or capricious, and is enforced fairly . . ." The Carrier's Policy here, as applied to the Claimant, was unreasonable and arbitrary given the facts presented.

Other Awards cited by the Carrier involving policies restricting hours of service are distinguishable from the dispute here. Reliance on PLB No. 4979, Award No. 21 and Third Division Award No. 24707 is misguided. There the claimants had already worked 16 continuous hours and a decision was made not to allow claimants another overtime opportunity.

In deciding the proper remedy, we conducted a review of the numerous awards rendered by this Board involving the parties in this dispute regarding the controversy over the proper compensation – "made whole" versus "straight time" – when finding in favor of the claimant who was denied overtime. We find no basis to ignore the dominate rationale adopted by this Board from PLB No. 4549, Award No. 1 and its progeny that the Carrier is obligated for straight time compensation when the employee is improperly

denied overtime. PLB No. 4549 was empaneled specifically to decide the matter as a guide for the parties and subsequent boards of adjudication. While there have been logical conclusions contrary to the rationale emanating from Award No. 1, we do not find anything in the record here to sway us from the conclusions reached by the scores of awards following the remedy fashioned by PLB No. 4549. Moreover, in deciding the merits of the dispute in favor of the Claimant we took guidance from Award Nos. 35495, 35642, and 37658. Each one of these awards adopted the straight time compensation remedy. We see no basis to ignore those findings.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Organization has provided sufficient evidence that the Carrier violated the Agreement and that the Claimant shall be compensated at the straight time rate of pay for all hours claimed and none for the claim related to June 5, 2016.

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 17th day of May 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARDS 43619, 43620 and 43621
DOCKETS MW-44633, MW-44634, and MW-44635

(Referee Michael Capone)

The Carrier must vigorously dissent to this Board's findings in the above-referenced matters. Limits on working hours are critical to a safe railroad. The scientific focus in this area has recently developed and revealed a strong connection between working hours and fatigue, resulting in loss of alertness, which can have fatal consequences. The Carrier has studied a vast amount of scientific research and reports, and the data obligated the Carrier to create its policy limiting working hours. The Carrier shared the data that it relied on with the Organization and this Board to demonstrate that there was a basis for its policy.

This Board has erroneously relied on the Organization's limited support. In the cited awards, the Board was assessing whether preventing an employee from working was justified by a specific safety concern or policy and none was provided to the Board in previous cases. In contrast, here, the Carrier's decision to prevent Claimant from working overtime was clearly justified by a safety concern and policy. Just as this Board has stated that it does not possess the "requisite knowledge or the necessary analytical capability to confirm or refute" the Carrier's data, it would not make sense to have lay managers assess each employee's level of alertness after 14 hours of work when it the consequences are already known through safety experts and scientific studies.

Further, nowhere in the Agreement is there a prohibition against the Carrier promulgating a rational, safety-based policy surrounding availability and qualification. Claimant did not meet the availability and qualification requirements because working the disputed overtime and his regular shift, which he was undisputedly obligated to work, would have jeopardized the safety of Claimant, fellow employees, and the public.

Therefore, this Board's decisions are erroneous. For these reasons, we vigorously dissent.

Sharon Jindal
Katherine N. Novak

Jeanie L. Arnold
Jeanie L. Arnold

May 17, 2019