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

Award No. 43620
Docket No. MW-44634
19-3-NRAB-00003-180122

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 26, 2016 and July 14, 2016 and instead assigned a junior employe (System Files NEC-BMWE-SD-5485 and NEC-BMWE-SD-5486 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Chomko must now be compensated for twenty-three (23) 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 July 15, 2016, the Claimant, Electric Traction Electrician Thomas Chomko, filed two separate claims, which due to their similarity with four previous ones decided in Award 43619, 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 June 26 and July 14, 2016 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 claims asserting the Organization had not met its burden of proof that the Agreement had been violated. It maintained that its Letter of Instruction 2015-3, dated August 21, 2015, (hereinafter referred to as the "Policy") prohibits Engineering Department employees 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 7 P.M. to 7 A.M. or 8 P.M. to 7 A.M., respectively, and therefore, since the Claimant's regular shift on the following day was 7 A.M. to 3 P.M., the total hours worked would exceed the 14 hour limit of the Policy, rendering him unavailable and unqualified for the overtime. Further, the Carrier asserts that the junior employee performed eight hours of the eleven-hour shift on July 14, 2016 on straight time, not overtime, which is not prohibited by the Agreement.

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."

Due to the similar facts, rules, and evidence contained in the record, the decision here is in companion to the Findings and Award rendered in Award 43619. As such, the Board does not repeat all of the findings related to the dispute except where there is a factual distinction that requires our specific attention.

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 26, 2016. The record indicates that the work on July 14, 2016 was performed during the junior employee's straight time assignment for

the first eight hours. Nothing in the record requires the Carrier to "piecemeal" overtime when an employee already performing the work in dispute can complete it. As such, the claim for overtime compensation for July 14, 2016 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 addressed in our companion Award, 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 also Third Division Award No. 31595. Here, the record confirms that the Carrier's Policy, as applied to the Claimant, arbitrarily deprived him of an overtime opportunity in violation of Rule 55.

As in the circumstances presented in the companion Award, nothing in the record indicates the Claimant was unfit or incapable of working the overtime assignment of June 26 or his regular assignment on June 27, 2016. The Claimant was on a rest day on June 26 and the overtime assignment would have required him to work continuous into his regular shift on June 27. Following the applicable precedent by this Board relative to the Agreement and the Carriers application of the Policy, we find that without some evidence that the Claimant was unable to perform his regular assignment on June 27, 2016, he was improperly denied the opportunity to work overtime on June 26. As we stated in Award 43619, "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 initial denial of the claim, dated September 13, 2016, addressed to the Claimant, states that he was denied the overtime assignment because he " . . . would not have been available to perform your normal assignment . . ." Without some evidence that the Claimant would not have been "available" or that he was unfit to perform his normal assignment, the application of the Carrier's Policy has an arbitrary effect. In Award 43619 we concluded as follows:

> **"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."**

As we did in our companion Award, guidance was afforded from the same dispute between the parties and decided by Third Division Award No. 35495, which reads as follow:

> **" . . . 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 . . . 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."**

In Award No. 35495, we found that "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 . . . That is not the Board's function. Only the parties can do that." The Board again confirms those findings where it is evident that the impact of the Carrier's Policy creates an "overreach" that would unilaterally modify a negotiated benefit. Such a change can only be achieved through collective bargaining or government regulation.

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. All relevant analysis and conclusions were reached in the companion Award and apply to the dispute presented here pertaining to both the merits and the proper remedy. 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 for June 26, 2016 and that the claim related to July 14, 2016 is dismissed.

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