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

Award No. 43621
Docket No. MW-44635
19-3-NRAB-00003-180123

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**
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(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 July 24, 2016 and instead assigned a junior employe (System Files NEC- BMWE-SD-5489 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant T. Chomko must now be compensated for twelve (12) 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 7, 2016, the Claimant, Electric Traction Electrician Thomas Chomko, submitted his claim, in addition to six previous ones, which due to the similarity in the controversy, 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 July 24, 2016 it assigned overtime to an employee junior in seniority to the Claimant, who was available and qualified to work the assignment.

On April 17, 2017, the Carrier denied the claim 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 assignment scheduled on the date in dispute was for a 7 P.M. to 7 A.M. shift and therefore, since the Claimant's regular shift was 7 A.M. to 3 P.M. the following day, the total hours worked would have exceeded the 14-hour limit of the Policy, rendering him unavailable and unqualified for the overtime.

The on-property record indicates that the Carrier denied subsequent appeals from 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."**

The record indicates that the dispute addressed here was progressed on the property together with similar claims decided by the Board in Awards 43619 and 43620. Due to the similar facts, rules, and evidence contained in the record, the decision here is in companion to the Findings rendered in those Awards, which apply to the claims presented here. As such, the Board does not repeat all of the findings related to the dispute. We find no factual distinction that requires our specific attention and therefore, rely on those Findings and apply them here without variation.

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 Awards 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 July 24, 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