

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44357
Docket No. MW-45729
21-3-NRAB-00003-200064**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 Agreement was violated when the Carrier assigned employees T. Watts and D. Fitzgerald to perform overtime service at the 30th Street Station on August 13, 2018 instead of assigning Mr. J. Ciferni thereto (System File NEC-BMWE-SD-5717 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Ciferni shall now receive ten (10) hours’ compensation at the 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 Claimant established and holds seniority within the Carrier's Maintenance of Way Department. On the date of the instant dispute, the Claimant was assigned and working as a contractor protection Bridge and Building (B&B) inspector at 30th Street Station. The Claimant's normal tour of duty was Monday through Friday, 7:00 AM to 3:00 PM, and his assigned territory includes North and South Penn and 30th Street Station.

Employee T. Watts established and holds seniority within the Carrier's Maintenance of Way Department. At the time of this dispute, he was regularly assigned as a B&B maintenance mechanic whose tour of duty was Monday through Thursday, 8:00 PM to 6:30 AM. Employee D. Fitzgerald has established and holds seniority within the Carrier's Maintenance of Way Department. At the time of this dispute, he was regularly assigned as a B&B inspector at 30th Street Station whose normal tour of duty was Monday through Thursday, 6:00 AM to 4:00 PM. It is undisputed that the Claimant is the senior qualified B&B inspector among them.

On August 13, 2018, the Carrier required employees to oversee contractors working at the 30th Street Station during an 8:00 PM to 6:30 AM shift. The inspector who normally held the position to oversee the contractors was attending training and was unavailable. The Carrier assigned employees T. Watts and D. Fitzgerald to the overtime service, rather than the Claimant.

The Organization presented a claim by letter dated September 5, 2018. Thereafter, by letter dated November 5, 2018, the Carrier denied the claim. The Organization advanced the claim in a letter dated November 19, 2018. On January 25, 2019, the Carrier sent a denial of the appeal. Thereafter, by letter dated February 1, 2019, the Organization notified the Carrier that it had exceeded the time limits allowable under Rule 64(b) of the Agreement and that it was now required to pay the claim as presented. The parties were unable to resolve the claim on-property, so it is now properly before this Board for final adjudication.

The Organization contends that although the Claimant was the senior available B&B inspector to be assigned to the disputed overtime duties, the Carrier failed to assign the Claimant thereto and instead assigned junior employees T. Watts and D. Fitzgerald, in violation of Rule 55 of the parties' Agreement, which states,

"RULE 55 - PREFERENCE FOR OVERTIME WORK

- (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.”

In addition, the Organization contends that the Carrier failed to timely disallow the Organization’s appeal in violation of Rule 64, which states, in part:

“RULE 64 - CLAIMS FOR COMPENSATION-TIME LIMITS FOR FILING.

- (b) Should any such claim or grievance be disallowed, AMTRAK shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative), in writing, of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of AMTRAK as to other similar claims or grievances.”

As a result, the Organization contends that its claim must be allowed as presented.

The Carrier contends that a simple clerical error in the processing of the second-level appeal caused the Carrier’s second-level response to be mailed to the BMW office rather than the Vice General Chairman’s house, but this should not cause the claim to be allowed. The Carrier acknowledges that responses are generally sent to the Vice General Chairman, but contends that its response was timely and in compliance with Rule 64, as the Organization was in timely receipt of its response. Furthermore, when the Carrier realized its mistake, it also sent a copy of the response to the Vice General Chairman who initially filed the appeal.

In addition, the Carrier contends that the Organization has not met its burden of proving that the Claimant was entitled to the disputed overtime work under Rule 55. Furthermore, the Carrier contends that the Organization has failed to show that any overtime work was performed that the Claimant had a superior claim to work. The Carrier contends that Watts did not work any overtime on the claimed date and that any overtime work performed by Fitzgerald on the claimed date was a continuation of his regular tour of duty.

The Carrier further contends that the claimed remedy is excessive, as the Organization has not shown that ten hours of overtime work were performed.

With respect to the procedural objection raised by the Organization, there is no dispute that the Carrier provided a timely second-level response to the Organization. Although the parties had a practice of providing the response to the signatory of the appeal, the clear and unambiguous language permits the Carrier to provide its response to the claimant's representative. There is no question that the Organization is in fact, the Claimant's representative. Therefore, the Carrier did not violate Rule 64, as the Claimant's representative was timely notified. Furthermore, upon realizing its error, the Carrier delivered a second copy directly to the signatory on the appeal.

As to the merits of the claim, the Organization has not shown that the Claimant was entitled to the disputed work. Although a claim was made against Watts, the record does not permit this Board to reach a conclusion that Watts worked overtime on the claimed date. Furthermore, the Carrier presented evidence that the disputed work performed by Fitzgerald on the claimed date was a continuation of his regular tour of duty. Prior decisions of this Board have made clear that Rule 55(a) gives preference for overtime work to the qualified and available employee who "ordinarily and customarily" performs the work. *See, e.g.,* Third Division Award 37657; Third Division Award 41687. The Carrier has established that the work in dispute was ordinarily and customarily performed by Fitzgerald, and not the Claimant.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of January 2021.