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

Award No. 44559
Docket No. MW-46202
22-3-NRAB-00003-200888

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior employees S. Heil, J. Harper, D. Gaultney, G. Ulmer, W. Steffish, R. Schultz and B. Wise to perform overtime watchmen duties at Mile Post 86 on the Harrisburg line in Elizabethtown, Pennsylvania on April 22, 2019 and May 6, 13 and 20, 2019 instead of assigning senior employee J. Troup thereto (System File BMWE-156691-TC/BMWE-156691-R AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Troup shall now be compensated twelve (12) hours' overtime for each day, totaling forty-eight (48) hours' overtime, at his pro-rata rate for this loss of work opportunity."

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.

Claimant J. Troup has established and holds seniority in the Carrier's Maintenance of Way Department. On the above-noted dates, all Mondays, employees junior to the Claimant were assigned twelve (12) hour shifts performing overtime watchmen duties. The Organization filed a timely claim on Mr. Troup's behalf, with the claim properly processed on the property without resolution and thereafter progressed to this Board for final and binding adjudication.

The Organization avers that the failure to assign the overtime work to the Claimant violated Rule 55-Preference for Overtime Work. The Claimant's rest days were Saturday and Sunday so that he was available and could have worked the 6 am – 6 pm overtime followed by his regularly-assigned M-Th 9 pm – 7 am tour. The Carrier cannot violate Rule 55 by imposing the daily fourteen (14) hour limit. The Claimant would have been well rested for the Monday overtime and would have had three (3) hours between shifts. The claim is not overly broad.

The Carrier denies a violation of Rule 55. Moreover, the Organization's information is inaccurate as records show that the junior employees at most each worked a total of thirty-eight (38) overtime hours. The Organization lacks supporting evidence and the Claimant was not available because, assuming he had been assigned, he would have worked twenty-two (22) hours in a twenty-five (25) hour period, would have created a safety hazard rendering him unavailable for overtime work. Because the Claimant's regular assignment was a thirty (30) minute drive from the overtime assignment, he would have had two and one-half (2 ½) hours to rest in his vehicle. His regular duties involved track protection that required him to be alert and attentive. Had he worked the overtime, there would have been a safety issue that would have rendered him unavailable. The request for compensation is inappropriate because the case involves a duplicate claim and because there is strong on-property precedent for compensating sustained claims for time not worked at the standard rate.

The relevant portion of Rule 55 – Preference for Overtime Work states that: "(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." The facts are not in dispute in this case. Clearly, junior employees were assigned to overtime watchman duties when the Claimant was not offered these assignments. The only question this Board must answer is whether a combination of the Claimant's overtime and regular assignments, amounting to twenty-two (22) hours.

The sole case provided by the Carrier, Third Division Award 43625, arose on the property when the senior Claimant, who had a commercial driver's license (CDL), was not offered overtime because he would have had less than the required ten (10) hours between the overtime and his regular assignment as specified for drivers required to have a CDL by the Federal Motor Carrier Safety Regulation, Hours of Service, 49 CFR Section 395.3(a)(1). Because nothing in the current record indicates that the Claimant possessed or was required to have a CDL, that case must be distinguished from the one now under consideration.

Three on-property awards provided by the Organization are deemed relevant to the safety hazard question. Third Division Award 43619 concerned a Claimant bypassed on four dates for overtime in favor of a junior employee. On each of the dates the overtime was scheduled to begin at either 8 pm or 9 pm and end at 7 am, with the Claimant's regular shift scheduled from 7 am – 3 pm. The Claimant was not assigned the overtime because his combined hours would have violated the Carrier's Letter of Instruction 2015-3 dated August 21, 2015 (Policy) prohibiting Engineering Department employees from working more than fourteen (14) hours in a twenty-four (24) hour period. That Board found that "the record confirms that the Carrier's Policy, as applied to the Claimant, arbitrarily deprived him of overtime duties in violation of Rule 55." Particularly relevant to our consideration is a quote from Third Division Award 37658, where the Board "found that when there were only two hours of rest between assignments, the Carrier had not presented '. . . a rational basis for its decisions that the Claimant was unfit to perform the assignment due to the number of hours he would have worked.'"

On-property Third Division Award 35642 involved a claim that was filed when the Claimant was bypassed for overtime in favor of a junior Foreman. The overtime would have involved ten (10) hours prior to the Claimant's regular eight (8) hour shift. The claim was sustained in part because the Board found no evidence of a safety issue.

On-property Third Division Award 37658 considers yet another instance in which the senior Claimant was bypassed on two dates for overtime (watchman) work in

favor of a junior employee. Had the Claimant been assigned the overtime, he would have worked twenty-five (25) hours beginning on October 20, 2001 with only a two (2) hour rest period and twenty-eight (28) hours on October 26, 2001 with only a one-hour rest period. In sustaining the claim, that Board wrote that "the Carrier's failure to schedule the Claimant for overtime during the disputed periods was not shown to be justified by any specific safety concerns or written departmental policy or agreement with respect to maximizing number of hours an employee is permitted to work continuously."

The most recent of the three awards referred to above, Award 43619, did consider a policy that put limits on the number of hours that could be worked in a twenty-four (24) hour period, but found the application of the policy arbitrary. This Board has no particularly relevant expertise that would allow an informed judgment about whether the Claimant could have been rendered a safety hazard, and thus unavailable. While this is the Carrier's premise, it remains an assertion unsupported by anything in the way of probative evidence that might inform the Board's decision. Therefore, the Board is compelled to adhere to the on-property precedent inherent in the above-noted awards. The Board has considered the Carrier dissent to Award 43619 and the point made that nothing in the Agreement prohibits the Carrier from establishing policies that enhance safety. While sympathetic to Carrier concerns for safety, the Board must repeat what other Boards have noted, which is that safety-related polices must consider relevant contract provisions such as Rule 55.

This leaves the matter of compensation for the missed work opportunity. In Award 43619 the Board wrote that after reviewing numerous awards:

> **We find no basis to ignore the dominate (sic) 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 4549was 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 Awards No. 35495, 35642, and 37658. Each one of these**

awards adopted the straight time compensation remedy. We see no basis to ignore these findings.

This Board sees no basis for departing from the rationale of Award 43619. The Claimant will receive such straight-time compensation only for the overtime hours that were actually worked providing that Carrier records establish that hours worked were less than the hours claimed. Finally, at the hearing the parties agreed that this does not involve a duplicate claim, thus there is no need to address that issue.

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 8th day of October 2021.