

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44566
Docket No. MW-46427
22-3-NRAB-00003-210245

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:

- “(1) The Agreement was violated when the Carrier assigned employe W. Draper to perform overtime foreman duties on July 12 and 13, 2019 instead of assigning employe E. Strause thereto (System File BMWE-157111-R AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Strause shall now be compensated twenty-nine (29) hours at his respective time and one-half rate of pay for this loss of work opportunity plus per diem.”

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 E. Strause, hired on March 21, 2007, has established and holds seniority in the Carrier's Maintenance of Way Department. On July 12 and 13, 2019, the Carrier assigned employee W. Draper to overtime Foreman duties rather than the Claimant who, all things being equal, would have had preference. Consequently, the Organization filed a timely claim on Mr. Strause's behalf. The claim was properly processed on the property without resolution and thereafter progressed to this Board for final and binding adjudication.

The Organization contends that Rule 55(a) Preference for Overtime Work was violated when the work was assigned to Mr. Draper because the Claimant is senior, was qualified to do the work of replacing a switch and, contrary to the Carrier's contention, was not called by Foreman J. Halikias. An October 21, 2019 handwritten statement by the Claimant is part of the on-property record as follows:

I, Erich Strause, was available and would have enjoyed working the overtime assigned on July 12th and 13th, 2019. Both my personal and work phones were on and in working order on July 12th and 13th, 2019. In advance I inquired about overtime assignments for the week of July 8th, 2019 through July 14th, 2019 and was told by management that there was no overtime on any of those days/nights. I am a M/W Repairman Foreman in gang Y072. I ordinarily and customarily direct and work with employees assigned under my jurisdiction in repairs to mechanical tools, on-track equipment and roadway machinery used by Maintenance of Way.

The Organization also insists that Foreman Halikias was not qualified to call others for overtime assignments.

The Carrier insists that the Organization has provided "insufficient, incorrect, and inconsistent facts." Initially, the overtime work was not described, but later it became critical to the claim. Initially, the Organization said that W. Draper "ordinarily and customarily" performed the overtime work, but ultimately said that he had not. The Organization indicated that the Claimant was the more senior of the two, but W. Draper was hired on March 1, 1999. The Carrier further asserts that Foreman Halikias appropriately called the Claimant, but next called Mr. Draper after Foreman Strause did not answer his phone. The Organization has not indicated "that Strause was not called." Finally, the requested remedy is viewed as excessive and

unmerited. The Claimant was not due per diem since he did not perform the overtime duties and, therefore, incurred no related expenses. And, there is abundant on-property precedent that work not performed, if compensated, brings compensation 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 Carrier’s reliance on “insufficient, incorrect, and inconsistent facts” is misplaced and need not be addressed by this Board. And, while Mr. Draper is senior to the Claimant by approximately eight (8) years, the former’s seniority would not have entitled him to the first call. In the Carrier’s submission is the acknowledgement that “However, while the Union is correct that the Claimant would have had preference to be called before Mr. Draper for the overtime, the record shows that if the Claimant did not answer his phone, Mr. Draper would have been called in turn” (Board emphasis). Put another way, the Carrier has acknowledged that, in the words of Rule 55, the Claimant “ordinarily and customarily” performed the overtime. Therefore, the response to Part (1) of the claim lies in the Board’s determination of whether the Claimant was called.

Foreman Strause’s handwritten, detailed statement makes a *prima facie* case that he was not called and shifts the burden of rebuttal to the Carrier. Carrier rebuttal lies solely in the assertion that that the Organization has not proven that the Claimant was not called. While the Organization did not argue the point on the property, the reality is that Mr. Halikias was acting as an agent for the Carrier. It is not the Organization’s burden to prove a negative; rather, as noted above, it is the Carrier’s burden to rebut the Organization’s *prima facie* case with evidence and not simply assertions. The absence of a statement from Mr. Halikias leaves the *prima facie* case unrebutted, requiring that Part (1) of the claim be sustained.

Part (2) of the claim is sustained in part. Because the Claimant did not perform the overtime, he incurred no related expenses and, therefore, is not due the windfall that awarding per diem would bring. Third Division Awards 36263, 39357, 39612. And, as the Carrier contends, there is strong precedent in the form of on-property

awards for compensating missed overtime at the straight-time rate. See Public Law Board 4549, Award 1 and Third Division Awards 43619, 26235 and 26534.

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 8th day of October 2021.