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

Award No. 44646
Docket No. SG-45606
22-3-NRAB-00003-190484

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: **(BROTHERHOOD OF RAILWAY SIGNALMEN**
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM:

"Claim on behalf of R.P. Haveman, for 12 hours at his overtime rate; account Carrier violated the current Signalmen's Agreement, particularly Rule 32, and Appendices B-3 and B-4, when on February 17, 2018, Carrier used a junior Electronic Technician, Shawn Fleming, to work with the VacTrain to remove ballast from manholes, thereby causing the Claimants a loss of work opportunity. Carrier's File No. BRS-SD-1266. General Chairman's File No. AEGC – 20181025. BRS File Case No. 16113- NRPC(S). NMB Code No. 172."

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.

Rule B-4 of the parties' Agreement requires that employees be offered trouble calls in a specific order. It also requires supervisors to keep a list of employees to whom the work has been offered and when they were contacted. In this case, the Carrier contends that the Claimant was offered the work but refused it. However, the required call list is not in the record. This case presents exactly the circumstances that

the call list is intended to avoid. In the absence of the required call list, the Carrier's contention that the Claimant was called is not supported. Accordingly, the Board concludes that the Claimant was not called, and the Carrier violated the Agreement when it assigned a junior employee to the work without first offering it to the Claimant.

The Claim being sustained, the Board must next address the remedy. The Organization contends that the Claimant should be paid overtime. The Carrier contends that on this property, remedies are limited to straight time pay.

Remedies in contract are intended to put the individual who was wronged in the position that he or she would have been, but for the contractual violation. In the labor relations setting, back pay for missed work opportunities is typically paid at the rate to which the Claimant would have been entitled had the work been properly assigned to him. Here, that would be overtime.

The Board does not find the awards cited to it by the Carrier to be persuasive and is convinced that the better approach is to follow the normal and traditional remedial approach. That is, the Claimant should be paid for his missed work opportunity at his overtime rate of pay.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant 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 15th day of December 2021.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 44646 – Docket 45606
(Referee Andria Knapp)

The Carrier dissents to the Majority's determination that the overtime rate is the appropriate remedy for a missed overtime opportunity. The overtime rate is not the "normal and traditional remedial approach" and is the approach that has long been rejected at this property.

Historically, there have been many decisions awarding the straight time rate for missed work opportunities. The overtime rate is not the longstanding precedent as the Majority implies. For example, in NRAB Third Division, Award No. 10990, dating from the 1950s, this Board stated that "[t]he claim for time and one-half for the work lost cannot be sustained. *The penalty for work lost under many awards of this Division is the pro-rata rate of the positions.*" (emphasis added)

More importantly, this is a settled issue at Amtrak. There is a long practice of paying claims for missed overtime opportunities at the straight time rate and the Majority has provided no justification for deviating from that. The Third Division has ruled in favor of this position between these parties, including in Award No. 40619 (BRS/Amtrak) when it stated the following: "Our review *on this property* of the numerous Awards submitted support the Carrier in this regard . . . The claim must be sustained at the straight time rate of pay." (emphasis in original) *See also NRAB Third Division, Award Nos. 40622* (Amtrak/BRS).

This is the standard for other crafts on this property and it is appropriate for this Board to consider that as it did in Award No. 40619. This Board cited the public law board convened specifically for the purpose of deciding this issue at Amtrak, Public Law Board No. 4549, which stated in 1988 that "[i]n this Board's experience we cannot recall considering another case where the 'line of precedent' on the property has been so well-established as the result of numerous, recent arbitration awards." This Board has followed that standard since. *See e.g. NRAB Third Division, Award Nos. 42803, 42804, 43619, 43620, 43621, 44355, 44566, 44559, 44560.*

The Majority decision here is an anomaly in a long line of precedent and will lead to continued litigation over this issue where none is necessary.

For this reason, the Carrier respectfully dissents.

Angela Heverling

Kristin Beckner

Angela Heverling
Carrier Member

Kristin Beckner
Carrier Member

LABOR MEMBER'S CONCURRING OPINION TO NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION AWARD NO. 44646

(REFEREE Andria S. Knapp)

The Board's findings in this case provide several reasons for special concurrence from the Labor Member. The Board properly applied the agreement language contained in Appendix B-4 which requires Carrier to record the calls and responses on a designated form. As the Board noted, this type of situation is the exact reason the parties agreed to the process outlined in Appendix B-4 to document the calls and resolve any dispute that may have grown out of the calls made. Carrier's failure to utilize the agreed to form was done at its own peril and the Board's finding on this issue are proper and serve to hold the Carrier to the agreed-to provisions of the Agreement.

As important, is the Board's findings regarding the remedy. As the Board notes, "*Remedies in contract are intended to put the individual who was wronged in the position that he or she would have been, but for the contractual violation.*" In this case, the Claimant was deprived of an overtime work opportunity, to which the Board properly found him to be entitled to the overtime pay he would have received if not for the violation of the Agreement. This principle was well laid out and established in **Third Division Award No. 13738**, where Referee Dorsey held:

> "Had Claimants been called and performed the work involved, as was their contractual entitlement, they would have been paid, by operation of the terms of the Agreement, time and one-half for the hours worked. In like circumstances this Board has awarded damages at the pro rata rate in some instances, and the overtime rate in others. The cases in which the pro rata rate was awarded as the measure of damages, in a number of which the Referee in this case sat as a member of the Board, are contra to the great body of Federal Labor Law and the Law of Damages. The loss suffered by an employe as a result of a violation of a collective bargaining contract by an employer, it has been judicially held, is the amount the employe would have earned absent the contract violation. Where this amount is the overtime rate an arbitrary reduction by this Board is ultra vires."

This principle was again succinctly covered in **Third Division Award No. 25601** where the Board held:

> "Payment would have been made at the overtime rates. It is Claimant who would be penalized if he were reimbursed at straight time or only for actual hours worked."

A small sampling of the numerous Awards of the Board that followed this sound reasoning include **Third Division Award Nos. 16821, 17748, 17917, 20413, 26431, 31571, 35569, 35564, 36722**, and **37049**.

Additionally, in **Public Law Board 7693, Award No. 2**, between these same parties, Referee Capone held:

> "The Claimants here were deprived the opportunity to work in excess of their regular tour of duty which if properly provided to them would have paid them the overtime rate. There is no basis in the record here to deprive the Claimants the opportunity to be 'made whole'".

This "*normal and traditional remedial approach*" is so well accepted that it is often not necessary to note; however, this Carrier has attempted to use Section 3 Tribunals to carve out an exception for itself from this proper approach. In that attempt Carrier has attempted to expand from **Public Law Board 4549, Award No. 1** which explicitly stated:

> "This Board concludes that on this property the Carrier is only obligated to pay straight time compensation to **BMWE employees** who are bypassed improperly and miss overtime opportunities." **(Emphasis added)**

Despite that Award clearly applying only to employees of one craft, Carrier has consistently attempted to apply this flawed logic to cases involving this Organization, pleading its case to arbitrators.

Carrier "*well established on this property*" argument relies on Awards between itself and the BMWE craft. Additionally, it relies on four Awards between these parties, the first of which is **Third Division Award No. 40622**; however, in that Board's findings it followed the "on this property" straight-time argument only due to "*no rebuttal is forthcoming from the Organization*" relying on the unrefuted statement as fact versus finding actual logic in Carrier's plead. Another Award relied on by Carrier was **Third Division Award No. 40619** which again stated "*constrained by the unique record at bar*" for its reason of providing straight-time pay. As is evident in both these Awards, there is no precedential value, as both were limited to the unique record in those cases.

Lastly Carrier turns to **Third Division Award Nos. 44014 and 44013**, to which this Labor Member dissented for the exact reasons provided in this opinion. Undoubtedly, the Carrier will continue to plead its case for its ability to violate the agreement at a discount rate, but future Boards should not entertain such disservice to the enforcement of the agreement.

The Majority's proper application of remedial damages provided in this case are sound and in line with the proper enforcement of the Agreement to make the Claimant whole for what he would have been compensated if not for the violation. Future Boards should likewise follow this sound principle.

For the reasons stated above, the Majority's findings warrant a concurring opinion of the Labor Member.

Brandon Elvey

Labor Member