

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44959  
Docket No. MW-46763  
23-3-NRAB-00003-210692**

**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 junior employees B. Shank and T. Hindman to perform overtime rail pickup car operator duties within the Adams Maintenance of Way Yard near Mile Post 35 in North Brunswick Township, New Jersey on October 4, 9, 10, 16 and 18, 2019 instead of assigning senior Rail Pickup Car Operator L. Lewis, Jr. thereto (System File BMWE-158154-TC AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Lewis, Jr. shall now “\*\*\* receive compensation for the thirty-two (32) hours overtime earned by the junior employees as referenced herein, and payable at the Claimant’s respective EWE rate. \*\*\*”**

**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 has established and holds seniority in the Carrier's Maintenance of Way Department. The Claimant was holding an Engineer Work Equipment Operator ("EWE") "A" Rail Pickup Car Operator position and was assigned to Gang Y-402, working a Monday through Thursday work week with assigned hours between 6:00 AM and 4:30 PM. The Claimant has a service date of May 10, 1999, and an EWE "A" operator seniority date of April 17, 2000.**

**On October 4, 9, 10, 16, and 18, 2019, the Carrier assigned overtime work involving rail train repairs to B. Shank and T. Hindman. The overtime work completed by Employees Shank and Hindman was five assignments involving minor repairs to the rail pick-up machine and its rail cars near MP 35 Adams Maintenance of Way Yard in North Brunswick Township, NJ.**

**Both employees have established and hold seniority within the Carrier's Maintenance of Way Department. Employee Shank has a hire date of March 24, 2014 and was assigned to gang Y170A with a TOD of 6 AM to 4:30 PM Monday through Thursday with rest days of Friday, Saturday, and Sunday. Employee Hindman has a hire date of February 9, 2015 and was assigned to gang Y170B with a TOD of 6 AM to 4:30 PM Monday through Thursday with rest days of Friday, Saturday, and Sunday.**

**In a letter dated November 19, 2019, the Organization filed a claim on behalf of the Claimant. The Carrier denied the claim in a letter dated January 13, 2019. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.**

**The Organization contends that on the claimed dates, the Carrier allowed junior and improperly assigned employees Shank and Hindman to perform overtime work without contacting the senior, regularly assigned Claimant. The Organization contends that this was not a continuation of work, but an overtime assignment.**

**The Organization contends that the Claimant ordinarily and customarily performs work in connection with rail train operation, maintenance, and repair. The junior employees who were improperly assigned are not qualified to work with the rail train and do not customarily perform this work, according to the Organization. The**

Claimant was not offered this overtime opportunity and consequently suffered a loss of earning opportunity.

Rule 55 the Agreement provides:

**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.

\* \* \*

- (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....

The Organization contends that the Claimant was the senior, qualified, and available employee who customarily and ordinarily performs such work, while junior employees Shank and Hindman were improperly assigned and as a result subsequently abolished as rail train technicians on Gang Y-170A and Y-170B. In addition, the organization contends that neither Shank nor Hindman possessed the required qualifications to work with the rail train on any of the disputed dates. The Organization contends that the statements provided by the junior employees acknowledge that they had worked alongside the Claimant performing this work on other assignments. The Organization contends that the Claimant performed this very work claimed herein with the junior employees.

The Carrier contends that the Organization has failed to meet its burden of proof regarding an overtime claim on behalf of the Claimant. The Carrier contends that while overtime assignments involving train repairs were assigned to Technicians on October 4, 9, 10, 16, and 18, 2019, this was work ordinarily and customarily performed by those employees.

The Carrier contends that Rule 55 does not provide that the assignment of overtime work must be governed solely by seniority. It applies to work that is "ordinarily and customarily performed" by employees. Here, the work performed on the rail train and cars is work that is ordinarily and customarily performed by the junior employees within that unit, not the Claimant.

The Carrier contends that whether they were operating the rail car or still needed training in how to do so, they were entitled to the work making repairs. The Carrier contends that the Organization has failed to prove that the junior employees were not qualified to make repairs on the rail train.

The Carrier contends that the Organization has not proven that the Claimant had a right to the overtime, as he was assigned to another gang and not an employee who regularly performed the work claimed. The Carrier contends that there is no requirement to call a senior employee from another gang when junior employees who regularly performed the work at issue are available to perform it.

There is no dispute that the claimed overtime was performed, and that the Claimant was more senior than the employees who were assigned the overtime. However, Rule 55 gives preference for overtime work to qualified and available employees who ordinarily and customarily perform the work. Here, the Carrier has asserted that the work of repairing rail cars was not ordinarily and customarily performed by the Claimant. Conversely, the junior employees who were assigned the overtime work did ordinarily and customarily perform this work.

In addition, the Organization has not met its burden of proving that the junior employees were not qualified to perform the work. The Carrier asserts that they are qualified and their statements assert that they have previously performed this work with the Claimant. As an appellate body, we are not in a position to resolve this conflict in material fact, which prevents the Organization from sustaining its burden of proof. Thus, the claim must be denied.

**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 24<sup>th</sup> day of May 2023.