

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44961  
Docket No. MW-46799  
23-3-NRAB-00003-210769**

**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 Carrier violated the Agreement when it failed to assign Mr. M. Wills to perform overtime work on December 15, 2019 at Mile Post 219 (System File 04-20/BMWE-158429-TC AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Wills shall receive compensation for eight (8) hours of overtime at his respective 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 has established and maintains seniority in the Carrier's Maintenance of Way and Structures Department. At the time of this dispute, the Claimant was assigned and working as a thermite welding foreman on Gang S135 with an assigned schedule of Monday through Friday from 10:00 P.M. through 6:00 AM. On December 15, 2019, an employee who was assigned and working as a thermite welding foreman on Gang T300 notified Supervisor J. Rodriguez that he was unable to work his 10:00 PM to 6:00 AM shift that evening. Seeking another employee to cover the shift, Supervisor Rodriguez unsuccessfully attempted to contact the Claimant to work the overtime shift. Eventually, the Supervisor made plans to utilize an employee who was already on the property for his regular shift to cover the absence. The employee was paid at his straight time rate of pay.

In a letter dated January 7, 2019, the Organization filed a claim on behalf of the Claimant. The Carrier denied the claim in a letter dated March 6, 2020. 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.

Rule 55 of 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.

The Organization contends that the Carrier violated the Agreement when it failed to call and assign the Claimant, a qualified thermite welding foreman, to perform the subject overtime work at Mile Post 219 on December 15, 2019. Instead, the Carrier utilized Track Foreman K. Makara, who was not qualified as a thermite welding foreman. Further, the Organization contends that the Carrier did not make a reasonable attempt to contact the Claimant to offer him the disputed overtime work.

The Organization contends that Rule 55 of the parties' Agreement gives preference for overtime service to the senior, qualified, available employee who ordinarily and customarily performs such work. The Organization contends that there is no dispute that the Claimant was assigned and working as a thermite welding foreman on Gang S135 while the assigned employee was regularly assigned as a track foreman on Gang T300.

The Carrier contends that the Organization has failed to present a *prima facie* case that the Agreement was violated. The Carrier contends that the assigned employee was not offered the work as an overtime assignment but was assigned this work during his regular shift. Thus, the Carrier contends, Rule 55 was not triggered, as there was no overtime assignment made. In Third Division Award 31003 (an on-property Award), the Board confirmed that it is the Carrier's right to determine whether a vacancy will be filled on overtime, and that overtime preference rules are triggered only when an overtime assignment exists.

Although the Carrier initially intended to use someone on overtime to cover the absence in Gang T300, it made the management decision to rearrange work assignments among the employees already on the property. Once the work was assigned to the employee at his straight time rate, there was no overtime assignment.

In addition, the Carrier contends that the Claimant did not respond to the Supervisor's efforts to contact him until the next morning, making him unavailable for the work. When the Claimant did not respond to the call, the Carrier was free to cover the absence in another way.

On-property precedent has made clear that the overtime preference provision in the Agreement is only triggered when there is overtime to be worked. In Third Division Award 31003, this Board wrote,

The use of the phrase "subject to" therein indicates an obligation on the referenced employees and not an automatic entitlement to overtime service where no overtime is actually worked by any employee. (Where overtime is assigned, other Rules obviously provide for precedence to be given to Maintainers for overtime Maintainers' work.)

The obvious corollary to this holding is that when no overtime is assigned, the overtime preference Rule (Rule 55) does not apply. In a similar fact situation involving another craft, the Third Division wrote that overtime preference guidelines do not preclude an employee from performing the work at the regular straight-time rate. Third Division Award 31782. There, the Board quoted from Awards 12 and 15 of Public Law Board 3932, to wit, "Claimant cannot claim a preference for overtime work that was never performed." This claim is therefore, 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.**