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

Award No. 45024
Docket No. MW-47314
23-3-NRAB-00003-220269

The Third Division consisted of the regular members and in addition Referee Barbara C. Deinhardt 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 Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier called out and assigned Sub Division Gang PVTL-M01 Truck Driver (CDL-Fuel) M. Keene to perform overtime driving a welding truck to weld rail in the Perryville Sub-division on May 3, 2020 instead of assigning Southern District Welding Unit Gang MAST-Z02 Truck Driver (CDL-Hi Rail Welding) C. Hamilton, who was assigned to a position in the work classification for the overtime assignment and who ordinarily and customarily performed the work in question, thereto (System File BMWE-159171-TC AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. Hamilton shall now receive compensation for the eight (8) hours overtime earned by M.A. Keene as referenced herein, and payable at the Claimant's respective Truck Driver 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 was employed by the Carrier as a truck driver in the welding gang. On May 3, 2020 Carrier assigned overtime to a junior employee who was a truck driver in the maintenance gang.

The Organization argues that the Carrier violated the agreement by failing to assign the overtime to the Claimant. He was the senior qualified employee and he was available. The Organization denies that the Claimant was offered the work.

According to the Carrier, the Claimant was not available. The overtime was offered to everyone on the Claimant's gang and it was refused. It was only then that the work was given to the junior employee.

Upon a review of the record as a whole, the Board finds that the Organization has met its burden of proof. Rule 55(a), PREFERENCE FOR OVERTIME WORK, reads: "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."

When it filed its claim on June 29, 2020, the Organization asserted that the Claimant, the senior employee, was available and qualified, but was not offered the work. When the Carrier responded on August 28, 2020, it did not include as a defense that the Claimant had in fact been offered the work. It was not until December 30, in response to the Organization's October 28 appeal, that this defense was first raised. Carrier included an email from Deputy Division Engineer Monte Stokes dated December 21 reading, "Good Morning Dana, I pray all is well. The MASTZ01 welding team was asked to weld the Sunday of May 3, 2020 by Charlie Matlack and no one sign up for it. We filled in the slots with our subdivision people due to them working in the B& P tunnel. Let me know if you have any questions." There is no indication of any documentation that could have supported or corroborated this hearsay statement rendered more than seven months after the fact. In response to the Carrier's assertion, the Organization then submitted a statement from the Claimant that "myself and my gang were never asked if we wanted to work overtime starting at 7:00 AM on May 3, 2020. Had someone asked me is [sic] I wanted to work or if there was a signup sheet I would have signed it and told my supervisor that I wanted to work." We find that under

all the circumstances, the statement from the Claimant carries greater weight and that he therefore should be considered to have been available for the assignment.

As the Claimant was available and senior, the only questions remaining are whether he was qualified and whether the work at issue was ordinarily and customarily performed by him, as required by Rule 55(a). We find that the Organization has so proved. (The proof is also supported by the Carrier's assertion that it offered the work to the Claimant. If the Claimant was not qualified or did not ordinarily and customarily do the work, why would it have been offered?)

The Carrier argues that if there were a violation, the remedy is payment for the hours missed, but at the straight time rate, rather than the overtime rate, as claimed by the Organization. We agree. Arbitral precedent on this property has clearly established that straight time or pro rata rate for lost overtime opportunities is the appropriate measure of damages.

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 7th day of September 2023.