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

Award No. 45086
Docket No. MW-47233
24-3-NRAB-00003-220204

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Keolis Commuter Services

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier used junior employe J. Sweeney to perform overtime and double time work in conjunction with the Force Account Flagging Crew on September 19, 2020 from 5:00 P.M. through 5:00 A.M. on September 20, 2020 instead of using Readville, Massachusetts headquartered senior Assistant Foreman R. Blocker who was working the assignment in question and who was the senior available qualified employe at the headquarters who ordinarily and customarily performed such work (System File S-2011K-1119/BMWE 01/2021 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Blocker shall now '… be compensated all hours worked by the junior employee, as well as all credits for vacation and all other benefits for the dates claimed for his lost work opportunity. *'""**

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.

Factual Background:

On September 19, 2020 and September 20, 2020, the Carrier assigned employe J. Sweeney to perform overtime service at Readville, Massachusetts. Claimant was more senior and was regularly assigned to the work involved. The Organization argued Claimant was entitled to the claimed overtime work. The resulting claim has been fully processed through the grievance procedure to consideration by the instant Board.

Rule 11 of the parties' Agreement addresses Overtime, stating as follows in pertinent part:

> **1. Time worked preceding or following and continuous with the employee's assignment on regular eight-hour work periods shall be computed on the actual minute basis and paid for at the time and one-half rate, with double time on an actual minute basis after sixteen (16) hours of work in any twenty-four hour period (computed from the starting time of the employee's regular shift), except that overtime shall automatically cease and the pro rata rate shall apply at the starting time of the employee's next regular assigned work period.**
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> **2. Employees called to perform work not continuous with the regular work period will be allowed a minimum of two hours and forty minutes (2'40") at the time and one-half rate and, if held on duty in excess of two hours and forty minutes (2'40"), they will be paid on a minute basis at the time and one-half rate for all time worked.**

> **3. Time worked on rest days and holidays will be paid for at the time and one-half rate with double time on an actual minute basis after sixteen (16) hours of work until relieved or until commencement of the employee's next regular assigned work period, whichever occurs first. Such continuous time worked after commencement of the next regular assigned work period shall be paid at the pro rata rate, pursuant to Section 1 of this Rule 11. 4. When necessary to work employees under this Rule, the senior available qualified employees will be called according to the following: (a) Preference to overtime work on a regular work day which precedes or follows and is continuous with a regular assignment shall be to the senior available qualified employee of the gang or the employee assigned to that work. "(b) Preference to overtime work other than in (a.) above, shall be to the senior available qualified employee at the headquarters who ordinarily and customarily performs such work.**

Position of Organization:

The Orgaization maintains there is no dispute that Claimant was the senior employe and was entitled to be given preference to this overtime as a continuation of his regular assignment. There is also no dispute that Claimant was qualified and available to perform the claimed work had the Carrier given him the opportunity to do so.

The record is void of any evidence whatsoever to support the Carrier's affirmative defense that it has a practice of restricting employes from working in excess of sixteen (16) hours. Even if the Carrier did have evidence, their argument must be rejected for three reasons. First, there is no long hours' condition within Rule 11, or anywhere else in the Agreement. In fact, Rules 11(1) and 11(3) specifically describe the proper rate of pay for when employes work sixteen (16) or more hours in a twenty-four (24) hour period. Second, the Carrier is not allowed to unilaterally institute a policy that infringes upon Agreement rights of employes. Third, the Carrier did not show a reasonable basis in which to restrict the Claimant's seniority rights. In this regard, it is arbitrary for a supervisor directive to restrict an employe's ability to work. This is especially so when the Carrier's directive is limited to a small group of employes,

while other Maintenance of Way employes across the system routinely work in excess of sixteen (16) continuous hours.

Position of Carrier:

The Carrier attempted to evade liability for its actions in this instance by contending that the Carrier has a practice in place that prevents employes who oversee contractors, particularly Force Account flagging employes, from working more than sixteen (16) hours, citing alleged safety concerns. Thus, the Carrier contended that because the Claimant had worked the sixteen (16) hours leading up to the overtime work being claimed herein, he was not entitled to the overtime assignment involved here.

Analysis:
This is not the first time this issue has arisen under the applicable contract, though it must be noted that Keolis acquired the Agreement from Amtrak. The language remains unchanged and we acknowledge the consistency of precedent. Each of the Boards addressing this issue has held that the Agreement provides for overtime opportunities based only on qualifications, availability and seniority. Below are quotes from these decisions delineating the rationale:

> **Award 32371**
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> **The Board does not find persuasive Carrier's reasons for excluding payments when the combination of overtime hours worked by Polinaire and the scheduled hours of Claimants would have exceeded 16 hours pay in a 24 hour period. It is acknowledged that Polinaire was improperly utilized on overtime work that Austin and Higueruela were entitled to perform. They filed a claim seeking payment for the hours Polinaire worked. They are entitled to be paid for these hours as a remedy even if, as Carrier said, such payment would be the equivalent of being on duty in some instances of between 19 and 23 hours in a 24 hour period. The Agreement was violated when Polinaire was used instead of Claimants. As reparations for the violation they are entitled to be paid the equivalent of the total number of hours that Polinaire worked in violation of the Agreement.**

Award 35495:

The Claimant was regularly assigned as a Foreman 7:00 A.M. to 5:00 P.M., Monday through Thursday. On Friday, December 9, 1994, the Claimant worked an 11 hour overtime assignment from 6:00 A.M. to 5:00 P.M. performing communication and protection work as he customarily performed on his regular assignment.

On December 9, 1994, the Carrier needed a Foreman to pilot the Sperry Rail Car from Paoli to Holmesburg, Pennsylvania, from 9:00 P.M. to 5:00 A.M. the next day. The Carrier assigned A. Alessi, a Foreman junior to the Claimant, to perform that work. This claim followed with the argument that as senior Foreman, the Claimant was entitled to the overtime call given to Alessi and, for a remedy, the Claimant should be compensated for the lost overtime opportunity at the overtime rate. * * *

There are three considerations in Rule 55 relevant to this case - qualification, availability and seniority. Qualification and seniority are not in dispute in this case. The Carrier concedes that the Claimant was qualified to perform the overtime work commencing at 9:00 P.M. and that the Claimant was senior to Alessi who was used for that overtime work. The issue raised by the Carrier is whether the Claimant was 'available.'

The Carrier asserts that because the Claimant worked from 6:00 A.M. to 5:00 P.M. on December 9, 1994, the Claimant was not 'available' for another overtime assignment beginning at 9:00 P.M. The Carrier points out that the work needed commencing at 9:00 P.M. (piloting the Sperry Rail Car) required a high degree of vigilance to ensure the safe operation of the equipment. According to the Carrier, if the Claimant had been used for the 9:00 P.M. to 5:00 A.M. assignment on the Sperry Rail Car, he would have performed a total of 19 hours of work in a 24 hour period. That amount of work in a 24 hour period, argues the Carrier, made the Claimant not 'available' under Rule 55.

Although framing its argument in terms of whether the Claimant was 'available' under Rule 55, the Carrier is really arguing that because of the 19 hours of work in a 24 hour period, the Claimant was 'unfit' to perform the overtime assignment which was given to Alessi.

The Carrier has broad discretion for determining fitness of an employee to perform assigned job duties. Those decisions are managerial prerogatives subject to very limited review by the Board. The Board will only look to whether the Carrier's fitness decision was arbitrary or capricious. If the Carrier's decision concerning fitness of an employee has a rational basis or justification, the Board must defer to that decision, whether we agree with that decision or not. In this case, we can find no rational basis in the record for the Carrier's decision.

A 19 hour work day is a long one. But, as the Organization points out, the Claimant would have had five hours of rest between assignments. Moreover, and most important, there is nothing in the record to show that aside from counting the number of hours in the 24 hour period that the Claimant would have worked, the Carrier made any objective evaluation of the Claimant's physical or mental abilities on that day to perform the duties of the overtime assignment given to junior Foreman Alessi. The Claimant was simply bypassed for the overtime call. Accepting the Carrier's argument in this case would, in effect, cause the Board to amend Rule 55 to insert a provision that employees cannot work 19 hours in a 24 hour period and that five hours of rest between assignments is not enough. That is not the Board's function. Only the parties can do that. * * *

Without more from the Carrier concerning its assessment of the Claimant's individual circumstances, we choose not to get on what in effect is a slippery slope which would cause the Board to establish by fiat a limit on hours where the parties have not done so by agreement. Without more from the Carrier concerning the Claimant's individual circumstances, we cannot find a rational basis for the Carrier's determination that the Claimant was unavailable - in effect, unfit - to perform the overtime assignment given to junior Foreman Alessi. That decision by the Carrier was therefore arbitrary. On the merits, we find

> **the Carrier violated Rule 55 by not calling the Claimant for the overtime assignment given to junior Foreman Alessi.**
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> **<u>AWARD 37658:</u>**
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> **Rule 55 is clear and sets forth only considerations of qualification, seniority and availability. The Carrier has not shown that the Claimant was unavailable for either overtime assignment. As noted in Third Division Award 35495, the Carrier must present a rational basis for its decision that the Claimant was unfit to perform the assignment due to the number of hours he would have worked. * * ***
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> **The Board has held that the fact that the combination of overtime hours sought and scheduled hours of the Claimant would exceed 16 hours in a 24 hour period is an insufficient basis for denying payment for such hours if a violation of Rule 55 is shown in Third Divisions 35642 and 32371.**

These decisions rest on fundamental approaches to contract interpretation. Rule 11 expressly sets forth the criteria for filling overtime positions, including those where the employee has already worked 16 hours. This makes it clear that the parties intended for available employees to have the right to take overtime opportunities based on seniority, availability and qualification alone. No other criterion was mentioned and none can be created by the Board. The term 'availabile' must be given its ordinary and every day meaning, which is that the employee is readily obtainable. (Webster's Dictionary of the English Language.) Even if 'availability' is interpreted to include consideration of fitness for duty, precedent establishes that this determination can only be made after an evaluation of the individual employee involved. To deem all employees who have worked 16 hours unfit for further duty has been found arbitrary. This Board does not reach a different conclusion.

The parties have not negotiated a safety exception to overtime opportunities for an employee in a safety critical position who has worked 16 hours. It would be an abuse of jurisdiction for this Board to take it upon itself to add criteria for overtime opportunities which the parties have not negotiated into their Agreement. Such an

exception to the express language of the Agreement must be created and/or acknowledged by the parties.

This Board is deeply committed to the safety of bargaining unit members. We have no doubt that the Organization and Carrier share this commitment with us. However, given the express language of the applicable contract provisions, the power to limit overtime opportunities based on safety concerns does not fall within the purview of this Board.

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 31st day of October 2023.