

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 4549

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NATIONAL RAILROAD PASSENGER CORPORATION \*  
-and- \*  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES \*  
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CASE NO. 1

AWARD NO. 1

Public Law Board No. 4549 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the National Railroad Passenger Corporation (hereinafter the "Carrier" or "Amtrak") and the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization" or the "BMWEE"), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following issue, which was joined in eight (8) individual cases which the Carrier withdrew from the Third Division of the National Railroad Adjustment Board:

"When the Carrier improperly bypasses an employee for an overtime opportunity, is that employee entitled to the premium (punitive) rate of pay for the overtime hours missed, or is that employee entitled to the straight time rate for the overtime hours missed?"

### Background Facts

There are no disputed facts regarding the Organization's claims that the Carrier improperly bypassed certain employees, between the dates of September 15 and December 2, 1984, who were entitled to be called for overtime.

Those facts were established, apparently, on the property; and the claims were only progressed to arbitration concerning the question of the appropriate remedy. Those claims and several other claims were submitted to the Third Division of the National Railroad Adjustment Board (hereinafter the "NRAB"), where two (2) of those claims resulted in Award Nos. 26508 and 26690 authored by Referee Robert W. McAllister. In sustaining the Organization's position, Referee McAllister found that payment of the claims at the "time and one half rate [was] appropriate".

Thereafter, the Carrier, exercising its right under Section 3, Second of the Railway Labor Act withdrew the remaining claims (NEC-BMWE-SD1124, 1140, 1141, 1142, 1143, 1175, 1177 & 1187) from the Third Division. These claims had been at the Division for more than one year, and the Carrier sought the establishment of a Public Law Board.

After resolving certain procedural disputes, the parties agreed to the establishment of this Board for the purpose of rendering a single decision which would be applicable to the eight (8) dockets which had been withdrawn from the Third Division.

### Position of the Organization

Simply stated, the Organization contends that in situations where the Carrier has improperly assigned overtime work to junior employees, the senior aggrieved employees are entitled to receive the rate they would have received had they been allowed to perform the work.

The Organization argues that this position is supported by the vast majority of past awards of the Third Division of the NRAB. In support of this argument the Organization cites approximately seventy-five specific awards of the NRAB. The Organization submits that the numerous awards it has cited represent "but a sampling of the legion of awards rendered by the Third Division supporting our position".

The Organization also contends that its position is supported by awards "both past and present relating directly to this Carrier". The Organization points out that the Pennsylvania Railroad was the predecessor of Amtrak, and that the Amtrak Scope and Work Classifications Rules as well as Amtrak's Rule 44 (Overtime) were copied almost verbatim from the Pennsylvania Railroad Company agreement effective December 16, 1945. The Organization then points to Decision No. 433 (Docket No. 563) which was issued under the Pennsylvania Railroad (Pennsylvania-Reading Seashore Lines) agreement with the BMWE, in which the parties agreed to pay a claimant more than the straight time rate, in a circumstance, which the

Organization contends, is analogous to the instant cases.

The Organization submits that a number of Third Division awards, including Award Nos. 26508 and 26690, involving these same parties, sustained the Organization's position. The Organization contends that the rationales of Referee McAllister (Award Nos. 26508 and 26690), Referee Blackwell (Award No. 19947, BRS and the Trustees of the Penn Central) and Referee Sickles (Award No. 21767, BRS and the Trustees of the Penn Central) clearly and unambiguously establish that claims, such as those presented to this Board, are to be paid for at the premium rate. The Organization submits that the position the Carrier has taken in the instant case was carefully considered in Third Division Award No. 19947 (Blackwell) and was rejected.

The Organization submits that the awards sustaining its position are better reasoned, and that this Board should conclude that the awards relied upon by the Carrier were rendered in error.

The Organization argues that the awards relied upon by the Carrier, which have sustained the Carrier's position regarding the payment of straight time to employees who have been bypassed for overtime assignments on this property, have incorrectly concluded that there was a "practice and acquiescence by the Organization" which permitted the Carrier to pay only the straight time rate.

In further contradiction of the Carrier's position, the Organization submits that the awards relied upon by the Carrier are not representative of the vast majority of past awards of the Third

Division which generally address this issue.

The Organization states that it wholeheartedly agrees with the Carrier that the principle of stare decisis should be applied in the instant case. The Organization submits that precedent mandates sustaining the instant claims consistent with its position.

The Organization concedes that in the past claims for overtime have been settled on the property by the payment of straight time. However, the Organization submits that these "settlements" are of no precedential value. Additionally, the Organization contends that it would be inappropriate for this Board to consider such settlements as binding upon the Organization, since to do so would adversely affect good labor management relations and result in the parties inability to settle future grievances.

Finally, the Organization contends that the entire fabric of the collective bargaining agreement recognizes that members of the BMWE craft or class receive premium rates in a number of circumstances where they have not performed work (i.e. certain vacation entitlements).

In conclusion, the Organization requests that the Board not find that the "history" on this property or any "past practice" has been established wherein the Organization has acquiesced to the Carrier's position regarding payment of the straight time rate. The Organization asks the Board to reject the awards of Third Division referees or Public Law Board neutrals who have, in the Organization's

opinion, erroneously concluded that such a history exists or that such a past practice was established.

Therefore, the Organization submits that the appropriate make whole remedy in the instant case requires the payment of the premium rate.

#### Position of the Carrier

The Carrier contends that under the principle of stare decisis the issue before the Board has already been decided on this property between these same parties; and that six (6) different neutrals, rendering eleven (11) awards, have agreed with the Carrier's position that the straight time or pro rata rate for lost overtime opportunities is the appropriate measure of damages.

The Carrier has referenced the awards of Neutrals Zumas (PLB 3932, Award 14), Gold (Third Division, Award 26235), Roukis (Third Division, Award 26456), Benn (Third Division, Award 26534), Marx (Third Division, Awards 27088 & 27089) and Dennis (Third Division, Awards 27147 through 27150).

The Carrier submits that these awards were all based upon review of the same practice, rule structure, award support and documentation as are the cases pending before this Board.

The Carrier cites from Referee Gold's decision (Award No. 26235) in which it was held ". . . Carrier's position is the more persuasive. By custom, history, and practice, overtime has not been

paid in this instance for time not worked." The Carrier also cites specific language from the award of Referee Benn (Award No. 26534) to the effect that "assignment of overtime work under this Agreement on this property is payment at the pro rata rate".

After reviewing the awards of Referee Marx (Award Nos. 27088 and 27089), which also sustained the Carrier's position, the Carrier argues that the awards of Referee McAllister (Award Nos. 26508 and 26690) are "clearly erroneous"; as those awards ignored the issue of "prior claim handling practice and other awards on this property under this agreement on the issue".

The Carrier points out that awards issued subsequent to Referee McAllister's decisions have not supported his views. Therefore, the Carrier submits that Award Nos. 26508 and 26690 are "palpably erroneous and have no precedential value given the fact pattern and award support on this property on this issue".

The Carrier submits that the issue of the proper payment to BMW employees bypassed for overtime opportunities was "finally" resolved on this property by the award of Referee Benn (Award No. 26534), and that there is absolutely no purpose for the Organization to continually relitigate the question.

In conclusion, the Carrier submits that the Claimants have been properly compensated for the lost overtime opportunities claimed; and the Carrier requests that the Board sustain its position.

### Findings and Opinion of the Board

This Board has carefully reviewed all of the lead awards which have been cited to us for our consideration, where full text copies of those awards have been made available to the Board.

Of particular historical interest to this Board is Award No. 19947 of Referee Blackwell, an award cited by the Organization in support of its position. We find this award to be significant, not because of the fact that it sustained the argument that the premium rate was the appropriate compensation for a missed overtime opportunity [although we should note that it was an award that did not involve the Organization, but rather concerned a claim by the Brotherhood of Railroad Signalmen], but because this award summarizes in clear and understandable terms the historical conflict between the "straight time compensation" rationale (Award No. 4616, Referee Carnody) and the "punitive/premium time compensation" rationale (Award No. 13738, Referee Dorsey).

Award No. 19947 demonstrates the long-standing philosophical dispute between the parties and Section 3 neutrals regarding the appropriate measure of compensation for missed overtime opportunities. Referee Blackwell's conclusion bears repeating here:

"These contentions [the Carrier's position] are not wholly without merit and Carrier's presentation in general is an impressive one. Also, we frankly acknowledge that there is a credible rationale to support each line of conflicting authorities. We are concerned, though, that the straight time authorities



are characterized by an undue absorption in the historical purpose of overtime, as well as a strained search of the contract itself to find specific guidelines on the measure of damages. Overtime rates evolved both from public laws and negotiation at the bargaining table, but we fail to see in this history any express or implied prohibition against taking the loss of overtime into account, along with the loss of straight time, when a Carrier's violation of an employee's contractual rights to work is under appraisal. Also, we know that many things are left unsaid in a collectively bargained agreement and that the measure of damages for a contract violation is one of the most common among them. On balance, therefore, we are skeptical about the rationale of the straight time authorities for we believe it may contain underlying defects which are absent from the overtime rationale. Accordingly, we shall adhere to the ruling laid down in Award 13738 and sustain the claim."

No reasonable person can dispute that Referee Blackwell's award is "well-reasoned". He concluded that he was better prepared to accept the rationale of Referee Dorsey in Award No. 13738 and that he was "on balance" not prepared to accept the reasoning in awards that followed the straight time compensation rationale; for, he believed, the straight time compensation rationale "may" contain underlying defects which are absent from the overtime rationale.

Referee Blackwell chose his words carefully. He was "skeptical" and he found that the straight time rationale "may" contain certain decisional defects. He did not conclude that any awards which adopted the straight time compensation rationale were "palpably erroneous".

The "palpably erroneous" standard has been the one used by

neutrals functioning under Section 3 of the Railway Labor Act, who find reason to reverse a decision or a line of decisions that are directly on point with the cases they are considering. This undefined standard has contributed significantly to the problems faced by carriers and labor organizations who find themselves continuously litigating and relitigating issues that have been previously resolved on their respective properties.

In 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.

Six (6) different neutrals in the last four to five years have rendered thirteen (13) awards involving what are essentially the identical facts, issues and arguments. The present score is the Carrier 5 (neutrals) and 11 (awards) and the Organization 1 (neutral) and 2 (awards).

While this Board is not persuaded that the rationale of the Carrier is superior to the rationale argued by the Organization, we are persuaded that this dispute, on this property, has reached the point where further litigation serves no purpose. In our opinion, this dispute should have ended with the decision by Referee Marx (Award No. 27088). Referee Marx considered the two (2) McAllister awards that sustained the Organization's position. He also recognized that innumerable awards have been issued in favor of each

of the conflicting theories of compensation. He observed that counting the number of awards or reviewing the arguments in favor of either position would be to no avail, except to highlight one obvious conclusion; that being that "agreement language does not clearly and unambiguously specify which position is correct". Referee Marx then concluded, after reviewing the history of claim handling on the property and the awards involving these same parties and this same issue, that payment of straight time "is the more consistent result".

While this Board is not persuaded that there is an established "binding past practice on this property" or that the Organization's settlement of some or many claims for missed overtime opportunities at the straight time rate may be properly considered as the Organization's "acquiescence" to straight time being the proper remedy, nevertheless we must agree with Arbitrator Marx that an award of straight time is the "more consistent result" on this property.

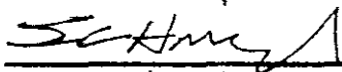
Referee McAllister was the only neutral on this property who found reason to sustain two claims at the premium rate. He relied on a rationale (authored by Referees Dorsey and Blackwell) that has some substantial merit; contrarywise the rationales of Referees Carmody, Zumas, Gold, Benn and Marx also have substantial merit. None of these awards, in this Board's opinion, can be properly characterized as "palpably erroneous". Unfortunately, some of these awards conflict with others on this property.


As noted above, this Board is going to sustain the Carrier's

position, since in our opinion the Carrier's position has some merit, and since the Carrier's arguments have been sustained more consistently by more neutrals on this property.

**Award:** This Board concludes that on this property the Carrier is only obligated to pay straight time compensation to BMW employees who are bypassed improperly and miss overtime opportunities.

This Award was signed this 14th day of July 1988 in Bryn Mawr, Pennsylvania.

  
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L.C. Hriczak  
Carrier Member

  
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W.E. LaRue  
Organization Member

  
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Richard R. Kasher  
Chairman and Neutral Member