SPECIAL BOARD OF ADJUSTMENT NO. 957

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY "AUTHORITY"	:	
AND	:	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES "ORGANIZATION"	:	AWARD NO. 21

STATEMENT OF CLAIM

Claim of the Brotherhood (BMWE-86-7-F11) that:

The Authority has violated Article V, Section 514 (b), and other pertaining rules of the Scheduled Agreement, when on September 12 and 13, 1986, it assigned overtime work to a junior 2nd class painter instead of Claimant E. Burbage.

REMEDY:

The Claimant, 2nd Class Painter E. Burbage, shall be paid for eleven (11) hours at the punitive time rate of pay of the 2nd class painter position.

OPINION OF THE BOARD

Claimant, E. Burbage, contends that he was improperly denied overtime work. The Organization seeks overtime paid for Claimant for the time he was not permitted to work.

The basic facts are not complex. Claimant, painter second class, was assigned to work at the Wayne Station during the latter part of July, 1986. On or about September 9, 1986 Claimant was reassigned to the East Falls Station for unspecified reasons. Subsequently, on September 12 and 13, 1986 overtime

work was performed at the Wayne Station. The overtime work was two hours on September 12 and nine hours on Saturday, September 13. Claimant was not offered the opportunity to perform this overtime work, even though the overtime was performed by an employee junior to the Claimant. Subsequent to September 13, Claimant was discharged for reasons unrelated to this case.

The Authority maintains that as Claimant was discharged subsequent to the events herein involved, this claim is moot and therefore non-arbitrable. Moreover, according to the Authority, the claim is without merit, as Claimant was not the incumbent at the Wayne Station project since he had previously been assigned to another painting project. The Authority therefore believes Claimant was not entitled to the overtime assignment by virtue of Section 514 (d) of the contract.

The Organization asserts that under the provisions of Section 514, Claimant was entitled to the overtime in question, as he was the incumbent of the position requiring overtime. The Organization notes that Claimant had the same foreman and was a member of the same crew as that which performed the overtime work. According to the Organization, Award No. 4 of this Board makes clear that in these circumstances Claimant was the incumbent, even though he was not assigned to the work site at which the work took place.

The Agreement provision germane to this case is as follows:

Article V - Section 514 - Overtime

a) Pay time for overtime work in excess of eight (8) hours per day will be one and one-half times the

> regular rate of pay. Hours in excess of forty (40) worked in a calendar week will be paid at time and half time.
>
> d) In assigning overtime, SEPTA's general practice will be to give preference to the incumbent of the position requiring overtime. If the incumbent refuses the work, it will then be offered in seniority order to available, qualified employes present at the location.

The Board has determined that the claim must be sustained in part.

Concerning the Authority's contention that this claim was made moot by the Claimant's subsequent dismissal, the Board rejects this position. Claimant is entitled to any remedy for any contract violation which took place while he was still employed. There is nothing in the collective bargaining agreement that dictates a contrary conclusion.

The Board has determined that the Claimant was "the incumbent" of the position performing the disputed overtime work on September 12 and 13. Although Claimant was not working at the Wayne Station where the work was performed, he had the same foreman as those employees working at that location. In these circumstances, Award No. 4 is applicable to this dispute. In Award No. 4, this Board (Sirefman, Chairman) stated in relevant part:

> The Organization contends that as the senior employee, Claimant was the incumbent and that SEPTA should have contacted him before assigning the overtime opportunity to the junior employee. SEPTA contends that section 514 (d) does not require that preference be given to the "senior" incumbent. Rather, as Claimant had already left and Helper Rose had remained on the property, the latter was the incumbent and the most senior employee available, qualified, and present

at the location when the assignment became available.

In the Board's opinion SEPTA's contention is not persuasive. The section's reference to "general practice" contemplates that except for unusual circumstances, e.g., an emergency, a set procedure for assigning overtime will be utilized. Nothing in this record indicates that an emergency or unusual circumstance was present on April 28th. Furthermore, the language of the section also contemplates that there is an employee who is "the incumbent", as compared to the second sentence which speaks of overtime being offered to other "employes". There is no contractual definition of "incumbent". Nevertheless, that there be a rational process for determining who that is must have been contemplated by the Parties when they negotiated this provision.

It has long been arbitral practice to select an interpretation of contract language which is clear, objective, orderly and practical. In industrial relations seniority has long been widely accepted as satisfying these criteria. To base `incumbency' upon which employee remains longer on the property than another after the work day is completed, or to simply select an employee who happens to be there when the need arises, would make the overtime assignment process accidental, haphazard, disorderly and implausible. Indeed, there is nothing in this record to establish that Claimant was in error in leaving the property when he did nor to establish that Helper Rose was required to be there when the call from the contractor came in.

Therefore, the Board is persuaded that the Claimant as senior General Helper was "the incumbent" for the purposes of section 514 (d). SEPTA was required by that section to notify Claimant of the opportunity, and only upon Claimant's refusal could the assignment have been given to another employee. The Foreman's selection of Helper Rose was in violation of the Agreement. This determination does not change or amend the Agreement, but interprets it within the context of accepted arbitral principles as does the awarding to Claimant of the wages he would have earned had his overtime opportunity not been improperly bypassed.

Award No. 4 sets the precedent that incumbency is not determined by "who happens to be there when the need arises". Thus, employees who perform the same work and have the same

foreman are all to be considered for purposes of determining incumbency under the provisions of Section 514 (d).

Award No. 4 also sets the precedent that incumbency is to be determined by seniority. Thus, as Claimant was senior to an employee who performed overtime on September 12 and 13, it follows that he was the incumbent rather than the employee who performed the job. This finding does not, however, end the Board's inquiry. Section 514 does not require that the incumbent be granted an overtime assignment in all circumstances. Rather, Section 514 requires only that the "general practice will be to give preference to the incumbent of the position requiring overtime." The provision clearly envisions that there will be some circumstances in which the incumbent will not receive the overtime. This was further recognized in Award No. 4 of this Board, which held that "unusual circumstances, e.g., an emergency" would negate the need for overtime to be assigned to the incumbent.

This Board now determines that when a small amount of overtime is performed at the end of the shift, and the incumbent is not at or in the immediate vicinity of the work location where the overtime work is to be performed, the Authority is not obligated to transport the incumbent to the involved work site to perform the overtime work. It appears to the Board that it would simply be impractical to require one employee to cease his work, and another employee to go to that location and complete a small amount of the remaining overtime work. Such a practice would

also be inconsistent with Section 1005 of the Contract, (Productivity) which states that "all parties are charged with the responsibility of positively and cooperatively advising management concerning means of improving productivity by...reducing overtime...."

The Board has further determined, however, that when an entire shift or otherwise large amount of overtime work is involved, the Carrier is obligated to offer the work to the incumbent. In those circumstances, the incumbent's right to generally receive overtime work outweighs the practical and efficiency considerations that allow a non-incumbent to do a small amount of overtime at the end of a shift. There appears to be no reason why a qualified incumbent who works at one location cannot be told to report on a day off to perform a shift of overtime work at another location. If the Authority was not obligated to give such overtime work to the incumbent, the Authority would be free to deprive employees whom it considers undesirable of overtime assignments, as it could simply assign senior employees to locations where no overtime was to be performed, while allowing junior employees to work at places involving regular overtime assignments.

Applying these principles to the case now before the Board, it is apparent that the Claimant was not entitled to the two hours of overtime work on Friday, September 12 but was entitled to perform the nine hours of overtime work on Saturday, September 13. The two hours on September 12 were apparently at

the end of the shift. While the record is not explicit as to how far the Claimant was working from the Wayne Station, it does not appear that he was in the immediate vicinity. In these circumstances, the Authority was contractually permitted to assign the work to an employee already at the Wayne Station who was already performing the work. On September 13, however, Claimant's incumbency status created an obligation for the Carrier to assign him the work. There is no reason why Claimant could not have been told to report to the Wayne Station on that morning and perform the work.

As to remedy, the Authority shall be directed to compensate Claimant at the overtime rate. Imposition of the overtime rate is not done for punitive purposes, but rather to make Claimant whole for wage loss suffered as a result of him not receiving overtime work to which he was entitled. In addition, it appears that Award No. 4 set a precedent of granting remedies in cases such as this at the overtime rate, as the Board there sustained a claim for overtime rate payments for a violation involving a Claimant improperly being denied an opportunity of work overtime.

AWARD

Claim sustained in part. Monies owed shall be paid within 30 days of the date of this Award.

R. B. Birnbrauer 10/7/88
R. B. BIRNBRAUER
Authority Member

W. E. LaRUE
Organization Member

S. E. Buchheit
S. E. BUCHHEIT
Neutral Member