

NATIONAL MEDIATION BOARD, ADMINISTRATOR
SPECIAL BOARD OF ADJUSTMENT NO. 957

In the Matter of the Arbitration

-between-

Brotherhood of Maintenance of
Way Employes

-and-

Southeastern Pennsylvania
Transportation Authority

OPINION AND AWARD
Award No. 261

In accordance with the September 26, 1999 agreement in effect between the above-named parties, the Undersigned was designated as the Chairman and Neutral Member of the SEPTA-BMWE Public Law Board (the Board) to hear and decide the following Claim:

1. The Agreement was violated when the Carrier assigned junior TM2 R. Stratford to perform overtime service on March 15, 2001, instead of using senior TM2 A. Pickell (SEPTA Grievance No. 01-052-F12).
2. As a consequence of the violation referred to in Part (1) above, Mr. Pickell shall be properly compensated for all lost overtime referred to in this incident.

A hearing was held in Philadelphia, Pennsylvania on September 4, 2002 at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to offer evidence and argument and to examine and cross-examine witnesses consistent with the relevant procedures that exist between the parties. The Arbitrator's Oath was waived. The Board met in Executive Session after the hearing.

FINDINGS OF FACT AND OPINION OF THE BOARD

A careful review of the record indicates that the Claimant served as a Rail Maintainer Second Class. The present dispute involves an overtime assignment on March 15, 2001.

The Organization relies on Article V, Section 514 (Overtime) of the September 26, 1999 Agreement, which provides, in pertinent part, that:

(a) Hours worked in excess of eight (8) hours per day, or forty (40) hours in a calendar week, will be considered overtime work and will be paid at time and one-half. There will, however, be no pyramiding of such overtime.

. . . .

(d) The following procedures will govern the assignment of work outside the regular shift in the Track and Utility Sections:

(1) For all scheduled work outside the regular shift, the opportunity for such work will be offered by craft and in seniority order to the incumbent subject to the following: The incumbents are described as all of those who regularly have worked on a particular project as a result of picking or daily assignment and have and have been assigned to the project for a continuous eight (8) hour shift during the past five (5) days. However, such work shall first be offered to the employee(s) who, as a result of his/her daily assignment has spent the preponderance of his/her time, during the past five (5) days, on the project.

(2) If there are no incumbents, or if sufficient personnel are not found among the incumbents, then work outside the regular shift shall be offered in seniority order to the needed craft within the Utility/Track Sections as follows:

(a) The work shall be offered in seniority order to the remaining personnel in

the needed craft and classification within the same Track/Production gang or Utilities Section.

(b) If sufficient personnel are not found using the procedure in 1,2, and (a) above, the work shall be offered to all remaining personnel in the Track or Utilities Section within the craft and classification needed and the same management center.

(c) If sufficient personnel are not found within the management center, then the overtime shall be offered in seniority order to all remaining personnel in the needed craft regardless of management center.

(3) In situations where there is a call out of personnel, that is, non-scheduled or non-continuation of the work outside the regular shift, then such work will be offered in seniority order to the needed craft and classification within the respective Track Sections. The Sections are defined as Track, Production, Projects and Utility. This is exclusive of emergency overtime, which is described as derailments, thermal kinks, hurricanes, snowstorms, flooding or other Acts of God, which cause a disruption of rail service or constitute a significant safety hazard. In these instances, personnel will be assigned as required. However, preference will be given to the aforementioned Steps when deemed practical by the department.

If not enough personnel agree to work after following the above steps, then mandatory assignments will be made by management to available employees.

The Organization argues that Section 514 omits the limitation that the Carrier imposed on the Claimant and that the Carrier therefore had a duty to permit the Claimant to work the disputed assignment instead of permitting the junior employee who actually worked the disputed assignment.

The Carrier, however, maintains that no violation occurred

based on the following "Hours of Service Policy" issued and posted by the Carrier on or about March 8, 1994:

Effective immediately any Project, Track, Power and Communication employee will not be permitted to work more than 16 continuous hours in any 24 hour period.

In addition employees will not be permitted to work consecutive 16 hour days back to back. Deviations for emergency situations will be handled by the Chief Line Officer on a case by case basis.

(Carrier Exhibit 5.)

The Carrier insists that it developed the Hours of Service Policy in accordance with Section 1002 of the Agreement, which provides:

All management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this agreement are retained and vested exclusively in SEPTA, including but not limited to, the right to establish and administer policies, procedures, and standard of services, training, operations, and maintenance . . . to direct the workforce . . . to maintain the efficiency of employees . . . to establish and change work schedules and work standards . . . to require employees to work overtime . . . to make or change SEPTA rules, regulations, policies, and practices; and otherwise generally to manage SEPTA, so as to attain and maintain full operating efficiency.

A careful review of the record--as clarified during the hearing--indicates that the Claimant worked his regular shift from 7:30 a.m. to 4:00 p.m. on Wednesday March 14, 2001 for which he was paid eight hours; had 6½ hours rest from 4:00 p.m. on Wednesday, March 14 until 10:30 p.m. on Wednesday, March 14; worked from 10:30 p.m. on Wednesday, March 14 until 4:30 p.m. on

Thursday, March 15 for which he was paid 18 hours; and had 5½ hours of rest until 10:00 p.m. on Thursday, March 15, 2001. The present dispute therefore involves the Carrier's refusal to permit the Claimant to work the 16 hours from 10:00 p.m. on Thursday, March 15 until 2:00 p.m. on Friday, March 16, 2001. The record omits any evidence that the Claimant lacked the physical or mental capacity to perform the disputed work assignment.

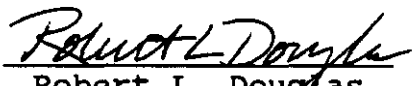
Section 514 of the Agreement contains detailed provisions concerning overtime. As a result, Section 1003 of the Agreement does not apply to the present dispute because Section 514 expressly addresses overtime. The Carrier, however, promulgated and disseminated the Hours of Service Policy on March 8, 1994, which occurred before the September 26, 1999 date of the present Agreement. The record omits any evidence that the parties mutually intended to abrogate, eliminate, or rescind the Hours of Service Policy and also omits any evidence that the parties mutually intended to retain the Hours of Service Policy. In fact, the record contains uncontroverted evidence that the parties resolved two prior disputes, which had involved F. Quagliarella and D. Coleman, concerning the Hours of Service Policy without referring the matter to final and binding arbitration. The parties therefore permitted this unclear and ambiguous situation to continue.

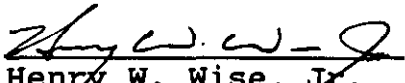
Under these highly unusual and ambiguous circumstances, the Organization failed to sustain its burden to prove by a fair

preponderance of the credible evidence that a violation had occurred when the Carrier had assigned junior employee R. Stratford to perform overtime service on March 15, 2001 instead of using the Claimant. Any other arguments raised by the parties during this proceeding are not relevant to a proper determination of the present dispute. The rights of the parties are explicitly reserved to clarify this issue for the future. The Award shall indicate that the Claim is denied.

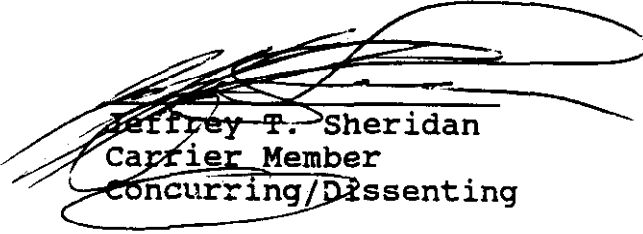
Accordingly, the Undersigned, duly designated as the Chairman and Neutral Member of the SEPTA-BMW Public Law Board and having heard the proofs and allegations of the above-named parties, makes the following AWARD:

The Claim is denied.


Robert L. Douglas
Chairman and Neutral Member


Henry W. Wise, Jr.
Employee Member
Concurring/Dissenting

DATED: 12/3/02


Jeffrey T. Sheridan
Carrier Member
Concurring/Dissenting