

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36318
Docket No. CL-36670
02-3-01-3-202

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12677) that:

The Carrier violated the BRAC/NRPC Agreement of July 27, 1976, in particular, Rules 4-A-1, 5-C-1 and Appendix E, Extra List Assignment, when it allowed, permitted, and/or required a junior employee to work an overtime assignment and failed to call and use the Claimant who was senior, qualified and available to work.

On September 12, 1999, the Carrier allowed, permitted and/or required Ed Dennis, Roster number 877, Position number 5C, to work an overtime position as a Crew Dispatcher, in the Crew Management Department, 15 South Poplar Street, Wilmington, DE from 11 p.m. to 7 a.m.

The Carrier failed to call and use Phillip Carr, Roster number 466, who was senior, qualified and available to work.

The claim is filed on behalf of Phillip Carr for 8 hours pay at the overtime rate for Phillip Carr as a penalty the Carrier violated the above mentioned agreement.

Claim is filed in accordance with Rule-B-1, is in order and should be allowed."

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.

On or about September 14, 1999, the Organization filed a claim on behalf of the Claimant, Phillip Carr, arguing that the Carrier violated the parties' Agreement on September 12, 1999, when it allowed, permitted and/or required a junior employee, Ed Dennis, to work overtime on Position 5C, Crew Dispatcher, from 11:00 P.M. to 7:00 A.M., instead of the Claimant. The Organization argues that prior to the start of the third trick (11:00 P.M.) that night, the Carrier called the Claimant, who was observing a regular rest day, to work overtime on any one of the desks LC, 1C, 3C, and 12C. The Claimant chose not to accept any of the four positions identified as available prior to 11:00 P.M. The Organization emphasizes that at the time the overtime calls were made in advance of 11:00 P.M., there was no known vacancy on Desk 5C. The Organization maintains that the incumbent of that position did not mark off until 12:30 A.M. The Organization asserts that the Claimant was not called at that point to cover the vacancy, and the Carrier instead force-assigned a junior employee to fill the position. The Organization acknowledges that the Claimant did decline the four positions offered prior to 11:00 P.M., but it nevertheless contends that once the Carrier learned of the 5C vacancy at 12:30 A.M., the Claimant should have been called and offered the vacancy. The Claimant, however, was not called, in violation of the parties' Agreement.

The Carrier denied the claim. The Carrier asserts that the instant claim is based on mere assertions and allegations, and the Organization has not proven that the Carrier violated any Rule of the Agreement. The Carrier maintains that there is no evidence that Rules 4-A-1, 5-C-1, and Appendix E were violated, or that the Claimant was available to work the position that is the subject of this claim. The Carrier emphasizes that the vacancy in question was not a known vacancy, and the Claimant previously had refused a call for overtime on desks LC, 1C, 3C, and 12C. In fact, according to the TCU clerical caller, the Claimant said he did not want to work at all and not to call him again. The Carrier points out that numerous Board decisions have recognized that the burden of proof in a claim rests with the petitioner. The Carrier argues that because the Organization has asserted a violation without offering any

supporting evidence, the Organization's position cannot be given any serious consideration. The instant claim should be denied because the Organization failed to offer any proof in support of its position. The record shows that the Carrier fully complied with all of the provisions of the Agreement. The Carrier further maintains that no compensatory damages are due where no showing of a monetary loss has been made; in fact, the Claimant suffered no loss of earnings as a result of the incident at issue. Moreover, the amount claimed here clearly is excessive, particularly in light of the fact that there are no penalty provisions within the parties' Agreement. The Carrier argues that if the Board determines that a violation has occurred, any payment should be at the pro-rata rate.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier violated the Agreement when it failed to call the Claimant to work Position No. 5C on a overtime basis on September 12, 1999. The Board recognizes that the Claimant had previously turned down other positions. However, it is clear that when the Carrier found out later that the 5C position was vacant and needed someone to work it on overtime, the Carrier failed to call the Claimant for that position. The Claimant was the most senior person available to perform the work and was qualified and should have been called when Position 5C became open.

Although the Carrier contends that the Claimant stated that he did not want to work at all when he was first told of the other vacancies, we find that the Claimant should still have been called when another vacancy involving a different, and possibly easier, job became open. This vacancy was a different vacancy and the Agreement requires that the Claimant should have been called and given the opportunity to work the job on overtime. Because he was not, we find that the Carrier violated the Agreement and the claim must be sustained.

AWARD

Claim sustained.

Form 1
Page 4

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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 13th day of November 2002.