

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36344
Docket No. CL-36578
02-3-01-3-51**

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12689) that:

Claim No. I

It is the claim of the District Committee that the Carrier violated the TCU/NRPC Agreement of July 27, 1976, in particular, Rules 4-A-1, 5-C-1 and Appendix E, Extra List Agreement when it allowed, permitted and 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 March 31, 1999 the Carrier allowed, permitted and required P. Kiefner Roster No. 724, Position No. TC-21 to work an overtime position as a Ticket Clerk, in the Customer Services Department, 30th Street, Philadelphia, from 3:30 p.m. to 7:30 p.m.

The Carrier failed to call and use D. Philpot, Roster No. 78, Position TC-3, who was senior, qualified and available to work.

Claim is filed in behalf of D. Philpot for 4 hours pay at the overtime rate for March 31, 1999 as a penalty when the Carrier violated the above-mentioned Agreement.

Claim is filed in accordance with Rule 7-B-1, is in order and should be allowed.

Claim No. II

It is the claim of the District Committee that the Carrier violated the TCU/NRPC Agreement of July 27, 1976, in particular, Rules 4-A-1, 5-C-1 and Appendix E, Extra List Agreement when it allowed, permitted and 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 April 1, 1999 the Carrier allowed, permitted and required S. Green Roster No. 487, Position No. TC-2 to work an overtime position as a Ticket Clerk, in the Customer Services Department, 30th Street, Phila., from 3:30 p.m. to 7:30 p.m.

The Carrier failed to call and use D. Philpot, Roster No. 78, Position TC-3, who was senior, qualified and available to work.

Claim is filed in behalf of D. Philpot for 4 hours pay at the overtime rate for April 1, 1999 as a penalty when the Carrier violated the above-mentioned Agreement.

Claim is filed in accordance with Rule 7-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 May 25, 1999, the Organization filed two claims on behalf of the Claimant, arguing that the Carrier violated the parties' Rules Agreement when it refused to take note of the Claimant's seniority status when overtime occurred on the Ticket Seller positions in the Customer Service Department in Philadelphia, Pennsylvania, on March 31 and April 1, 1999. The Organization argues that the Carrier violated the parties' Agreement on these dates simply because it failed to correctly predict the number of passengers that would use its trains during the approaching holiday weekend. The Organization maintains that the days prior to Easter Sunday are a busy time, but the Carrier attempted to get by with the normal personnel on hand, making no provision for a normal increase in the riding public approaching a holiday weekend. The Organization also asserts that contrary to the Carrier's contention, it does not have the contractual obligation to prove the availability of an employee for a work assignment; this is the Carrier's burden and can easily be proven when the Carrier calls the employee. The Organization emphasizes that in the instant case, the Claimant was available, and if the Carrier had any doubts, it could have eliminated them by calling the Claimant. The Carrier, however, did not call the Claimant.

The Organization emphasizes that the overtime at issue on March 31 and April 1, 1999, were extra assignments, not overtime on a rest day of a position. Accordingly, under Article 6 of Appendix E, the Claimant was the senior available, regular employee, and he should have been called and used on these overtime assignments. The Organization goes on to assert that as to the local October 1998 Overtime Agreement, cited by the Carrier, this Agreement was invalid from the outset in that neither signatory had authority to enter into such an Agreement or to be party to a document that undermined the force and effects of the negotiated Rules of the parties' Agreement. The Organization emphasizes that Rule 11-A-1 precludes local parties from taking such actions. The Organization then asserts that even if this invalid October 1998 Agreement is found to apply, this local Agreement specifies that when four or more hours are needed, the senior available employee will be contacted. The Organization points out that the record shows that four hours of overtime were needed on each of the two dates at issue, and the Claimant was the senior available employee. The Organization further asserts that the February 1988 local Agreement is similarly ineffective, because it has the same unauthorized effect of modifying and revising the applicable negotiated Rules contained in the parties' basic Agreement. The Organization maintains that such actions by local representatives are contrary to the existence and philosophy of a collective bargaining Agreement.

The Organization contends that the hours involved in the two claims are not part of the junior employees' regular assignments. Instead, the four-hour periods at issue are designated as extra work assignments, and junior employees do not hold contractual priority to such assignments. The Claimant was available and qualified to work the two overtime assignments at issue, and he was senior in roster standing to the junior employees whom the Carrier erroneously utilized to work these assignments. The Organization contends that the claims should be sustained, and the Claimant is entitled to be compensated for four hours at the time and one-half rate for each of the two dates in question.

The Carrier denied the claims. The Carrier initially contends that the instant claims are vague and non-specific, and that the Organization failed to prove that the Agreement was violated. The Carrier maintains that on each of the dates in question, a sudden surge of business occurred in the late afternoon, and Ticket Clerks Kiefner and Green remained in their ticket windows, on overtime status, to handle the increased business. The Carrier emphasizes that these employees were available on the property to help handle the increased business. The Carrier further argues that these employees were utilized in accordance with the Rules Agreement and the February 1998 understanding.

The Carrier then argues that although the Organization cited certain Rules as the basis for the claims, the Organization has not developed any facts or arguments to demonstrate how these alleged violations occurred, nor has the Organization cited any specific portion of these Rules. The Carrier further points out that the claims cover the period of 3:30 P.M. to 7:30 P.M. on each date, but the Claimant had finished his tour of duty at 1:30 P.M. on each day and had gone home. The Carrier maintains that it complied with Rule 4-A-1 because both Kiefner and Green were compensated at the time and one-half rate for all work performed following their respective shifts on the claim dates. As for Rule 5-C-1 and Appendix E, the Carrier argues that these do not apply because there were no Extra Board employees available on the claim dates. The Carrier maintains that Rule 4-A-(b) is the applicable Rule, and in accordance with this Rule, Kiefner and Green were regularly assigned Ticket Clerks utilized to perform work continuous with the end of their respective work shifts. Both of these employees were compensated at the overtime rate for their services, and both were utilized in accordance with a long-standing local understanding.

The Carrier emphasizes that the Organization bears the burden of proof, but it has not offered any supporting evidence. The Carrier therefore asserts that the

Organization's contentions cannot be given any serious consideration. The Carrier contends that the Organization failed to prove that a violation occurred and harm resulted. The Carrier accordingly argues that the claims therefore must be denied or dismissed. The record demonstrates that the Carrier fully complied with all of the applicable provisions in the Agreement. The Carrier maintains that Kiefner and Green, not the Claimant, were the proper employees for the overtime work at issue, and the Claimant did not have a demand right to the overtime work. The Carrier further asserts that the Claimant did not suffer any lost wages, and he is not entitled to any additional pay. Moreover, the amount of the claim clearly is excessive. The Carrier ultimately asserts that the claim should be dismissed and/or denied in its entirety.

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

The Board reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier violated the Agreement when it permitted two junior employees to work overtime assignments and failed to call the Claimant, who was senior to them. Therefore, the claim must be denied.

The record reveals that on each of the two claim dates, there was a sudden surge of business in the late afternoon. The employees who were on duty remained at their ticket windows in an overtime status to handle the increased business. They were both available on the property at that time. Moreover, it appears that for many years, the Carrier had a policy that the employee completing his or her duty at the time that the overtime was needed would be offered the overtime. The Claimant in this case had finished his tour of duty at 1:30 P.M. and had gone home. The two individuals who were awarded the overtime on the dates in question were working at 3:30 P.M. when the overtime was needed.

A review of the Rules makes it clear that the Carrier did not violate any of the Rules when it took the action it did in these two situations. The Organization bears the burden of proof of showing some wrongdoing. In this case, although the Claimant was the senior employee of the group, he was not at work and therefore was not entitled to the overtime at issue. There has been no proof of any rule violations and, therefore, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of December 2002.