Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36889
Docket No. CL-37461
04-3-02-3-520

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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-12915) that:

1. The Carrier, Northeast Corridor (NEC) violated the rules of the parties' Agreement dated July 27, 1976, effective September 1, 1976, particularly Rules 2-B-1, 2-B-2, 4-A-1, 4-A-4, 4-A-6, 5-A-1 and Appendix E, Extra List Agreement, when on February 23, 2001, it called and used junior employee D. Thompson to work overtime on position of Mail Express Clerk during hours 3:30 pm to 11:30 pm in the Crew Management Department, 15 South Poplar Street, Wilmington, Delaware, instead of calling and utilizing the services of senior employee Shirley Howard, who was both available and qualified to work the Mail Express Clerk position.

2. The Carrier shall be required to compensate employee Howard for eight (8) hours at time and one-half rate account of failing to call and use her on the Mail Express Clerk position on an overtime basis on February 23, 2001.

3. This claim has been presented and progressed in accordance with the provisions of Rule 7-B-1 of the Agreement and should be allowed.

4. This submission consists of three separately filed claims and are combined into this submission as one case."

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.

The Claimant to this dispute was working in a Mail Express Clerk position at Wilmington, Delaware, when the dispute arose. She is covered by the parties' Northeast Corridor Clerical Agreement.

On February 23, 2001, regularly assigned Mail Express Clerks were either marked off sick or could not get to work because of bad weather. By letter received by the Carrier on April 10, 2001, the Organization claimed that the Carrier failed to call the Claimant to fill a Mail Express Clerk vacancy from 3:30 P.M. to 11:30 P.M. in the Crew Management Department on February 23, 2001. Instead, it called and used junior employee D. Thompson. By letter dated April 20, 2001, the Carrier rejected the claim, stating that the Supervisor filled the vacancies by calling qualified employees in seniority order, that he did call the Claimant at the telephone and page numbers on record but that no answers were received. As a result, the Supervisor continued to call less senior employees and ultimately filled the vacancy with Thompson. By letter dated December 1, 2001, the Organization contends that the Claimant provided the Carrier with newer telephone and page numbers on or about December 22, 2000, but that those new numbers were not properly placed on appropriate Carrier records. It contended that if the Carrier did call the old

numbers, as it asserts, those numbers were obsolete long ago and that the Claimant could not be reached there.

Rule 4-A-1 of the Agreement defines the workday and overtime rate:

> "(a) Unless otherwise provided in this Agreement, eight (8) consecutive hours on duty, exclusive of the meal period, shall constitute a day's work for which eight (8) hours' pay will be allowed. Time worked in excess of eight (8) hours in any twenty-four (24) hour period will be considered as overtime and paid for at the rate of time and one-half. . . ."

The Agreement, through Appendix E, sets forth the Carrier's obligation for filling extra assignments and vacancies that occur, as follows:

> "ARTICLE 6
>
> (a) Regular and extra work assignments not covered by Article 5 above will be offered to the senior, qualified, available extra or regular employee in the territory whose position is under the jurisdiction of the extra board involved."

The Organization filed three claims on behalf of the Claimant that were denied by the Carrier. By letter dated August 17, 2001, the General Chairman progressed the dispute to the Director, Labor Relations. The claims were denied by the Carrier on November 8, 2001. The dispute was then referred to the Board.

The Organization argues that the Carrier violated Rule 4-A-1 and Appendix E of the current Agreement when it failed to call and use the Claimant for overtime on February 22 and 23, 2001. It contends that the Carrier has the contractual responsibility to use the proper employee when filling a vacancy and to call the proper employee for overtime work, which it neglected to do in this case. It maintains that the record establishes that the Claimant officially notified the Carrier in writing on or about December 22, 2000, of a new home telephone number and new page number, but that the Carrier improperly used her old home telephone and page numbers instead. It protests that the Carrier allowed a junior employee to

call employees for overtime work, and that said junior employee neglected to call and use the proper employee so that he himself could work the overtime, instead of the Claimant, who was more senior.

The Organization further contends that the Carrier refused to make available to its representatives call sheets and information relative to telephone numbers allegedly called. It contends that if the parties reviewed pertinent documents in a mutual effort to settle this dispute, they would see that the Claimant furnished the proper office with her up-to-date phone number and pager number which were not used. Further, it contends that because the old phone number and pager number were no longer in service, no message at either number could have been left as claimed by the Carrier. It contends that the information contained in the Claimant's December 1, 2001 letter was not refuted by the Carrier and that the Carrier's failure to refute relevant evidence must be treated as admissions of fact.

Finally, the Organization argues that by refusing to settle this dispute on the property, the Carrier is knowingly condoning a deceitful act committed by a junior employee against the rights of the Claimant, a senior employee, solely for the purpose of personal monetary gain. The Organization urges that the claim should be sustained.

The Carrier argues that the claimed violation of Rule 4-A-1 and Appendix E is without merit. It asserts that the Organization presented no proof that the Claimant was available to work the overtime. The Carrier further contends that Supervisor Hueg actually made the calls to the Claimant, and that when the Claimant was found not to be available, he properly began calling other employees in seniority order.

The Carrier further argues that the Organization failed to meet its burden of proof in establishing a violation, contending that "mere assertions" are not proof. Citing authority, the Carrier contends that because the Organization did not submit any proof that a violation occurred with respect to the claim, it must be dismissed.

The Carrier's final argument asserts that the Organization has not shown that the Claimant suffered any loss in compensation on the claim date. It contends that February 22 and 23, 2001 were the Claimant's assigned rest days and that there

is no provision in the Agreement to justify the payment sought. Finally, it contends that the amount claimed is clearly excessive. The Carrier urges that the claim be denied.

The Board is persuaded that the claim on behalf of the Claimant must be denied. The evidence is insufficient to establish that the Carrier was put on notice of the Claimant's new phone and pager numbers. Furthermore, the Organization's contention that the information contained in the Claimant's letter of December 1, 2001 was not refuted by the Carrier and that the Carrier's failure to refute such relevant evidence must be treated as admissions of fact is without merit. While the Organization contends that the Claimant furnished the proper office with her updated numbers on December 22, 2000, the copy of the actual document allegedly provided by the Claimant is, in fact, undated and, therefore, does not prove that the Carrier was put on notice on the date alleged or, indeed, at any other time. Moreover, the Organization did not present this argument regarding proper notice until December 1, 2001, almost one month after the final denial of the claim on the property. This is clearly established in the Organization's Submission which states, at page 6: "This fact [that Claimant furnished her up-to-date telephone and page numbers] was revealed by Claimant Howard in her joint letter to the Director Labor Relations and the General Chairman dated December 1, 2001." Based upon the on-property handling, the Carrier's alleged failure to refute facts contained in the letter of December 1, 2001 cannot be treated as admissions of fact.

Because the Organization failed to demonstrate through the timely submission of evidence that the Carrier violated any provision of the Agreement, it failed to meet its burden of proof and the Board must find in favor of the Carrier.

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 25th day of February 2004.