

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36891
Docket No. CL-37476
04-3-02-3-524**

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-12917)
that:**

Carrier violated the BRAC/NRPC Agreement of July 27, 1976, in particular, Rules 4-A-1 and Appendix E Extra List Agreement, 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 February 18, 2001, the Carrier allowed, permitted and/or required Phil Carr, Assignment Clerk, 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 N. Schum, Roster number 728, Assignment Clerk, who was senior, qualified and available to work.

The claim is filed on behalf of TCU for 8 hours of pay at the overtime rate for N. Schum as a penalty 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.

The Claimant to this dispute was working in a regular Assignment Clerk position at Wilmington, Delaware, when the dispute arose. She is covered under the provisions of the parties' Northeast Corridor Clerical Agreement.

On February 18, 2001, a "must fill" Crew Dispatcher vacancy occurred in the "B" tour (3:00 P.M. to 11:00 P.M.) and the "C" tour (11:00 P.M. to 7:00 A.M.) of the Crew Dispatching Department. The Parties agree that the Carrier called the Claimant at 8:10 P.M. to work. The Organization, by letter dated June 20, 2002, alleges that the Claimant was called for and rejected overtime for the remainder of the "B" tour (3:00 P.M. to 11:00 P.M.) of the Crew Dispatching Department, but that the Carrier failed to call the Claimant to fill the "C" tour vacancy from 11:00 P.M. to 7:00 A.M. Instead, it called and used junior employee Phil Carr. The Carrier claims that the TCU Clerk calling to fill vacancies for the "C" tour had no qualified extra employees available for overtime, called the Claimant's telephone number of record and offered the overtime to the Claimant but she declined it. The TCU Clerk then filled the vacancy in seniority order by calling regular assigned employees.

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 . . .”

Appendix E, Articles 5 and 6 of the Agreement sets forth the Carrier’s obligation for filling extra assignments and vacancies that occur, as follows:

ARTICLE 5

“(A) When it is necessary to perform work of a five-day assignment on the rest days of that assignment and the work is basically the same as that performed during the work week and during the same relative hours and no qualified extra board employees are available at the straight time rate, the incumbent of the five-day assignment will be offered the overtime first. Likewise, in the event the relief employee is absent the vacancy will first be offered to the incumbent of the position being relieved. Should the incumbent refuse the overtime it will then be offered to the senior, available, qualified extra or regular employee in the territory whose position is protected by the particular extra board involved.”

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 protested the Carrier’s failure to call the Claimant as violative of Rule 4 and Appendix E of the Agreement. By letter dated September 14, 2001, the General Chairman progressed the dispute to the Director, Labor Relations. The claim was denied by the Carrier on November 13, 2001. The dispute was then referred to the Board.

The Organization argues that the Carrier violated Rule 4-A-1 and Appendix E, Extra List Agreement, of the current Agreement when it failed to call and use the Claimant who was senior, qualified and available to work to perform the overtime assignment on February 18, 2001.

The Organization further contends that, while the Carrier called the Claimant at 8:10 P.M. to fill the remainder of "B" tour, she was never called for "C" tour. It points out that the copy of the phone record of February 18 supplied by the Carrier does not indicate what position was offered to the Claimant.

Finally, the Organization argues that one phone call for an overtime or extra assignment is not sufficient and that many Awards support the inadequacy of a single call. It maintains that the Carrier cannot assume that, having declined a single offer of overtime, the Claimant would decline a subsequent offer. The Organization urges that the claim 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 the Claimant was called by the TCU Clerk filling vacancies for the "C" tour and offered the overtime but she refused it. The Carrier contends that, in compliance with Appendix E, the clerk called other employees on the list (junior to the Claimant) in seniority order until one agreed to work the vacant position.

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 urges that the claim be denied.

Finally, the Carrier argues that the amount claimed is clearly excessive. It contends that no compensatory damages are due because there was no showing of a monetary loss and no penalty payment should be granted because there are no penalty provisions within the Agreement.

The Board is persuaded that the claim on behalf of the Claimant must be sustained. The Organization argues that a separate call was required for each tour. There is a factual dispute concerning which vacancy the Claimant was called to fill and, therefore, which vacancy she declined. The Carrier asserts that it "offered the overtime" to the Claimant at 8:10 P.M. The Organization acknowledges that an offer was made at 8:10 P.M. but asserts that evidence on the form of the Claimant's statement is that, the offer was for the remainder of the "B" tour and not for the "C" tour.

The record does not include any statement from the TCU Clerk as to what was offered to the Claimant nor is there any other indication in the record as to which tour the offer of overtime included. The Carrier's assertion that overtime was offered is general, conclusory and not separated in the record. The Claimant's version that he was not offered "C" tour overtime stands unrefuted. Given these facts, the claim must be sustained.

The Carrier claims that prior Awards establish that only one call is needed to cover both tours. The Awards offered as proof do not support such a contention. The Claimants in Awards 18644 and 35852 refused overtime for the same time period. The Awards appropriately noted that the Claimants cannot pick and choose from vacancies which occur at the same time: Either the Claimant is available to work at that time or is not. In the instant case the vacant positions covered different tours. It is perfectly reasonable for an employee to be available at one time and not at another time. The Claimant should have been offered both positions. The fact that he was not warrants a sustaining claim.

AWARD

Claim sustained.

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 25th day of February 2004.