

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36897
Docket No. CL-37531
04-3-02-3-565

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-12928)
that:**

The Carrier violated the Amtrak-Northeast Corridor Clerks Rules Agreement when it called and worked junior employee Jagnarian on February 11, 2001, on a lead/supervisor position at the punitive rate of pay.

Claimant N. Imperial now be allowed eight (8) hours at the punitive rate of pay for each and everyday thereon after of this violation until claimant has been paid on account of this violation."

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 in this dispute was working, according to the Organization, in a Lead Baggage Clerk position, and according to the Carrier, in a Customer Service Representative (Redcap/Baggageman) position, at Pennsylvania Station, New York, when the dispute arose. He is covered by the parties' Northeast Corridor Clerical Agreement.

On February 11, 2001, Lead Baggageman positions for all three shifts needed to be filled. The 7:30 A.M. to 4:00 P.M. position was filled by R. Jagnarian (Roster 359) and the 11:15 P.M. to 7:45 A.M. position was filled by the Claimant (Roster 379). Neither employee was available to work the complete late afternoon/evening shift position.¹ The Carrier determined that R. Jagnarian had the least schedule conflict and gave the assignment to him. By letter dated February 20, 2001, the Organization asserted that the Carrier violated the Agreement when it failed to call and work the Claimant, who it maintained was senior, qualified and available to work on his rest day, for the 7:30 A.M. to 4:00 P.M. position, followed by the late afternoon/evening shift position. By letter dated April 11, 2001, the Carrier denied the claim, stating that the Claimant did work overtime that day (beginning at 11:15 P.M.), and noting that R. Jagnarian was the senior employee with the least conflict.

The Organization filed this claim on behalf of the Claimant which was denied by the Carrier. The Organization cited in support of the claim Appendix E, Article 5(A), and Article 6(A) of the controlling Agreement. By letter dated September 14, 2001, the Division Chairman progressed the dispute to the Director, Labor Relations. The claim was denied by the Carrier on December 10, 2001. The dispute was then referred to the Board.

The Organization argues that the Carrier violated Appendix E, Articles 5 and 6, of the current Agreement on February 11, 2001, when it failed to call the Claimant for the position of Lead Baggage Clerk. It contends that the Carrier had the contractual obligation to call the Claimant because he was the senior, qualified, and available employee for this work.

¹The Carrier states that this shift is from 3:30 p.m. to 12:00 midnight; the Organization states that this shift is from 3:00 p.m. to 11:30 p.m.

The Organization further contends that the Claimant was on his relief day and that the Carrier should have called him to work the 7:30 A.M. to 4:00 P.M. shift and then in turn to work past this shift to cover the evening hours from 3:00 P.M. to 11:30 P.M. It maintains that the Claimant was not contacted for either of these shifts but, if he had been contacted, would have accepted both vacancies.

Finally, the Organization argues that it requested that the Carrier produce their "swipe" timecard records or overtime sheets to support the Carrier's contentions, but that the Carrier failed to produce any record of the overtime when the employee worked. Citing authority, the Organization contends that, if the Claimant had the right to work, the burden of persuasion shifts to the Carrier to prove that he rejected the call for overtime. It maintains that the Carrier has not supplied any evidence to support its position. The Organization urges that the claim be sustained.

The Carrier argues that the claimed violation of Appendix E (Extra List Agreement), and Rules 4-A-1 and 4-A-4² of the Agreement is without merit. It asserts that the Organization presented no proof that it was precluded from utilizing senior employee Jagnarian over the Claimant on the claim date.

The Carrier further contends that the claim as filed is vague and ambiguous and that its assertions were too general, broad, and vague to permit the Carrier to prepare a response other than a general denial. It argues that the claim should be dismissed or denied outright.

The Carrier further argues that the Organization failed to meet its burden of proof in establishing a violation and 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 finally argues that the Organization has not demonstrated that the Claimant suffered any loss in compensation on the claim date. Finally, it contends that the amount claimed is clearly excessive, especially since the Claimant

²The Board notes that, although the Organization cited Rules 4-A-1 and 4-A-4 in its initial claim, its submission to this Board does not cite either of them in support of its claim.

worked on the claim date and was paid at the overtime rate. The Carrier urges that the claim be dismissed, or in the alternative, denied.

At the outset, the Board notes the many facts in dispute between the parties. Among the open questions are the position held by the Claimant (Customer Service Representative [Redcap/Baggageman] versus Lead Baggage Clerk), the seniority of the Claimant (junior versus senior), the disputed shift (afternoon/evening versus morning), and the hours of the afternoon/evening shift (3:30 P.M. to 12:00 midnight versus 3:00 P.M. to 11:30 P.M.). Insufficient evidence was presented to resolve these conflicts and, because the claim does not turn on their resolution, the Board does not do so.

The Board is persuaded that the claim on behalf of the Claimant must be denied. It was the Organization's burden to prove the violation. The evidence is insufficient to establish that the Carrier violated the Agreement when it offered the morning shift and the afternoon/evening shift to an employee other than the Claimant. The Carrier's records indicate that the Claimant, Roster 379, is credited with less seniority than R. Jagnarian, Roster 359. Despite repeatedly asserting that the Claimant was the more senior, the record contains no persuasive evidence that contradicts the Carrier's records.

The Board is not persuaded by the Organization's assertion that the Claimant had the right to work the position and that, therefore, the burden of persuasion shifted to the Carrier, which refused to provide the Organization with their "swipe" timecard records or overtime sheets and thereby failed its obligation. The Organization's request for such records was not made until June 25, 2002, well after the record was closed on the property. The Board holds that the request for time cards was tardy and that they are not properly before the Board.

Finally, even if the Claimant had been awarded the 7:30 A.M. to 4:00 P.M. assignment, he would not have been permitted to work any more hours on the date in question than he actually did. The Claimant had already worked his regular tour that ended at 6:30 A.M. on February 11, 2001. That is the basis for the Organization's argument that the Claimant was available to work the morning assignment. The combination of his regular tour plus the additional morning tour would not have been extended to a third consecutive tour (afternoon/evening shift).

Because the Organization failed to demonstrate through the timely submission of evidence that the Carrier violated any provision of the Agreement, 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.