

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38051
Docket No. CL-39138
07-3-05-3-594

The Third Division consisted of the regular members and in addition Referee Martin H. Malin 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 TCU (NEC-2323) that:

The Carrier violated the Amtrak-TCU (NEC) Agreement on Thursday April 11, 2002, when it called, worked, and paid eight (8) hours at the punitive rate of pay to junior employee J. Slay Job Symbol No. RAC- 1, beginning at 8:59 am for position of Baggage man at NY Penn Station NY, NY. In doing so it failed to contact Claimant Hector Malave who is senior, was available, and is qualified to perform the said work.

Claimant Hector Malave now be allowed eight (8) hours at the punitive rate of pay as a Baggage man on account of this violation.

The Carrier is in violation of Appendix F Articles 3a, 5a, 6a and Rule 4-A-i and other rules.

Claimant H. Malave works in the Mail, Baggage & Express Department as a Baggage man. Claimant is senior to junior J. Slay, is also a qualified to perform the work, Claimant should have overlapped between his tour and the vacancy at 8:59 am. The Carrier contacted junior employee J. Slay, made a (check mark) next to his name as accepting the position but failed to specify what time he had accepted the call, who made the calls to him, how many calls were made. However, the Carrier failed to make a notation (sic) next to claimants name-there was no notation as to what time a first or second call/s were made, who made the attempts in notifying him

of the vacancy, by whom did the calling, time or date of calls were made-and a refusal or denial. The Carrier did not make an effort at all to contact Claimant Malave according to the Carriers Call-out sheet for the overtime for the said position. The Carriers Supervisor of the Department provided an Assignment Sheet and Call-out sheet for the date to prove this claim to be valid.

Claimant would have accepted the work, filled the vacancy in its entirety, and would have been compensated at the punitive rate of pay for work performed.

Claimant H. Malave should have been given the opportunity to work that day he was not.

This Claim has been presented in accordance with Rule 7-B-i of the NEC-Amtrak Agreement and in accordance with Rule 25 of the Off Corridor Clerks Rules Agreement and should be allowed and accepted as presented."

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 April 11, 2002, a vacancy arose on the 8:59 A.M. Baggage-man position at New York City, Penn Station. The Carrier filled the vacancy when it called an employee who was junior to the Claimant. There is no dispute that the Claimant was entitled to be called prior to the employee who filled the vacancy. During handling on the property, the Carrier asserted that the Claimant was called and

declined the call while the Organization asserted that the Claimant would have accepted the work had he been called but insisted that he received no call.

The call sheet was produced during handling on the property. It contains check marks in the column headed, "No," for some employees and a check mark in the column headed, "Yes" for the employee who worked the vacancy. However, it reflects no mark at all on the line bearing the Claimant's name. Thus, the Carrier's own record of the callout fails to document that the Claimant was called. The Carrier's assertion that the Claimant was called and declined the call is impeached by its own record. The claim will be allowed for eight hours at the straight time rate.

AWARD

Claim sustained in accordance with the Findings.

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 January 2007.