

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38234

Docket No. CL-39198

07-3-05-3-597

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-2328) that:

The Carrier violated the Amtrak-Northeast Corridor Rules Agreement on May 18, 2002, when it called and worked junior employee N. Hutchinson, for position of Ticket Seller-Job Symbol No. TC-45, hours 530am to 200pm, and paid her at the punitive rate of pay – based on the pro-rata daily rate of \$151.68 as a Ticket Seller. In so doing, the Carrier failed to make available the vacancy to Senior employee, Wm. Nabrizny, who is senior to junior employee Hutchinson, qualified to perform the work, and was available for the entire vacancy.

Claimant Wm. Nabrizny now be allowed eight (8) hours at the punitive rate of pay on Account of this vacancy.

The Carrier is in violation of Appendix 4-a-1, Appendix E-Articles 3c, 5a, 6a and other rules.

Junior employee, N. Hutchinson commenced a vacation hold down on May 16, 17, 2002 for Job Symbol No.TC-38, hours 12n to 8:30pm according to a letter from Ticket Dept. Supv. H. V. Rogers dated May 23, 2002, to the Organization. Rogers then indicated in his letter that junior employee, N. Hutchinson then observed the relief days of the hold down on Saturday and Sunday May 18, 19, 2002, and that on Saturday May 18, 2002, his department called, worked and paid junior Hutchinson at the punitive rate of pay for positions of

TC-45. The vacancy had occurred due to Hutchins placing a hold down on position of TC-38.

As a result of Hutchins placing a hold down on TC-38, her old position became available TC-45 (and she therefore) would no longer be the incumbent of the vacancy and the Carrier should have contacted Claimant Wm. Nabrizny who is senior, was available to work, and is qualified to perform said work. The Carrier never offered a first/second call to Claimant Nabrizny who would have accepted the work, and received the punitive rate of pay as a result of work completed.

This claim has been presented in accordance with Amtrak-NEC Rule 7-b-1 and with Rule 25 of the Off Corridor Rules Agreement and should be allowed 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 May 18, 2002, the Carrier worked N. Hutchins on her rest day on position TC-44. Hutchins had been the incumbent on position TC-44, but she had been awarded a hold down on position TC-38 from May 17 - 26, 2002. Consequently, on May 18, 2002, for purposes of overtime, Hutchins was not considered the incumbent of position TC-44. The Claimant had greater seniority and should have been called for the TC-44 vacancy.

During handling on the property, the Carrier never disputed, and at the Division Manager level admitted, that it erred in calling Hutchins for the vacancy. The Carrier denied the claim on the grounds that the claim was defective because it referred to "N. Hutchinson," instead of "N. Hutchins;" it referred to a rate of pay of \$151.68, which did not exist; it referred to the vacancy as being on position TC-45, when it was on TC-44; and because another employee had greater seniority than the Claimant and, therefore, greater rights to be called for the vacancy.

The Carrier's objections are groundless. Although the claim initially referred to employee "N. Hutchinson," it subsequently referred to the employee as "N. Hutchins." The Carrier's responses made it clear that the Carrier understood that the employee whose assignment to fill the vacancy that the Organization was contesting was N. Hutchins. The recitation of an incorrect rate of pay was irrelevant. The claim would have been a valid claim even if it did not specify a rate of pay. The reference in the claim to position TC-45 was an error, but it is clear that the Carrier understood that the vacancy in dispute was on position TC-44. Finally, numerous Boards have held that the Carrier may not defend against a claim of this type by alleging the existence of employees with greater rights than the Claimant. See, e.g., Third Division Award 2282, as well as Public Law Board No. 2263, Award 39.

As a remedy for violations of this nature, the Board has generally awarded eight hours pay at the straight time rate. Other Boards have varied, some awarding pay at straight time rates and others at overtime rates. In the instant claim, the Carrier admitted that it violated the Agreement when it called Hutchins and admitted that the Claimant had greater seniority and a superior right to be called for the vacancy. Considering all of the unique circumstances in this case, we find that an award of eight hours pay at the overtime rate is appropriate.

AWARD

Claim sustained.

Form 1
Page 4

Award No. 38234
Docket No. CL-39198
07-3-05-3-597

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 18th day of July 2007.