Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32303
Docket No. CL-32910
97-3-96-3-261

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11215) that:

(a) The Carrier violated the Rules Agreement dated July 27, 1976, as amended and revised, and particularly Appendix E, Articles 4, and others, when on January 1, 1995, Extra List employe, M. Campbell was called to work ATD-1, but Ms. Campbell had worked ATD-2 on December 31, 1994 from 3:00 - 11:00 p.m. and therefore, was not available to work 7:00 a.m. - 3:00 p.m. on January 1, 1995. Claimant is senior, qualified, and was available to work ATD-1 on January 1, 1995, but was never called to do so.

(b) Claimant should now be allowed eight (8) hours at time and one-half for January 1, 1995, to satisfy this claim.

(c) Claim filed in accordance with Rule 25 of the Corporate Agreement.

II. Claim of the System Committee in behalf of TCU Clerk, Joe Redmond that:

(a) The Carrier violated the Rules Agreement dated July 27, 1976, as amended and revised, and particularly Appendix E, Articles 5 and 6, and Rule 4-C-1 and others, when on January 8, 1995, the Carrier diverted ATD-3 (11:00 p.m. to 7:00 a.m.) employe, D. Smith, to work vacant position ATD-3, 11:00 p.m. to 7:00 a.m. Claimant Redmond was senior and available to work vacant position and was not allowed to do so.

Article 5 states that if no Extra List employes are available to work position at straight time, the incumbent will be offered it next at overtime. If the incumbent refuses it and no Extra employes at straight time are available (which was the case), the vacancy would be offered to the senior, qualified, available employe, which, in this case, was Mr. Redmond.

(b) Claimant should be allowed eight (8) hours at time and one-half for January 8, 1995, to satisfy this claim.

(c) Claim filed in accordance with Rule 25 of the Corporation Agreement."

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.

Claimant herein entered service of the Carrier on September 1, 1984 as an Assistant Train Director in Washington, D.C. and, at the time the instant two disputes arose, Claimant was regularly assigned to a 7:00 A.M. to 3:00 P.M. Assistant Train Director's position at "K" Tower, Washington, D.C. with Saturday and Sunday as rest days.

The factual background with respect to the first claim date is, for the most part, not contested. The record evidence reflects that on Sunday, January 1, 1995, a 7:00 A.M. to 3:00 P.M. Assistant Train Director (ATD) position was vacant at "K" Tower and, as there were no extra clerks available, the position had to be filled at the overtime rate. Carrier concurs that since Sunday was one of the Claimant's rest days on the

position to be filled, he was entitled to work the vacancy at the overtime rate. Carrier maintains that Trainmaster, E. Mruk, attempted to contact Claimant by telephone using the primary telephone number for him that is maintained on file with the Washington Crew Dispatcher's Office but received no answer. The Organization asserts Carrier never called Claimant to work the position in question on January 1, 1995 and that Carrier never proffered any evidence during the handling of this claim on the property that it made such a telephone call. Additionally, the Organization notes that even if Carrier called Claimant and received no answer, it was obligated to make a second call to Claimant before filling the position in question with another employee. Since Carrier failed to present proof it called Claimant during the handling of the claim on the property, the Organization argues Carrier is now barred from presenting any supporting evidence on this point before this Board on grounds it constitutes new evidence. Carrier counters the Organization's contention regarding the absence of proof in connection with calling Claimant for the position in question, asserting that this contention constitutes new argument in that throughout the handling of the claim on the property the Organization never questioned or raised a doubt that Trainmaster Mruk made the call to Claimant. Such new argument asserted before the Board must, Carrier argues, be rejected by the Board. Additionally, Carrier asserts, the Organization never requested to review the call log.

With respect to the first claim, we find an absence of conclusive evidence in support of either Party's position, but further find such absence of proof to be fatal to the Organization's position as it bears the burden of proof in this matter. In failing to meet this burden by establishing, in the first instance, that Carrier failed to call Claimant to fill the position in question and, in the second instance, to show that Claimant was, in fact, available to be contacted to work the position, we rule to deny Claim I.

As to Claim II, the undisputed facts show that on Sunday, January 8, 1995, a 11:00 P.M. to 7:00 A.M. Train Director vacancy at "K" Tower arose and that Carrier readily admits it filled the position with a Train Director junior in seniority to Claimant explaining that, it did not call Claimant to fill the vacancy because had it done so, Claimant would have been prevented from working his own regular assignment on Monday, January 9, 1995 pursuant to the limitations set forth under the Hours of Service Law. Carrier submits that, pursuant to well established arbitral authority, it cannot be obligated to offer employees overtime assignments that would render them unable to work their own regular assignments due to application of the Hours of Service

Law. In support of this latter point, Carrier refers the Board to Fourth Division Award 2588 and Third Division Award 23855, among many others. Additionally, Carrier defends its action in not calling Claimant to fill the position in question even though he was senior to the employee utilized to work the position, maintaining, it makes no business sense to call an employee for overtime work where his use would preclude him from filling his regular assignment. Carrier argues that due to the unique service restrictions involved, stemming from the Federal Hours of Service Law, it could be forced to fill multiple vacancies at the premium rate if the Organization's position here is upheld. Carrier asserts that aside from these contentions it believes that no rule or practice entitled Claimant to the subject overtime.

The Organization contends that in accordance with the Rules cited in paragraph (a) as set forth under point II of the Statement of Claim hereinabove, Claimant was the senior available employee to be called to fill the January 8th vacancy and that, what the resultant impact on his next schedule work tour might be, should not have been a concern of Carrier's under any circumstances. Although the Organization concedes Carrier might be correct in its noting that subsequent vacancies arising as a result of filling the vacancy in question with Claimant would also have to be filled at the overtime rate, nevertheless that's the way the Controlling Agreement works and, as Carrier is a party to the Agreement, it must abide by its terms regardless of the economic impact on its operations. In support of its position, the Organization cites Third Division Awards 5029 and 16022 which both stand for the proposition that seniority is the premier factor of consideration in assigning overtime.

The Board is of the view that if the dilemma which presents itself here of assigning the most senior employee to fill a vacancy arose as a matter confined solely to the internal application of the Controlling Agreement we would be fully in accord with the Organization's position that Carrier is obligated, in all situations, no matter what the economic consequences, to fill vacancies with the most senior employee. However, the dilemma which arises under the set of circumstances presented by this claim is caused by the existence of a Federal law that impacts the application of the Controlling Agreement. Since Carrier had no role in creating the provisions of the Hours of Service Law, unlike its role in creating the provisions of the Controlling Agreement and, since we are persuaded that Federal law trumps applicable provisions of an Agreement in cases where a conflict between the two exists, we are inclined to concur with Carrier's action in this case of utilizing an employee with less seniority than Claimant to fill the vacancy in question. Accordingly, we rule to deny Claim II in its entirety.