

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32782
Docket No. TD-33294
98-3-96-3-780**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers**

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Pursuant to Rule 17 of the Agreement between Conrail and ATDD this is a claim for one days pay at the punitive rate for K. O. Klinger due to a violation of Rule 5, Section 2 (e). The Carrier had called junior dispatcher L. Braddock to fill the third shift B Desk on Thursday July 20, 1995. Mr. Klinger was entitled to this work since he is the incumbent to the position and senior to L. Braddock.

The Carrier shall now compensate Dispatcher K. O. Klinger eight (8) hours pay at the punitive rate account he was entitled to this work ahead of L. Braddock but was not called."

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 July 20, 1995, a vacancy occurred on Desk B, third trick. There were no extra train Dispatchers available to fill the vacancy. In such circumstances, an employee had to be called on overtime. Rule 5, Section 2(e) provides for the order of call as follows:

“(e) Where, in the performance of extra work, no extra employees are available who can be used at the straight time rate of pay and it becomes necessary to assign an employee who must be paid at the overtime rate, assignment shall be made in accordance with the following order:

- 1. Available incumbent on his rest days.**
- 2. Senior available relief incumbent on his rest days.**
- 3. Senior available qualified train dispatcher on his rest days.”**

No employees expressly listed in Rule 5, Section 2(e) were available to fill the vacancy. Carrier then called L. Braddock from vacation, who had indicated his availability to fill the vacancy on an overtime basis. Claimant, who was the incumbent to the position and was senior to Mr. Braddock also was on vacation and was not called for the overtime opportunity. The Organization contends that, in keeping with the general intent behind Rule 5, Section 2(e) and with prior precedent of this Board, Carrier should have called Claimant first.

In Third Division Award 32781 we held that when diverting an employee from a different shift to fill a vacancy, Carrier is not bound to select the senior employee for the overtime opportunity. We need not decide whether to extend our holding to Carrier's determination of which employee to recall from vacation for overtime.

It is clear that under Rule 5, to be assigned extra work, an employee must be available. During the handling on the property, the parties made conflicting assertions regarding Claimant's availability for overtime assignment on July 20, 1995. Carrier asserted that Claimant was not available because he was on vacation and, unlike Mr. Braddock, did not advise Carrier of his availability to be called if there was a need for his services. The Organization asserted that Claimant was available on July 20, 1995

and that Claimant rarely turned down overtime assignments. In an apparent effort to explain why Claimant had not notified Carrier in advance of his availability to take calls while on vacation, the Organization asserted that Carrier had previously notified Claimant that when he is on vacation he is considered not available for overtime until his first day back at work.

The record developed on the property contains no evidence in support of either party's assertions. Unfortunately for the Organization, it had the burden to substantiate Claimant's availability. If Claimant was available on July 20, 1995, it would have been a simple matter for him to have provided a written statement attesting to that fact. Similarly, if Claimant had been deterred from making known his availability by prior statements of Carrier officials, Claimant could have provided a written statement attesting to that fact. Assertions are not proof. Because the Organization has failed to carry its burden to prove Claimant's availability, the claim must be denied.

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 23rd day of September 1998.