

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35446
Docket No. CL-35452
01-3-99-3-355**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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-12352) that:

The following claim is hereby submitted on behalf of Claimant Charles E. Fullerton:

- (a) The Carrier violated the Rules Agreement effective July 27, 1976, particular Rule: Appendix E, Article 6 and other Rules where applicable of the TCU Agreement.**
- (b) Violation occurred on December 5, 1997 and the Carrier has failed to compensate Claimant in accordance with the Agreement.**
- (c) Claim is for 8 hours overtime hours or overtime day(s) at the punitive rate in effect at the time of the violation of the Agreement.**
- (d) Violation occurred because of the following reason: Extra man was used to cover 11 p.m. to 7 a.m. position at overtime which I should have been entitled to in accordance with Appendix E Article 6 TCU 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.

On December 5, 1997, at 11:15 P.M., the second trick Operator at New Haven East, Connecticut, reported he had no relief. By midnight the Carrier determined the incumbent of the 11:00 P.M. to 7:00 A.M. shift had failed to report to work. The Carrier called an employee junior to the Claimant to fill the vacancy. At the time the vacancy occurred, the Claimant was regularly assigned to a 7:00 A.M. to 3:00 P.M. Block Operator position at New Haven East Tower, New Haven, Connecticut, with Thursdays and Fridays as rest days.

The Claimant filed a claim, by letter dated December 6, 1997, which was denied in a letter dated January 16, 1998, by the Superintendent - CETC. The Organization's appeal of this decision was denied, as were subsequent appeals.

It is the Organization's position that Appendix E, Article 6 is controlling in the present case. Appendix E, Article 6, reads in pertinent part as follows:

“(A) Regular and extra work assignments not covered by Article (5) above will be offered to the senior, qualified, available extra or regular employee in the territory whose position is under the jurisdiction of the extra board involved.”

The Organization asserts that by not calling the Claimant to fill the vacancy, as per Appendix E, Article 6, the Carrier knowingly violated the Hours of Service Law by making the second trick Operator double. The Organization contends that the Hours of Service Law violation would have been avoided if the Claimant had been properly called, and the Carrier paid him to stay home for his own shift following the vacancy.

The Carrier's position is that the Claimant was not available to fill the vacancy, as specified in the above-referenced Article. The Carrier contends that the overtime

hours the Claimant would have worked if called to fill the vacancy would have prevented him from working his regularly assigned position under the Hours of Service Law. The Carrier maintains that the Hours of Service Law, which precluded the Claimant from working the vacancy, is controlling.

At issue in this case is whether the Federal Hours of Service Laws or Appendix E, Article 6, is controlling. After careful review of the record, the Board finds that the decision in Third Division Award 32303 is on point. Award 32303 reads in pertinent part as follows:

“... 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 the 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. . . .”

AWARD

Claim denied.

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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 26th day of April, 2001.