

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36316  
Docket No. CL-36639  
02-3-01-3-126

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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-12711) that:

The following claim for compensation is being file din behalf of Kevin Murphy under Corporate Rule 25:

Please allow eight hours pay at the overtime rate for Monday, November 1, 1999. I was available to fill a known vacancy 5:30 a.m. Checkman this date and a junior employee performed the work of this position. Copy of Checkman paperwork done by junior foreman is enclosed.”

**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 November 1, 1999, the Organization filed a claim on behalf of the Claimant, Kevin Murphy, arguing that the Carrier violated the parties' Agreement when it failed to call the Claimant in connection with a known vacancy on November 1, 1999. The

Organization argues that the Carrier failed to prove its assertion that the vacancy was not known until 6:15 A.M. Moreover, the Organization contends that the Carrier has not proven its assertion that the Claimant stated that he left for the gym at 6:00 A.M. The Organization further asserts that one call is an insufficient attempt to contact the Claimant for overtime; a second call should have been attempted. The Organization goes on to argue that the Carrier has failed to offer any verification that the initial call was even made. The Organization further asserts that the evidence suggests that the position was not blanked, as the Carrier asserted, but was filled.

The Carrier denied the claim. The Carrier contends that the instant claim is based on mere assertions and allegations, and the Organization has failed to prove that any Rule of the Agreement was violated, or that the Claimant was available to work the position that is the subject of this claim. The Carrier emphasizes that the vacancy at issue was not a known vacancy; because the regularly assigned Checkman did not mark off properly, the Supervisor did not know about the 5:30 A.M. vacancy until 6:00 A.M. on the claim date. The Carrier maintains that once the vacancy was known, the Supervisor attempted to fill it by calling eligible employees in seniority order. When the Claimant was called, there was no answer; the Supervisor then continued calling other employees on the list until he found one who agreed to work the vacancy. The Carrier acknowledges that the employee who accepted the vacancy was junior to the Claimant, but the Carrier maintains that it was not unreasonable for the Supervisor to attempt to fill the vacancy by contacting other eligible employees, after no response was received from the Claimant. The Carrier points out that there has been no showing that the Claimant suffered any loss in pay; in fact, November 1, 1999, was an assigned work day for the Claimant. The Carrier argues that there is no provision in the Agreement to justify the payment sought. The Carrier emphasizes that the Organization has not cited or discussed any Rules as the basis for this claim, and the Organization also has failed to demonstrate just how this alleged violation occurred. The Organization bears the burden of proof here, but the Carrier maintains that the Organization has failed to meet that burden. Because the Organization has not offered any evidence to support its claim, the claim must be denied. The Carrier further asserts that the claim for a penalty payment is unjustified because no violation of the Agreement occurred and because there are no penalty provisions within the parties' Agreement. The Carrier contends that if the Board finds that a violation has occurred, any payment should be at the pro-rata rate.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board has reviewed the record in this case, and we must find that the Organization has failed to meet its burden of proof that the Carrier violated the Agreement when it filled the vacancy with a junior employee on the date in question.

The record clearly shows that the Claimant was called by the Carrier at 6:20 A.M. There was no answer. The Carrier was faced with a vacancy on a shift that had begun at 5:30 A.M. The Claimant had apparently left his house for the gym at approximately 6:00 A.M. and was not at home to receive the call. Consequently, the Carrier acted appropriately by going on to the next employee who was junior to the Claimant.

It is true, as the Organization argues, that the Carrier must call the most senior employee. However, if that employee is not available, and the Claimant was not, the Carrier has every right to go on to the next employee junior to the Claimant.

A thorough review of the facts in this case can show no violation of the Agreement by the Carrier. Therefore, 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 13th day of November 2002.