Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36317
Docket No. CL-36668
02-3-01-3-192

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-12723) that:

1. This letter is for a time claim dated for December 25, 1999. On Saturday at approximately 11:30 a.m. Usher George Dabner marked off sick for a 2:00 p.m. position. Supervisor on duty had already filled the position with Usher Whitehead (junior employee). I did not receive a call for overtime for this position therefore I feel that I am entitled to a day's salary.

2. The list for this day in question was posted and filled within the given guideline of this office. I declined to work on this day but since overtime was now available once again I feel that I should have been called. The Usher who worked this position had already signed to work on December 24 starting at 10:00 p.m. to 6:00 a.m. and then had signed to work on Saturday December 25 at 6:00 a.m. to 2:00 p.m. This Usher did not sign to work a double on Saturday so therefore once again I should have been called for the vacancy in question.

3. Please review this and get back to me as soon as possible."

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 29, 1999, the Organization filed a claim on behalf of the Claimant, John Ritoh, arguing that the Carrier violated the parties' Agreement on December 25, 1999, when it failed to call the Claimant for a vacancy on the 2:00 P.M. Metropark Announcer position. The Organization maintains that when the incumbent for this position marked off sick at 11:30 A.M. on December 25, the Carrier called and used a junior employee, Whitehead, who already had worked 6:00 A.M. - 2:00 P.M. that day, as well as the 10:00 P.M. - 6:00 A.M. tour on December 24. The Organization argues that the Carrier apparently denied the Claimant because a week or more prior to December 25, the Claimant declined to work the holiday. The Organization asserts that an earlier refusal, involving different hours and/or duties, does not amount to the Claimant's unavailability for the 2:00 P.M. job, nor does it relieve the Carrier from its obligation to offer the Claimant the specific overtime opportunity at issue. The Organization further argues that the Carrier's position fails to take into account possible meaningful changes in the circumstances that open the way to the Claimant taking a second look at available work.

The Carrier denied the claim. The Carrier contends that the instant claim is based on mere assertions and allegations, and the Organization has not proven that any Rule of the Agreement was violated. In fact, no Rule was even cited on the property as having been violated by the Carrier. The Carrier points out that there is no evidence that the Claimant was available to work the position that is the subject of this claim. The Carrier points out that this was a known vacancy that, according to established practice relating to holidays, had been posted and filled in seniority order. The Carrier contends that the fact that the Claimant marked off sick on the holiday and the vacancy was filled by a junior employee makes no difference because the Claimant had the opportunity to work this vacancy and elected not to. The Carrier additionally points out that there has been no showing that the Claimant suffered any loss in compensation on the claim date; in fact, the Claimant received holiday pay for December 25, 1999. The Carrier asserts that there is no provision in the Agreement that justifies the penalty

payment sought in this dispute, and the amount claimed is excessive. The Carrier argues that if the Board determines that a violation has occurred, any payment should be at the pro-rata rate. The Carrier argues that the moving party in a claim carries the burden of proof and the Organization has failed to meet its burden in this case,.

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 by failing to assign the Claimant overtime on the date in question. The Organization failed to cite any Rule of the Agreement as having been violated. Moreover, we find that there was no proof that the Claimant was available to work the position. The Claimant had enough seniority to work the vacancies, but elected not to work them.

It is fundamental that the burden of proof in these types of cases rests with the petitioner. There was insufficient evidence of any violation of the Agreement to support a claim. The claim was simply not proven. Therefore, it 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.