

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36556
Docket No. CL-36569
03-3-01-3-55**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12693) that:

It is the claim of the District Committee that the Carrier violated the BRAC/NRPC Agreement of July 27, 1976, in particular, Rules 4-A-1, 5-C-1 and Appendix E, Extra List Agreement when it allowed, permitted and required a junior employee to work an overtime assignment and failed to call and use the Claimant who was senior, qualified and available to work.

On March 7, 1999 the Carrier allowed, permitted and required F. McMenamin, Roster No. 996, Position No. U-6 to work an overtime position as a Red Cap in the Customer Services Department, 30th Street Station, Philadelphia, PA from 12:24 p.m. to 12:40 p.m., TR#95

The Carrier failed to call and use H. Schmid, Roster No. 19, Position No. RC08, who was senior, qualified and available to work.

Claim is filed in behalf of H. Schmid for 8 hours pay at the overtime rate as a penalty when the Carrier violated the above mentioned Agreement.

Claim is filed in accordance with Rule 7-B-1, is in order and should be allowed.

Claim is further made Carrier violated Rule 7-1-B when the General Supervisor Customer Service failed to respond to the initial claim.”

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 March 7, 1999, the Organization filed a claim on behalf of Claimant K. Atkins, arguing that the Carrier violated the parties' Rules Agreement when it failed to call the Claimant in connection with overtime that occurred on a Red Cap position in the Customer Service Department in Philadelphia on March 7, 1999. The Organization initially argues that there is no question that it sent the instant claim to the General Supervisor Customer Services, but that he thereafter ignored the claim. The Organization maintains that because it is annoying to the Carrier to call a senior employee for overtime, within the Rules of the Agreement, when qualified junior employees are readily at hand, and because the Carrier found itself vulnerable to pay an overtime call in connection with the claim, the Carrier chose to assert that it never received the claim. The Organization argues that the Carrier did receive the instant claim, but chose not to act upon the claim and to assert that it never received it, rather than face the penalty. The Organization contends that the merits of this matter should be recognized and addressed over the dubious assertion that there was a defect in the handling of the claim.

The Organization also asserts that the overtime assignment at issue was an extra assignment, and it therefore should have been offered to the senior qualified, available employee, rather than assigned to a junior employee working nearby in the interest of economy. The Organization maintains that the Board repeatedly has held that an employee's seniority rights cannot be taken away unless specifically authorized by one of the Rules. The Organization emphasizes that there is no Rule in the parties' Agreement that permits the Carrier to look beyond the Claimant's seniority and use a

junior employee in his stead to work an extra overtime assignment. The Carrier's use of the junior employee was only an economical convenience, balanced against the extra effort of calling and using the Claimant, the senior employee, and complying with the Rules of the Agreement.

The Organization contends that the Carrier's refusal to defend its actions, or take part in this proceeding on the basis of the claim's merits, must preclude the Carrier from now entering, for the first time, any defense or argument pertaining to the factual situation that occurred on the date in question. The Organization maintains that the instant claim was filed in a proper and timely manner with the General Supervisor's office, but the General Supervisor's office lost track of the claim and allowed the time limits to expire without issuing a response. The claim therefore is payable as presented, in accordance with the last paragraph of Rule 7-B-1(a). The Organization contends that the claim should be sustained in its entirety.

The Carrier contends that the Organization failed to properly file the instant claim. Moreover, the Organization did not submit any proof to the contrary. The Carrier further asserts 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. The Carrier maintains that the Organization has not identified which part of the Agreement was violated because it cannot do so. The Carrier emphasizes that there also is no evidence in the record that the Claimant was available to perform the work that is the subject of this dispute.

The Carrier points out that the Organization bears the burden of proof in this matter. The Carrier maintains, however, that the Organization failed to prove that a violation occurred and harm resulted. Because the Organization failed to meet its burden, the claim cannot be given any serious consideration and should be denied or dismissed. The Carrier then argues that the Organization's request for a penalty payment is unjustified, given that no violation occurred. Moreover, the Carrier maintains that compensatory damages are not due where no showing of monetary loss has been made. The Carrier argues that the amount claimed is clearly excessive, particularly because there are no penalty provisions within the Agreement. The Carrier ultimately asserts that the claim should be dismissed and/or denied in its entirety.

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

First of all, the Board must address the argument of the Carrier that the claim was not filed within the appropriate time limit as set forth in the Agreement. The Carrier contends that although the claim arose and was written on March 7, 1999, the Carrier never received a copy of it. The Carrier contends that the claim is procedurally flawed because it was never presented to the Supervisor as stipulated in Rule 25(a) of the Agreement. However, a review of the record makes it clear that there is a claim dated March 7, 1999, and that it was appealed to the Division Manager along with several other claims on September 15, 1999. On September 27, 1999, the Division Manager confirmed the receipt of the appeals of several claims, including the one at issue, and scheduled a conference for October 13, 1999. Apparently, the instant claim was discussed on October 22, 1999, and not until December 20, 1999, did the Carrier take the position that the claim was procedurally flawed and should be withdrawn from further consideration because it had never been presented to the Supervisor. The record reveals further that on December 30, 1999, the Organization appealed this claim to the next step. There was a subsequent conference on March 22, 1999, and not until May 1, 2000, did the Carrier again deny the claim, stating that it had never been presented to the General Supervisor, but included, for the first time, a memo from the Supervisor stating that he had no record of the claim. That interoffice memorandum from the Supervisor was dated May 2, 2000, many months after the first discussion of this claim.

Although it is true that the Organization must present the claim in accordance with the Agreement, if a Carrier contends that the claim was not received, it must do so before several discussions of that claim have taken place and it should present evidence of failure to present the claim at its earliest opportunity. The Carrier failed to do so in this case. Consequently, based upon the Organization's presentation of the claim and its statement that it was mailed, the Board cannot deny the claim based on the procedural violation belatedly raised by the Carrier.

Turning to the merits, the Board reviewed the record in this case, and we find that the Organization met its burden of proof that the Carrier violated the Agreement by failing to call the more senior Claimant to perform overtime on March 7, 1999. Article 6(A) of Appendix E reads 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 Carrier in this case used a junior employee on the extra work assignment, and, relying on its procedural argument, never presented any evidence as to why it failed to call the Claimant, who was more senior. The Organization is correct that although it may have been easier for the Carrier to use the junior employee who is currently on the job, the Rules require that it make an effort to call in the senior employee to work the overtime assignment. The Carrier failed to do so in this case and, therefore, the claim must be sustained in part. The Claimant is awarded eight hours' pay at the straight-time rate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 8th day of May 2003.