

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36805
Docket No. CL-37504
03-3-02-3-542

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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-12927)
that:

1. Carrier violated the Amtrak NEC Clerks Rules Agreement on January 20, 2001, when it failed to call and did not afford Claimant D. Hoeler for position U-17, hours 1:20 - 9:50 P.M., the opportunity to accept such position to start at 4:30 P.M. and end at 9:00 P.M. He was originally asked to work the vacancy for eight hours.
2. Claimant D. Hoeler now be allowed five hours and fifty minutes, at the punitive rate of pay, as was worked by junior employee M. Robinson, on account of this violation on January 20, 2001.”

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.

At the time of the dispute, the Claimant worked as a Customer Service Representative (Usher) at Penn Station in New York City. On January 20, 2001, the Desk Clerk Caller telephoned the Claimant and left a message on her answering machine that she was seeking to fill a 1:20 P.M. to 9:50 P.M. vacancy at the overtime rate and for her to please call if she was interested. When the Desk Clerk Caller received no response from the Claimant, she went down the seniority list, but was unable to immediately secure an employee for the shift. The Desk Clerk Caller was finally able to secure another Clerk to work the remainder of the shift, from approximately 4:00 P.M. to 9:50 P.M. The Organization alleges that the Claimant responded to the call from the Desk Clerk Caller and advised her that she would be unable to work the shift commencing at 1:20 P.M., but would be available to work from 4:00 P.M. to the end of the shift, "should it be called out that way." The Carrier alleges that its records indicate that the Claimant never called back. The Organization does not dispute that assertion, but asserts that because the Carrier was unable to get anyone to work at 1:20 P.M., the Carrier asked a junior employee to perform the assignment, and that employee worked from 4:00 P.M. to 9:50 P.M.

Appendix E sets forth the Carrier's obligation for filling extra assignments and vacancies that occur, as follows:

"Article 3

- (A) Employees assigned to an extra board will keep the telephone number where they can be contacted for work assignments on file with the Carrier's officer having jurisdiction over the extra board involved.
- (B) All employees on the extra board are subject to call and will hold themselves available for call for a two-hour period prior to the normal starting times, which will be considered to be 7:00 A.M., 3:00 P.M. and 11:00 P.M.

- (C) Management will verify all failures to answer a work assignment telephone call with a "Verified Don't Answer" from the telephone company, or, if possible, have another employee, preferably an agreement employee, verify that the call was made.

ARTICLE 5

- (A) ... [I]n the event the relief employee is absent, the vacancy will first be offered to the incumbent of the position being relieved. Should the incumbent refuse overtime it will then be offered to the senior, available, qualified extra or regular employee in the territory whose position is protected by the particular extra board involved.

ARTICLE 6

- (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 argues that the Carrier violated the Agreement when it did not afford the Claimant the opportunity to work position U-17 from 4:00 P.M. to 9:50 P.M. It contends that, pursuant to the Agreement, the Carrier was obligated to call the Claimant back after it determined that it would offer a revised schedule of 4:00 P.M. to 9:50 P.M. The Organization acknowledges that the Claimant initially indicated that she could not meet the work opportunity at 1:20 P.M., but that the Carrier was obligated to call the Claimant back once it revised the assignment's starting time. Citing authority, the Organization argues that the Carrier cannot "assume" an employee is unavailable; it must call and determine that fact. For all of these reasons, the Organization urges that the claim be sustained.

The Carrier argues that the claim is without merit. It contends that while the Organization argues that the Carrier violated the Parties' Extra List Agreement, it

has not offered any proof of a violation. Citing authority, the Carrier argues that the Organization has the burden to establish a violation of the Agreement, but that it has failed to do so in this dispute.

The Carrier further argues that the Organization's request for a penalty payment is wholly unjustified because no violation has been shown to have occurred. It points out that the Organization also failed to prove that the Claimant suffered any monetary loss. For all of these reasons, the Carrier urges that the claim be denied.

The Board is persuaded that the Organization failed to establish a violation of the governing Agreement or applicable Rules. The evidence establishes that the Desk Clerk Caller contacted the Claimant and left a message on her answering machine, advising her to contact her if she was interested in working the U-17 overtime assignment. The evidence also establishes that the Claimant advised the Desk Clerk Caller that she would not be able to work the entire shift for which she was being called. As such, the Carrier was then within its right to find an employee to work the U-17 shift by proceeding to contact other employees in order of seniority. The Organization has not submitted any evidence that the Carrier's action in permitting an available junior employee contacted pursuant to those calls to work for a portion of the shift violated the aforementioned provisions.

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 29th day of December 2003.