

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36806
Docket No. CL-37515
03-3-02-3-545

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-12924)
that:

- I. (NEC-2101) Carrier violated the Amtrak Northeast Corridor Clerks Rules Agreement on March 30, 2001, when it failed to call and work Claimant Wm. Nabrinzy, located at New York Penn Station Metropolitan for position FCLR-1, hours 5:00 A.M. to 1:30 P.M.

Claimant Nabrinzy now be allowed eight hours at the punitive rate of pay at the Ticket Agent pay on account of this violation.

- II. (NEC-2102) Carrier violated the Amtrak Northeast Corridor Clerks Rules Agreement on February 26, 2001, when it diverted Claimant L. Duberry-Carter from her assigned position of Ticket Seller, hours 6:00 A.M. - 2:30 P.M. at New York Penn Station to work the Metropolitan Lounge at New York Penn Station.

Claimant L. Duberry-Carter now be allowed an additional eight hours at the pro-rata rate at the agreed to Ticket Seller daily rate on account of this violation and for every day thereafter that such claim has not been allowed."

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.

The Claimants in this dispute were working as Ticket Clerks when the dispute arose. Both Claimants are covered under the provisions of the parties' Northeast Corridor Clerical Agreement.

The Organization alleges, with respect to the claim of L. Duberry-Carter, NEC-2102, that on Friday, February 26, 2001, the Carrier assigned Extra List employee Mazzurco to a vacancy beginning at 5:00 A.M., working to 1:00 P.M. At approximately 2:41 A.M., Mazzurco called in sick. The Carrier chose not to call the resulting vacancy. Instead, the Lead Ticket Seller covered the vacancy in the Metropolitan Lounge. When the Claimant reported to work, she was assigned to work in the Metropolitan Lounge from 6:00 A.M. until 2:30 P.M., as she normally would do in the ticket office.

According to the Organization, claim NEC-2101 arose on March 29, 2001, when Metropolitan Lounge Attendant Erhardt, hours 5:00 A.M. - 1:30 P.M. called in sick for her March 30, 2001 assignment. The Carrier did not call the vacancy out the previous night, and instead attempted to fill the vacancy at 5:00 A.M. on Friday March 30, 2001 by calling senior available and qualified employee Uez, who declined the vacancy. The Carrier then filled the vacancy by using Extra List employee Mazzurco, who was not eligible, because the vacancy was outside the Extra List territory. The Organization asserts that, had the Carrier called the Claimant, he would have been available and would have accepted the assignment.

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, with regard to claim NEC-2101, the Carrier unilaterally assigned an Extra List employee out of the territory to cover Mazzurco's vacancy, and that no initial call, nor second call, as required by the foregoing Rule, was made to Claimant Nabrizny, who was qualified, available, and would have accepted the call had it been made.

The Organization contends that in the second claim, NEC-2102, a similar violation occurred. The Organization argues that Nabrizny, who works in the Metropolitan Lounge location, was the senior, available, qualified employee who, had he been called, would have accepted. Instead, the Organization maintains that the Carrier diverted Claimant Duberry-Carter from her regularly assigned position rather than make the required call. As such, the Organization contends, the conditions of 4-A-6 - NOTIFIED OR CALLED were not followed.

The Organization points out that the Carrier makes no direct denial of the claim filed on behalf of Nabrizny, as the governing Agreement requires, and the claim, therefore, ought to be sustained. The Organization argues that the Carrier's reliance on earlier disputes, which involved the Carrier's unilateral expansion of the Extra List jurisdiction to cover the Metropolitan Lounge without first obtaining the required Agreement of the Division Chairman, is an effort to confuse the record. It contends that the earlier disputes and this dispute establish that the Carrier does not abide by the applicable Rules when filling vacancies. The Organization argues that the Rules at issue were designed to provide consistency and uniformity of application, not the abuse and inconsistency practiced by the Carrier. For these reasons, the claims should be sustained as presented.

The Carrier argues, with respect to the claim of Claimant Nabrizny (NEC-2101) that the claim is not properly before the Board because the claim date handled on the property was February 26, 2001, and the claim date appealed to the Board identifies the claim date as March 30, 2001.

As to the merits of Claim NEC 2102, the Carrier argues that the Organization has not presented any proof that the Carrier violated any Rules of the governing Agreement. The Carrier maintains that it has consistently taken the position that the Claimant was properly utilized in the Metropolitan Lounge. It points out that the First Class Lounge at Penn Station in New York is approximately 40 to 50 feet from the ticket office. It asserts that Ticket Sellers and Clerks must be qualified to work in the Lounge because tickets or ticket upgrades are sold in the Lounge. The

Carrier argues that, in effect, the Claimant performed "almost the same duties in the Lounge as she would have performed at the ticket windows." It further contends that the Lounge positions are "Partially Excepted," which means, in its view, that Amtrak has the right to select those employees who work in the Lounge. The Carrier points out that the Organization has insisted that the Penn Station Guaranteed Extra Board cannot protect vacancies in the Lounge.

The Carrier argues that the Organization failed to meet its burden of proof in establishing a violation, and that "mere assertions are not proof." Citing authority, the Carrier contends that because the Organization has not submitted any proof that a violation occurred with respect to either claim, the claims must be dismissed.

The Board is persuaded that the claim on behalf of Claimant Nabrizny must be sustained. The evidence establishes that in its August 20, 2001 answer to the claims at issue in this case, the Carrier did not deny claim NEC-2101. The letter cites both claims, and states that it "refers to the above-captioned cases, involving the following issue," but the body of the letter does not respond to or address the allegations of Claim 2101. The letter solely addresses the claim made by the Organization concerning the events of February 26, 2001, and responds that its diversion of Claimant L. Duberry-Carter to fill the balance of the vacancy in the Metropolitan Lounge did not violate the Agreement or any Rules. The Carrier is obligated to specify the reason or reasons for the denial of a claim. Its August 20, 2001 response does not answer or respond to the allegations raised in claim 2101. For this reason, the claim of Claimant Nabrizny is sustained for eight hours pay at the Ticket Agent rate of pay.

The Board finds, as well, that the Organization has not met its burden of establishing that the Carrier's action in assigning Claimant L. Duberry-Carter violated the Agreement or any Rules. The Organization acknowledges that there is no Extra List that obligates the Carrier to call qualified employees on the basis of seniority for vacancies in the Metropolitan Lounge. (See June 26, 2002 letter from the General Chairman to the Director Labor Relations). The Board concludes that nothing in the Rules cited by the Organization prevents the Carrier from utilizing the Claimant in the manner in which she was utilized on February 26, 2001.

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 29th day of December 2003.