

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38077
Docket No. CL-38929
07-3-05-3-453

The Third Division consisted of the regular members and in addition Referee Martin H. Malin 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 TCU (NEC-2325) in behalf of Claimant Paul Boehme:

The Carrier violated the Amtrak-TCU (NEC) Agreement on May 4, 2002, when it called, worked, paid eight (8) hours at the punitive rate of pay, and allowed junior employee, J. Slay the baggage counter position Job Symbol Number B-4, hours 9a to 530 pm. In doing so, the Carrier failed to contact Claimant Paul Boehme for the vacancy who is senior, was available, and is qualified to perform the said work.

Claimant Paul Boehme now be allowed eight hours at the punitive rate of pay as a Baggage man on account of this violation.

The carrier is in violation of Appendix E - Articles 3a, 5a, 6a and Rule 4-A-1 and other rules.

Claimant P. Boehme works a regular assignment (nights) in the Mail, Baggage & Express Department as a Baggage man at 10 pm on the Baggage Counter in the department. Claimant is senior to junior J. Slay. The Carriers assignment sheet reflects that junior slay worked that morning on the vacancy at 9am. Junior employee Slay works evenings also as does claimant at 10 pm as a regular Baggage man

Claimant would not have not overlapped between his own tour and the vacancy at 9am. Claimant had marked off sick the day before. In the Amtrak-NEC Agreement no rule exists that would prevent an employee from working an overtime after his initial assignment has ended and should he/se had called in sick for their own assignment. In involvement of overtime such rule does exist in Amtrak-Off Corridor Clerks Agreement Rule 15(j). The Carrier in this instance used a rule from another agreement that does apply when they decided not to call claimant for the vacancy, then wrote next to claimants name (pres s/s) on the overtime sheet for the vacancy at 9am. The Carrier did not ask claimant for his interest in the vacancy at all-they skipped to the next person down the overtime seniority list. The overtime sheet from the carrier does not indicate what time, date, whom had contacted junior employee-Slay. The only indication is a check mark with (y) yes. The Carriers cannot prove that Claimant denied work.

On 5/30/02 claimant's representative met with claimant's supervisor the person to whom this claim is addressed to try and resolve the claim without having paper work to be filed as it was obvious that a violation had occurred. Claimant's representative requested and was granted to peruse the overtime call-out sheet which reflected the claim merits to be true. Upon questioning why the Carrier did not call Claimant Supervisor indicated that claimant had called in sick on his previous work assignment the day before and because of this he had not been called. Claimant's representative advised and showed Supervisor that no rule existed in the Amtrak-NEC Agreement and that it only existed in another part of the country...Rule 14(j). Claimant's Supervisor indicated that when an employee calls in sick they must mark back up in order to be considered for work (overtime) and for his/her assignment would then be filled at overtime or blanked. Claimant's representative advised that claimant did mark back up prior to vacancy that morning and if it were not the case that claimant did not mark back up then when was he allowed to work that evening, no remarks

indicate on the call-out sheet for the overtime vacancy at 9am that he had not marked back up (only) that he had called in sick the previous day, and why didn't the Carrier call out his regular assignment that day if they did not know he was not coming in. The Carriers representative could not prove in any shape with an answering recording tape (which is used when employees mark up and mark off) or on any other markup off sheets that claimant had not marked back on.

Claimant would have accepted the work, filled the vacancy in its entirety, and would have been compensated at the punitive rate of pay for work performed.

The Carrier's representative advised the author of this claim to file this claim and he would decide later on what to do even though no records were produced to void claimant at submission.

Claimant P. Boehme should have been given the opportunity to work that day he was not.

This claim has been presented in accordance with Rule 7-B-1 of the NEC Amtrak Agreement and in accordance with Rule 25 of the Off Corridor Clerks Rules Agreement and should be allowed and accepted as presented."

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 facts in this case are not in dispute. The Claimant was employed as a Baggagehandler working the 10:00 P.M. to 6:30 A.M. shift. On May 3, 2002, the Claimant marked off sick for his shift that would end at 6:30 A.M. on May 4. A vacancy arose for the shift that began at 9:00 A.M. on May 4, 2002. The Carrier called an employee junior to the Claimant and did not call the Claimant because the Claimant had marked off sick.

The Organization observes that the Off Corridor Corporate Agreement Rule 14(j) provides that an employee who marks off sick is unavailable for other assignments, but that no comparable provision exists in the Northeast Corridor Agreement which governs the instant case. In the Organization's view, because the vacancy did not overlap with the assignment for which the Claimant had marked off, the Carrier was obligated to call him before calling the junior employee.

We decide this case strictly on the facts presented to us. The Claimant reported that he was unable to work his shift ending at 6:30 A.M. due to illness. It was reasonable for the Carrier to conclude, in the absence of any reason to believe the contrary, that the Claimant remained unable to work a shift that began a mere two and one-half hours after the conclusion of the shift that the Claimant was too ill to work. The Carrier's obligation to call senior employees depends on those employees' availability. Merely because an employee is not assigned to a shift which overlaps the vacancy does not mean that the employee is available. The Carrier may reasonably presume, absent information to the contrary, that an employee who is too sick to work his shift is too sick to work the shift that begins two and one-half hours later. We need not decide at what point the presumption of unavailability becomes unreasonable as that issue is not presented to us. However, on the facts presented, the claim must be denied.

AWARD

Claim denied.

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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 21st day of February 2007.