

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40637
Docket No. SG-40460
10-3-NRAB-00003-080310**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:

Claim on behalf of C. C. Huynh, for 8 hours at her time and one-half rate of pay, account Carrier violated the current Signalmen’s Agreement, particularly the September 22, 1993 Overtime Agreement as amended, when it assigned another employee instead of the Claimant to work the second shift at the C.E.T.C. dispatch center on May 29, 2006 and denied the Claimant this work opportunity. Carrier’s File No. BRS(N)-SD-1096. BRS File Case No. 13880-NRPC(N).”

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 claim involves seniority rights to work an overtime vacancy. There is no dispute on the following facts. On Memorial Day, September 29, 2006, the Claimant was regularly assigned to work the first shift. The Claimant requested permission to be off and did not work her shift. A vacancy arose on the 3:30 P.M. to 11:30 P.M. shift. A junior employee who registered absent on the preceding day was called and filled the vacancy. The Overtime Agreement of September 22, 1993, which was alleged to have been violated by the Carrier, states in Section VI, Paragraph C, "If either of the Electronic Specialists referred to in Paragraph 2, is not available or declines the opportunity to fill four (4) hours of the vacancy, the other shall be given the opportunity to work the entire eight (8) hours." The Claimant was not called to fill the vacancy and the assignment was filled by a junior employee.

The Organization argues that the Rule is clear. The fact that the Claimant requested to be off on her Memorial Day shift does not give the Carrier the right to ignore the Claimant's rights to other work and particularly to be called for the subsequent overtime shift. The Carrier must ascertain if she is willing to work the overtime assignment before contacting a junior employee for the work. In fact, the absence of the junior employee on the day prior to Memorial Day negated his availability rights. The Overtime Agreement clearly required that the Carrier contact the Claimant and its failure to obtain the required intent and availability violated the Agreement.

The Carrier contends that the Claimant requested the day off. As such, the Claimant indicated her intent to be unavailable to work the Memorial Day holiday. The Carrier notes that some employees are scheduled to work the holiday and some are not; but the Claimant was scheduled to work the holiday and requested permission to be off. Accordingly, the Claimant was quite properly not called to work the vacant assignment. The Carrier contends that had the holiday not been her regular assignment, or had she worked her regular assignment, then she would have been contacted. However, when, as here, the Claimant notified the Carrier that she wanted the Memorial Day holiday off, she was not in line for overtime on another shift.

The Board reviewed the Awards submitted by both parties to this dispute as well as the instant facts. Important to our decision is the statement from Assistant Division Engineer (ADE) Wray, which states:

“[Claimant] . . . was scheduled to work on Monday, May 29, 2006, which was Memorial Day. On Thursday, May 25, 2006, she informed me that she did not want to work the Memorial Day holiday. I explained that I needed someone to work her assignment that day. But, I told her that as long as someone would cover her assignment, she would not have to work. Thanh Nguyen covered [Claimant’s] assignment and, as she had requested, she was not required to work that day. Based on her advice to me that she didn’t want to work on May 29, 2006, she was not called for overtime.” [Emphasis added.]

The Claimant informed the ADE that she did not want to work on the holiday. It was her regularly scheduled work assignment and she marked off. The Board therefore finds that she marked off for the day and was, therefore, unavailable for overtime.

The Organization argued that there are numerous Awards supporting its position that the language of the Agreement and the seniority of the employee mandate that the Carrier assure the employees’ rights are met through a required declination (Third Division Awards 10122, 14496, 24332, 30833 and 33909). Third Division Award 24332 is not on point, in that the Claimant was off sick when overtime was arranged two days into the future and the Carrier failed to offer overtime. Third Division Award 33909 also strongly supported the importance of seniority, but unlike these circumstances, has nothing to do with the nearest employee to the point of call. Similarly, unlike Third Division Award 30833, which argues forcefully for the enforcement of seniority alluding to the importance of prior Awards, such as Third Division Award 19758, there is a clear dispute in this record on the “willingness and availability to do the job.”

In this instance, there is no evidence to support the Organization’s burden to prove that the Claimant should have been considered for overtime on the third shift and was willing and available to do so. Had the Claimant notified the ADE or

properly called in thereafter to request that she be considered off only on her assigned shift, the Carrier would have had an obligation to consider her available for overtime.

The Board finds that her request was not to be off on her assigned shift, but to be off on the Memorial Day holiday. The ADE would have obviously known and noted in his report that the Claimant had only requested being unavailable for her shift. The ADE did not. Further, there is no statement from the Claimant suggesting in any manner whatsoever that the ADE should have known that she was available for subsequent shifts on Memorial Day after requesting the Memorial Day holiday off. Accordingly, the claim must be denied because the Claimant marked off for the holiday and was, therefore, unavailable for the holiday overtime.

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 27th day of August 2010.