

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42802
Docket No. MW-42846
17-3-NRAB-00003-150069**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that

- (1) The Agreement was violated when the Carrier failed to call and assign senior Repairman A. DiAngelo on October 2 and 3, 2013 to perform overtime work in connection with the repair of the T/Save machine and instead utilized junior Repairman K. Deely (System File NEC-BMWE-SD-5262 AMT)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. DiAngelo shall now be compensated for twelve (12) hours at his respective time and one-half rate of pay.”

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 all relevant times herein, Anthony DiAngelo, the Claimant herein, was assigned as a repairman on Gang Y-092 headquartered on the Southern District. Employee K. Deely established and holds seniority in various classifications within the Maintenance of Way Structures Department. During all relevant times associated with the instant claim, Mr. Deely was regularly assigned as a repairman headquartered on the Southern District. The record reveals, and there is no dispute that Mr. Deely was less senior than the Claimant. The circumstances giving rise to the instant claim are as follows.

The record evidence reveals that on September 21, 2013, Equipment Engineer Paul Kubon ("Kubon") was informed of the requirements of the assignment which required employees to make repairs to the T/Save track car in Albany, N.Y. This assignment required M/VV Repairmen to travel outside of their normal work zone to Albany, NY to remove the transmission from the T/Save track car, transport it to Wilmington, DE and approximately 30 days later, return to Albany, NY to re-install the remanufactured transmission in the same T/Save track car. The Carrier viewed the removal and subsequent installation of the transmission to be one project that required continuity in employees to perform. The Carrier maintains that Mr. Kubon met with Claimant's work group, including Claimant (Field Repair Gang Y902) to tell the group about the assignment, noting that the employees assigned to these duties would be required to do both portions of the assignment (removal and installation of the transmission) and that those assigned would work as many hours as they could to safely perform the work plus travel time from their home location to Albany, NY. The record reveals that the assignment was completed on September 26, 27, 28, 29, October 1 and 2, 2013.

During the meeting to discuss the assignment, it is the Carrier's position that the Claimant declined the opportunity to work on this assignment, stating that he had an upcoming wedding for his daughter and he didn't like to work in New York. The record reveals, and there is no dispute, that Claimant's daughter was married on September 21, 2013. Following his claimed declination in the meeting, Mr. Kubon maintains that he asked Claimant two more times, once in person and a second time via telephone, if he, the Claimant, would like to reconsider taking the assignment. Mr. Kubon maintains that he clearly explained to Claimant that he would be required to offer the opportunity to Mr. Deely if Claimant would not accept the assignment and that Mr. Deely would complete all aspects of the assignment, including the installation work anticipated to occur approximately 30

days following the removal work. Again, the Carrier maintains that the Claimant declined the overtime opportunity three times on that date, and as a result, the opportunity was offered to Mr. Deely, who in fact worked the entire assignment along with M/VV Repairman Foreman John Giordanelli and M/VV Repairman Brian Bogarde.

The record reveals that Mr. Kubon discussed the October or installation portion of the assignment with Field Repair Gang Y902 on September 26, 2013 to inform them of the date to complete the assignment and the same crew (Giordanelli, Bogarde and Deely) were assigned to perform the work. The record reveals and there is no dispute that the Claimant was aware on September 26, 2013 that Mr. Deely, who was assigned to the first part of the project, would be assigned to complete the assignment and raised no issues or concerns until this claim was filed on October 14, 2013. The Carrier responded to the instant claim with a denial on December 9, 2013.

Thereafter, the Organization appealed the time claim dated December 18, 2013, stating in relevant part that the Carrier's Superintendent Engineering Production's denial was improper because Claimant was available and would have worked the overtime in October 2013 and the Carrier's reason for denial was flawed because Claimant's daughter was married in September 2013, well prior to the October overtime. By letter dated February 11, 2014, the Carrier denied the appeal at the second level. The Organization then appealed to the Director of Labor Relations by letter dated February 27, 2014. Following the appeal conference held on April 17, 2014, the Director of Labor Relations denied the appeal at the third level by letter dated May 14, 2014. The Organization filed a re-consideration letter on June 17, 2014 to which the Carrier responded on July 2, 2014.

By letter dated November 13, 2014, the National Railroad Adjustment Board advised the Carrier that the Organization had filed a notice of intent to file a submission dated November 7, 2014 with the Third Division in connection with this case, and provided the request for the parties to submit their briefs and attachments to the NRAB by January 27, 2015.

As noted in their submission to this Board, it is the Carrier's position that the disputed work involved a two-part assignment to uninstall and re-install a transmission to the T/Save track car, and since the regular assignment required M/W Repairmen to travel outside of their normal work zone, involved overtime,

and required consistency in crew assigned to both aspects of the assignment, on August 21, 2013, Equipment Engineer Kubon met with Claimant's work group to discuss the assignment requirements. The Carrier assigned the crew, excluding Claimant, to perform the two-part assignment. Claimant was not assigned to the crew because he declined the opportunity on three times on the date it was offered to him.

On the other hand, it is the Organization's position that the Carrier was contractually obligated to call the Claimant to perform the disputed work of making repairs to the T/Save track car in Albany, NY. The Organization maintains that since neither the Claimant nor Mr. Deely was assigned to the T/Save, then "overtime preference should have been given to the oldest employee on the Southern District Repairman roster."

We begin with the well accepted doctrine that in non-disciplinary cases such as this, the Organization carries the burden of proof to demonstrate that the Carrier's actions violated the Agreement. While this Board could very well conclude that the Organization failed in its burden based on the "he said, he said" doctrine, more convincing is the Claimant's statement. In his statement, the Claimant acknowledges that he was aware that the assignment at issue consisted of two parts, and reading into his statement, it is apparent to the Board that the Claimant was offered, at the very least, an opportunity to work the first part of the assignment. In this regard, the Claimant noted:

"I had no idea that if I was unable to work overtime on one occasion that I no longer have the right to any overtime after that date regardless of seniority. They also stated they wanted the people who removed the transmission to reinstall it because of the type of difficult job it was."

Upon our review of the record, it is more likely than not that the Claimant refused, at a minimum, the first part of the assignment since he was concerned that it might interfere or conflict with his Daughter's upcoming wedding on September 21, 2013. There is no doubt, in the Board's mind, that the task at issue was considered one job by the Carrier and accordingly, it was the Carrier's intent all along to use the same crew that removed the transmission to reinstall it at a later time.

Based on the foregoing, it is the Board's conclusion that the Organization has not carried its burden of proof in this matter, and accordingly, the instant claim will be denied.

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 28th day of November 2017.