

PUBLIC LAW BOARD NUMBER 3932

Award Number: 13  
Case Number: 13

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM

"This claim is on behalf of J. McKeever for time made by J. Curran.

On March 23, 1984 and March 24, 1984 (9:00 P.M. to 8:00 A.M.) Mr. Curran was utilized to assist the burro crane to unload CWR from Holmes east to Croydon area.

Since Mr. McKeever is senior to Mr. Curran and was available, he should have been utilized ahead of Mr. Curran.

In light of this violation of Rule 55, I am claiming 11 hours at time and one-half."

FINDINGS

By letter dated March 28, 1984, the Organization filed claim on behalf of Claimant seeking compensation on the basis that Carrier allowed another employee to perform service to which Claimant was entitled on March 23 and 24, 1984 in violation of the Agreement.

The issue to be decided in this dispute is whether Claimant was entitled under the Agreement to perform the work in question.

The position of the Organization is that Carrier violated

Rule 55 of the Agreement when it allowed another employee (Mr. Curran) to perform trackman service on March 23 and 24, 1984. The Organization alleges that Claimant was the senior employee qualified to perform the service in question, and therefore was entitled to perform that service pursuant to Rule 55, which states "Employees...will, if qualified and available, be given preference for overtime work...on work ordinarily and customarily performed by them, in order of seniority."

The Organization maintains that Carrier's excuse concerning Claimant's lack of availability is baseless. The Organization alleges that Claimant was present between 3:30 P.M. and 4:30 P.M. on March 23, 1984, when the overtime assignment was made. The Organization further argues that even if Claimant were not present at that time, Carrier was still obligated to notify him of the availability of the overtime work, particularly since the work in question was not to begin until 9:00 P.M. on March 23rd. The Organization maintains that Carrier has an obligation to notify the employee entitled to perform service on a particular date, and cites awards which it alleges confirm that position.

Finally, the Organization contends that the compensation requested is not excessive, since Claimant would have been entitled to the time and one-half rate if Carrier had not violated the Agreement.

The position of the Carrier is that the Organization has

failed to establish any basis for the compensation requested. Carrier denies that any provision of the Agreement prohibits the action taken in the present case.

Initially, Carrier argues that Claimant was clearly not "available" when the overtime assignment was made on March 23, 1984, since he left work early on March 22nd and did not report for work on March 23rd. Carrier argues therefore that Claimant was not "available" as required by Rule 55 when the assignment was scheduled on March 23rd. Carrier maintains that Claimant made himself unavailable by marking off on the 23rd, and therefore cannot now claim entitlement under Rule 55 to the work in question. Carrier argues that neither Rule 55 nor any other rule requires it to seek out and find an available employee when one is already on duty.

Finally, Carrier argues that if the Claim is deemed to have merit, it is nonetheless excessive in that it requests compensation at the punitive rate. Carrier maintains that it is well established that an employee may not claim the punitive rate for time not worked, and that therefore Claimant, if entitled to any compensation, would only be entitled to the regular rate.

After review of the record, the Board finds that the Organization's claim must be denied.

The crux of this dispute concerns whether Claimant was

"available" to perform the overtime work on the dates in question. It is uncontroverted that Claimant, had he been available, would have been entitled under Rule 55 to perform the work in question. However, we do not find that Claimant was "available" within the meaning of Rule 55.

Initially, we disagree with the Organization's assertion that the burden of proving Claimant's unavailability rests with Carrier. It is a well established principle that the petitioning party has the burden of proving all material elements of a claim. Thus, it is evident that the Organization has the burden of proving "availability", since it is essential to proving the Rule 55 violation alleged.

In the present case, the evidence indicates that Claimant was not "available" at the time the assignment was issued. It is uncontested that Claimant marked off on March 23, 1984. While Claimant's assertion indicates that he was present at the time the assignment was made, we find that assertion unpersuasive. We cannot find, and the Organization has failed to provide, any reason why Claimant would have been present once having marked off on the 23rd. Further, the Organization has failed to provide any other evidence indicating Claimant's presence at the time in question. Overall, we find that the Organization has failed to establish that Claimant was present on the date in question. Finally, the Organization has failed to provide any contractual support for its contention that Carrier has an obligation to call

an eligible employee. It may be true that in certain circumstances Carrier has a minimum obligation to notify the "correct" employee. However, in a case such as this, where the employee in question had voluntarily marked off on the date in question, we cannot find that Carrier was obligated to notify Claimant and offer him the work. Accordingly, since we find that the Organization has failed to establish that Claimant was "available" for the work in question, we must find that the Claim is unsupported by the Agreement.

AWARD

Claim denied.

  
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Neutral Member

  
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Carrier Member

  
\_\_\_\_\_  
Organization Member

DATE: \_\_\_\_\_

8-26-86