

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36345
Docket No. CL-36672
02-3-01-3-207

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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-12728) that:

On behalf of Claimant Janis Meichsner:

- (a) The Carrier violated the Amtrak-Northeast Corridor Clerks' Rules Agreement, particularly Rule 3-C-2 Paragraph A-1 and others when on May 14, 1999 it abolished TCU Clerk-Typist Position 3WTCT-10 held by N. Edwards and failed to assign the work of handling time cards to another TCU protected position and instead allowed ARASA personnel M. Beall, K. Snoots, M. Jenifer and other non-agreement people to perform these duties on a daily basis. This work has always been done by a TCU covered employee. The other duties of the abolished position were given to the Claimant on her Clerk Steno position in the Deputy Engineer's office.
- (b) Claimant now be allowed three hours pay at the prevailing rate of her position at time and one half for each and every day starting on August 20, 1999 (60 days from the date of this claim) and continuing until this work is returned to a TCU covered position. Three hours a day is the time being spent by the non-covered employees performing these duties. Claimant was and is available and qualified to do this work on overtime and should have been asked.
- (c) This claim has been presented in accordance with Rule 25 and should be 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.

On October 18, 1999, the Organization filed a claim on behalf of the Claimant, arguing that the Carrier violated the parties' Rules Agreement when it failed to offer certain work associated with an abolished position to the Claimant. The Organization argues that Rule 3-C-2 sets forth clear and concise instructions as to disposition of work when a clerical position is abolished. The Rule specifies that such work will be assigned to another position or positions covered by the Agreement at the location where the work of the abolished position is to be performed. The Organization maintains that this Rule does not leave room for interpretation, but instead sets one specific, restricted path that must be followed. The Organization argues that the Carrier has offered only indefensible assertions to support its actions, and the Carrier has chosen to ignore the absolute, prima facie proof of violation.

The Organization emphasizes that all of the work associated with the abolished position, with the exception of time-card duties, were moved to the position occupied by the Claimant. The fact that the time-card duties went to the ARASA Foremen is proof of the violation. Moreover, three ARASA Foremen gave statements identifying time-card duties as part of the work performed by the abolished TCU Clerk-Typist position, and acknowledging that this time-card work now was being done by the ARASA Foremen. The Organization emphasizes that Rule 1(e) expressly provides that Supervisors shall not be used to displace or replace regularly assigned employees or to negate the overtime Rules. The Organization also points to Rule 1(d), which provides that in the case of a reduction in force affecting clerical employees, remaining work shall be performed by employees covered by the Clerical Agreement. The Organization maintains that it has shown that the work at issue has been exclusively performed by

Clerical employees. The Organization contends that the claim should be sustained as presented.

The Carrier denied the claim. The Carrier initially contends that the instant claim is procedurally defective in that it is based on an incident that began on May 14, 1999, but the claim was not filed within 60 calendar days of that date. The Carrier maintains that the claim therefore should be dismissed outright. The Carrier asserts that even giving the Organization the benefit of the doubt, and using August 18, 1999, the claim still is far beyond the time limit of the parties' Grievance Rule.

The Carrier then argues that even if this claim is not dismissed because of this procedural defect, the claim nevertheless should be denied in its entirety because it is without merit or support from the Rules. The Carrier maintains that this is a Scope Rule case, which a number of arbitrators have found to be general in nature. The Carrier additionally argues that although the Organization bears the burden of proof here, it failed to offer any supporting evidence. The mere filing of a claim does not provide a basis on which the claim may be sustained. Moreover, the claim lacks the specificity demanded by arbitral authority, including how the Rules were violated and evidentiary support proving the Rule violations. The Carrier asserts that the claim must be denied because of the Organization's failure to present any evidence or arguments to support its assertion that the Carrier violated the parties' Agreement.

The Carrier emphasizes that a number of arbitrators have found the parties' Scope Rule to be general in nature. In addition, the Carrier points out that the Organization has not presented any evidence of a clear and mutual understanding between the parties that the work at issue ever has been reserved exclusively to members their craft. The Carrier then argues that there is no Rule support for the additional compensation requested in the instant claim. The Carrier maintains that the Claimant has not suffered any monetary loss in connection with the events surrounding this case; the Claimant worked her regular position and was compensated accordingly, so no additional compensation is warranted. The Carrier also asserts that there is no evidence that the alleged violation was of a continuing nature. The Carrier ultimately asserts that the claim should be dismissed and/or denied in its entirety.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board reviewed the procedural argument raised by the Carrier and we find it to be without merit. It is true that the job was abolished on May 14, 1999, and the claim was not filed until October 18, 1999. The parties' Agreement requires that claims be filed 60 days after the alleged wrongdoing. However, the Board finds that this case involves a continuing violation and, therefore, although the claim was not filed until five months after the job was abolished, it was still appropriate for the Organization to file the claim as long as the wrongdoing continued. In the event that the Board finds that the claim is valid and sustains it, we will only award relief dating back 60 days prior to the filing of the claim. However, the Board will not dismiss or deny this claim because of the failure of the Organization to file it before July 14, 1999.

With respect to the merits, the Board reviewed the evidence contained in the record, and we find that the Carrier violated the Agreement when it abolished the TCU Clerk-Typist Position 3WTCT-10 previously held by N. Edwards and failed to assign the work of handling time cards to another TCU clerical position and instead allowed ARASA personnel and other non-agreement people to perform those duties on a daily basis.

The Rule at issue states the following:

"Rule 3-C-2 ASSIGNMENT OF WORK

- (A) When a position covered by this Agreement is abolished, the work previously assigned to such position, which remains to be performed, will be assigned in accordance with the following:
 - (1) To another position or other positions covered by this Agreement when such other position or other positions remain in existence, at the location where the work of the abolished position is to be performed."

It is clear that the above Rule is mandatory in that it states that the work "will be assigned in accordance with the following." The Carrier assigned the work to positions that were not covered by the Agreement at issue. However, the Rule is clear that if the job is abolished, the remaining work should go to a Clerk covered by the Agreement.

The basic Carrier argument against this claim relates to the Scope Rule. However, this is really not a Scope Rule case. The Carrier continues to argue that the

work at issue is not reserved exclusively to TCU-represented employees and that the incidental work proviso is applicable. The Carrier cited numerous Scope Rule decisions which indicate that the work will not be reserved to a particular organization if it is not done so on a system-wide basis.

However, we find that those Scope Rule cases are not applicable here. In this case, the only question is how the remaining duties of the abolished positions were distributed. Did the Carrier do it in accordance with the Rule, or did it not. We find that the Carrier did not assign the duties in accordance with the Rule.

Consequently, the Board finds that the Organization met its burden of proof that the Carrier violated the Agreement when it failed to assign the work of handling time cards to another TCU-covered position. We order that the claim be sustained and that the Claimant be allowed three hours of pay at the prevailing rate beginning on August 20, 1999, and continuing until the work is or was returned to a TCU-covered position.

AWARD

Claim sustained.

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 26th day of December 2002.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 36345

DOCKET NO. CL-36672

NAME OF ORGANIZATION: (Transportation Communications International Union)

NAME OF CARRIER: (National Railroad Passenger Corporation (Amtrak))

On December 26, 2002, the Board issued a sustaining Award which addressed the following claim:

On behalf of Claimant Janis Meichsner:

- (a) The Carrier violated the Amtrak-Northeast Corridor Clerks' Rules Agreement, particularly Rule 3-C-2 Paragraph A-1 and others when on May 14, 1999 it abolished TCU Clerk-Typist Position 3WTCT-10 held by N. Edwards and failed to assign the work of handling time cards to another TCU protected position and instead allowed ARASA personnel M. Beall, K. Snoots, M. Jenifer and other non-agreement people to perform these duties on a daily basis. This work has always been done by a TCU covered employee. The other duties of the abolished position were given to the Claimant on her Clerk Steno position in the Deputy Engineer's office.
- (b) Claimant now be allowed three hours pay at the prevailing rate of her position at time and one half for each and every day starting on August 20, 1999 (60 days from the date of this claim) and continuing until this work is returned to a TCU covered position. Three hours a day is the time being spent by the non-covered employees performing these duties. Claimant was and is available and qualified to do this work on overtime and should have been asked.
- (c) This claim has been presented in accordance with Rule 25 and should be allowed."

The parties are in dispute as to the amount of monies owed the Claimant. The Carrier believes it has complied with the Award and paid the Claimant in full. The Organization disagrees and argues that substantial monies are still owed the Claimant.

The Board determined that when the Carrier abolished the Claimant's position the remaining duties of the position were not properly distributed in accordance with the Agreement. Therefore, we set forth an appropriate remedy account of the Carrier's violation of the Agreement. That remedy was as follows:

"Consequently, the Board finds that the Organization met its burden of proof that the Carrier violated the Agreement when it failed to assign the work of handling time cards to another TCU-covered position. We order that the claim be sustained and that the Claimant be allowed three hours of pay at the prevailing rate beginning on August 20, 1999, and continuing until the work is or was returned to a TCU-covered position."

The aforementioned remedy continues to be correct with a modification. The modification is the Claimant is to be allowed three hours of pay at the prevailing rate beginning on August 20, 1999, for those days the disputed clerical work was done by non-covered employees and continuing until the work is or was returned to a TCU-covered position.

The parties are directed to review the Carrier's records to determine if and when the disputed work was returned to a TCU-covered position. After that determination is made the monetary remedy should be made in accordance with the above stated modification.

Referee Peter R. Meyers who sat with the Board as a neutral member when Award 36345 was adopted, also participated with the Board in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of February 2005.