

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36895
Docket No. CL-37506
04-3-02-3-544**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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-12923)
that:**

- I. (NEC-2107) The Carrier violated the Amtrak-Northeast Corridor Clerks Rules Agreement on April 8, 2001, particularly Rule/s and appendixes but not limited to Rule 4-C-1, Rule 1-Scope paragraph H, Rule 4-E-1, Rule 4-F-1, when it diverted Claimant Frida Costello from her duties as an Usher and assigned her to perform temporary duties as Office Clerk (12:50 PM to 1:20 PM), Information Clerk (1:30 PM to 1:50 PM), and Train Announcer (6:40 PM to 7:10PM).**

Claimant Costello had bid upon and was awarded an Usher Position. When Claimant is assigned to a temporary assignment she is entitled to a higher rate when performing such work. The Carrier has continued to violate Claimant Costello's rights dating back sixty (60) days from this claim. The Carrier has elected not to hire someone but rather to include in her duties a diversion each and everyday. Claimant has not received the higher rate of pay when performing the duties as instructed to do so by the Carrier's Management.

Claimant Costello now be allowed an additional eight (8) hours on account of the diversions dating sixty (60) working days

back from the date of this claim, and be allowed for each and everywork day thereafter on this claim until such violation ceases.

This Claim has been presented in accordance with Rule &7-B-1) of the Off-Corridor Clerks Rules Agreement and Rule 25, and should be allowed.

- II. (NEC-2108) the Carrier violated the Amtrak-Northeast Corridor Clerks Rules Agreement when on work days of MO/TH/FR of April 5, 6, 9, 2001, particularly Rule/s and Appendixes but not limited to Rule 4-C-1, Rule 1-Scope paragraph H, Rule 4-E-1, Rule 4-F-1, when it diverted Claimant Frida Costello from her duties as an Usher and assigned her to perform temporary duties as an Usher and assigned her to perform temporary duties as Office Clerk (12:45 PM to (1:30 PM), Seating Area Attendant (11:45 AM to 12:20 PM). Info Desk Clerk (2:25 PM to 2:55 PM), Train Announcer (6:10 PM to 6:45 PM).

Claimant Costello had bid upon and was awarded an Usher position. When Claimant is assigned to a temporary assignment she is entitled to a higher rate when performing such work. The Carrier has continued to violate Claimant Costello's rights dating back sixty (60) days from this claim. The Carrier has elected not to hire someone but rather to include in her duties a diversion each and everyday. Claimant has not received the higher rate of pay when performing the duties as instructed to do so by the Carrier's Management.

Claimant Costello now be allowed an additional eight (8) hours on account of the diversions dating sixty (60) working days back from the date of this claim, and be allowed for each and every workday thereafter on this claim until such violation ceases.

This Claim has been presented in accordance with Rule (7-B-1) of the Off-Corridor Clerks Rule Agreement and 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.

The Claimant to this dispute was working in a Customer Service Representative (Usher) position at Pennsylvania Station, New York, when the dispute arose. She is covered by the parties' Northeast Corridor Clerical Agreement.

The Claimant was given specific assignment schedules effective October 29, 2000, for Saturday, Sunday and Monday through Friday. The Saturday - Sunday assignment required her to relieve employees on break as follows: Office Clerk (12:50 P.M. to 1:20 P.M.), Information Clerk (1:30 P.M. to 1:50 P.M.), and Train Announcer (6:40 P.M. to 7:10 P.M). The Monday through Friday assignment required her to relieve employees on break as follows: Office Clerk (12:45 P.M. to 1:30 P.M), Seating Area Attendant (11:45 A.M. to 12:20 P.M.), Info Desk Clerk (2:25 P.M. to 2:55 P.M.), and Train Announcer (6:10 P.M. to 6:45 P.M.).

By letters dated April 12, 2001, the Organization asserted that, on April 5, 6, 8, and 9, 2001, the Claimant was diverted from her Usher duties and assigned to perform the temporary duties listed above and that these temporary assignments (diversions) entitled her to higher pay, since the Carrier had improperly chosen not

to assign an additional employee to perform these functions. It cited Rules 4-C-1 (Absorbing Overtime), 1 (Scope), 4-E-1 (Preservation of Rate) and 4-F-1 (Established Rates and Positions) as having been violated. By letters dated May 7, 2001, the Carrier responded to the Organization that its practice of utilizing other Customer Service employees to relieve employees on breaks was a long standing practice and that, since this practice had gone unchallenged for more than ten years, the claims were stale. On the property, the Carrier cited the Doctrine of Laches.

The Organization's appeals on behalf of the Claimant were denied by the Carrier. By letter dated September 14, 2001, the General Chairman progressed the dispute to the Director, Labor Relations. The claim was denied by the Carrier on December 7, 2001. The dispute was then referred to the Board.

The Organization argues that the Carrier violated Rules 4-C-1 (Absorbing Overtime), 1 (Scope), 4-E-1 (Preservation of Rate) and 4-F-1 (Established Rates and Positions) of the current Agreement when it diverted the Claimant from her duties as an Usher and assigned her to perform temporary duties as Office Clerk, Information Clerk, Seating Area Attendant and Train Announcer. It contends that, when the Carrier assigned the Claimant to temporary assignments which were entitled to higher rates of pay, it had the contractual obligation to pay the Claimant at the higher rate when she performed such work.

The Organization further contends that the Carrier violated Rule 4-C-1 because, by incorporating outside duties into the bulletined duties of the Usher position, the Carrier has improperly done away with the potential need for overtime. It maintains that Rules 1(h) and 4-F-1 apply because, as advertised, the preponderance of the work is that of an Usher, yet the incumbent of that position is actually required to work, on a daily basis, higher-rated positions for which no allowance has been made.

The Organization further argues that the controlling language of Rule 4-E, "Employees assigned temporarily or permanently to higher rated positions will receive the higher rates while occupying such positions," requires that the Claimant be paid for every hour that she worked the temporary duties at issue. It maintains that the Carrier's argument that the Claimant was "simply helping" other employees - and is not, therefore, entitled to the higher rates - is without merit.

Finally, the Organization argues that the Carrier's defense of laches does not fit the circumstances involved in this dispute.

The Organization urges that the claim be sustained.

The Carrier argues that the claims of violation of Rules 4-C-1, 1(h), 4-E-1 and 4-F-1 are without merit. It contends that decisions regarding the assignment of work and the necessity for overtime are the prerogative of management. It asserts that the Organization presented no proof that the Claimant was entitled to the higher rates of various positions and the monies claimed.

The Carrier further argues that Rule 4-C-1 was not violated since no overtime was accrued by the Claimant when she relieved various employees for their 30-minute breaks. It contends that the job description for the Claimant's assignment as a Customer Service Representative (Usher) requires her to perform a host of different duties relating to assisting passengers, fellow employees, conductors, on-board service personnel, and even supervisors on occasion. It argues, therefore, that Rule 1 (Scope) was not violated since the job description does not restrict the Carrier from assigning the Claimant to assist other employees at the rate of pay assigned to her Usher position.

The Carrier further argues that the Organization failed to meet its burden of proof in establishing a violation, asserting that "mere assertions" are not proof. Citing authority, the Carrier contends that, because the Organization did not submit any proof that a violation occurred with respect to the claim, it must be dismissed.

The Carrier's final argument is that the Organization has not shown that the Claimant suffered any loss in compensation on the claim date. It contends that no proof was submitted that the Claimant lost any money or actually relieved employees on any higher rated positions on the claim dates. Finally, it contends that the amount claimed is clearly excessive. The Carrier urges that the claim be denied.

The Board is persuaded that the claim on behalf of the Claimant must be denied. It was the Organization's burden to establish the Carrier's violation of the

Agreement. The evidence is insufficient to establish that the Carrier violated any of the cited Rules when it assigned the Claimant to relieve her fellow employees while they took their lunch, restroom and other breaks.

The job description for Customer Service Representative (Usher) requires incumbents to perform diverse duties assisting passengers, fellow employees and on-board service personnel. It specifically states that incumbents "make PA announcements" and that they "will be available to assist supervisors and desk clerk between train assignments and checking tickets." The Claimant was well aware of these aspects of her Usher assignment when she accepted the position.

The language of Rule 4-E-1 that "Employees assigned temporarily or permanently to higher rate positions will receive the higher rates while occupying such position . . ." It is not plausible to argue that Claimant was permanently assigned to a higher rated position, since most of her time was devoted to duties of the Usher position not otherwise compensable as a higher rate. Therefore, the Board must determine whether Claimant was assigned temporarily to a higher rated position. Paragraph (b) defines a "temporary assignment" as one that "contemplates the fulfillment of all the duties and the assumption of all the responsibilities of the position during the time occupied." (Emphases added.) The record does not establish that the Claimant performed the full range of duties and assumed all the responsibilities of any higher rated position. On the contrary, the evidence establishes that she was, as the Carrier described her, merely a "caretaker" when she relieved other employees for their lunch breaks, restroom breaks, etc.

Because the Organization failed to demonstrate through the timely submission of evidence that the Carrier violated any provision of the Agreement, the Board must find in favor of the Carrier.

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 25th day of February 2004.