

****CORRECTED****

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36975
Docket No. CL-37675
04-3-03-3-28

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Kansas City Southern Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the System Committee (GL-12956)
that:

1. Carrier violated Rule 23, 17 and other rules of the Agreement between KSC and TCU on September 28, 1999, when it blanked job #7 held by Ms. Sharon C. Crump and then sent Ms. Crump to another location to work job #34.
2. Carrier shall now compensate Ms. Crump for 8 hours pay at the time and one-half rate. The job pays \$137.22 per day.”

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 facts are undisputed. The Claimant was regularly assigned to Customer Service Representative Position No. 7 at the Shreveport Customer Service Center. Before the start of the Claimant's shift on September 28, 1999, the Manager called the Claimant at home to notify her that the Carrier was blanking her position for the upcoming shift. Next, the Manager directed the Claimant to work the Shreveport Tower (Job No. 34) in the Yard in lieu of her regularly assigned position. The Claimant complied.

On November 24, 1999, the Organization initiated a claim seeking eight hours' pay at the overtime rate because the Carrier allegedly violated Rule 23(s)(2).

Rule 23(s)(2) reads:

"When it is necessary to blank a position covered by the Scope Rule, the following will apply:

* * *

- (2) In the event that any of the assigned duties of the blanked position, other than those specified in (1), are performed the Extra Board employee that would have worked had the position not been blanked will be compensated 8 hours at the pro rata rate. If no Extra Board employee is available and the work is performed by an employee covered by this Agreement, then that employee shall be compensated additional pro rata allowance for actual time away from his assigned work location, however, if the assigned duties of the blanked position are performed by an employee not covered by this Agreement, then the senior qualified employee at the nearest location will receive an additional 8 hours at the pro rata rate. It is understood that all payments specified above will be in addition to any other payments the employee may be entitled to on that date. It is further understood and agreed that the above payment will be automatic to the employee entitled to receive same and that copy of notice of payment will be furnished to the Division Chairman and General Chairman in addition to the employee.

NOTE (1) Definition of each occurrence as it appears above is:

For every train order copied, every message of record including track and/or motor car lineup copied and for message of record transmitted, or switch list or interchange report prepared, a separate penalty will be allowed except that it is agreed that no more than one 8 hour or 3 hour payment, whichever applies, will be allowed any one individual if more than one occurrence occurs at the blanked location during a consecutive two (2) hour period.

NOTE (2) At locations other than an Extra Board Headquarters point if no Extra Board employee is available and it is necessary that part of the duties of the blanked position be performed, Carrier may use an employee from an adjacent station to perform those duties. If an on duty employee is used, that employee shall receive compensation for mileage traveled and shall receive the additional allowance on the minute basis at the pro rata rate of the position worked or his position, whichever be the higher."

The Carrier initially argued that an emergency existed because it lacked a sufficient supply of Extra Board employees. The Carrier further explained that no qualified extra employee was available to work the Shreveport Tower. Thus, it had no choice but to assign the Claimant. Consequently, the Carrier blanked the Claimant's regularly assigned position.

The Board concludes that an emergency did not exist on September 28, 1999. An emergency is a sudden, unforeseeable, and uncontrollable event. (See Third Division, Award 24440.) A short supply of labor does not satisfy the definition of an emergency. *The Carrier can plan and control the level of its manpower.*

The Board finds an anomaly and a dilemma in this claim. The anomaly is that Rule 23(s)(2) addresses the situation where an employee performs the duties of a blanked position. Rule 23(s)(2) provides that the employee who performs the duties of a blanked position (unless an exception applies) is entitled to receive additional compensation because a blanked position is not truly blanked if the some or all of the work of the blanked position is performed. In this case the Carrier blanked the Claimant's Customer Service Representative position. Further, the instant claim is not predicated on who, if anyone, performed the duties of the Claimant's regular assigned

position in the Customer Service Center. Therefore, this claim does not fit within the precise parameters of Rule 23(s)(2).

The dilemma posed to the Board is that the Carrier's unilateral action, with very short notice, of moving the Claimant from her regularly assigned position to a completely different position in another work location obviously contradicts normal workplace practices. The record contains no evidence concerning why the Tower position was vacant. The record also contains no evidence concerning why the incumbent of the Tower position (if an employee was regularly assigned to the position) did not work the position on September 28, 1999. Absent such evidence, it would be speculative for the Board to assume that the Carrier blanked the Shreveport Tower position and then assigned the Claimant to perform the duties of the position. If this occurred, the Organization, as the party who bears the burden of proof, should have presented evidence of the blanking of the Shreveport Tower position on the property. It is also possible that another Agreement Rule not cited by either party covers the instant dilemma.

Because of the anomaly and the dilemma, the Board is constrained from sustaining this claim. The Board stresses that its decision herein is narrowly restricted solely to the facts, evidence, and arguments of this particular claim. Our ruling herein shall not constitute or be cited as a precedent in any future case.

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 21st day of April 2004.