

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38120
Docket No. CL-38451
07-3-04-3-495

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-13058) that:

- (a) The Carrier violated the TCU/CSXT - North Agreement, effective June 1, 1999, particularly, Rules 5, 18, 22, 30, 24, 40, 60, 64 and other Rules, when commencing on or about June 2, through June 7, 2003, they worked claimant Meilak outside her assigned hours (2300-0700 hours) and failed to compensate her at the overtime rate of pay. Also, the Carrier withheld Claimant Meilak from her regular assignment and failed to properly compensate her for those days;
- (b) Claimant was assigned a Clerk/Messenger assignment, effective June 2, 2003, location Selkirk Yard, Selkirk, NY.
- (c) Claimant should now be allowed an equivalent of eight (8) hours overtime pay, based at the rate of her position, commencing on June 2 and continuing for each and every day that she worked outside the assigned hours and/or rest days, until the portion of the violation was corrected on June 10, 2003.
- (d) The claim amounts may be reduced by the appropriate amounts that Claimant Meilak was paid for any involved dates.
- (e) This claim is presented in accordance with Rule 45 and should be allowed as presented.”

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 claim in this matter was initially presented on July 15, 2003. It was denied by Carrier's letter of September 15, 2003. In that denial, Director-Administration D. Dunlavey contended, in sum or substance, that the Carrier had scheduled Claimant M. Meilak for training during daylight hours while she was attempting to qualify on her 11:00 P.M. – 7:00 A.M. Clerk/Messenger position. Specifically, the Carrier reasoned:

“In the interest of safety, Selkirk Yard has had their midnight trick clerk/messengers qualify on daylights. Selkirk Yard can be a dangerous place to work for the unqualified in any craft, the midnight trick even more so due to the hidden dangers multiplied in the dark. For this reason, the midnight trick clerk/messengers are qualified on daylight to afford them the best and safest time to qualify in their new position.”

The Organization appealed the denial by letter dated October 21, 2003. Following the parties' March 16, 2004 claims conference and by letter dated May 15, 2004, the Carrier reiterated its position, and contended that qualifying Clerk/Messengers who would be working the midnight shift on the day shift had been common practice at the Selkirk Yard without claim since split date, June 1, 1999. Moreover, the Carrier contended that no Rule had been violated by requiring the Claimant to report for training on the first shift during her qualifying period. It further contended that “. . . the Claimant was not performing service, but qualifying.” In addition, the Carrier stated that the Claimant had lost no pay or benefits as a result of the temporary rescheduling, so the compensation sought was excessive and unwarranted.

The Organization responded to the Carrier's letter on August 5, 2004. It disputed the Carrier's statement that the practice at issue had continued at Selkirk Yard without claim since split date, June 1, 1999. As evidence, the Organization attached a claim filed on January 24, 2000, which it characterized as involving the same issue. The Organization further insisted that the Carrier caused the Claimant to work outside her assigned hours and failed to compensate her for holding her off her regular assignment during the period at issue. In particular, the Organization alleged that the Carrier violated Rule 64 – Employees Diverted From Assignments which reads, in relevant part, as follows:

- “(a) Regular assigned employees will not be required to perform service on other than their regular positions except in emergencies. When they are required to perform service on other than their regular position, they will be paid the rate of the position they fill, but not less than the rate of their regular position and will be allowed actual necessary expenses while away from their regular positions. Regular assigned employees, diverted to perform service on other than their regular positions within the same terminal district or town in which their regular positions are located, will be paid at straight time rate for only the necessary additional time enroute which would not be incurred had they remained on their regular positions and will be reimbursed for only necessary additional expenses.
- (b) Employees required to perform service under the provisions of this Rule shall retain the rest days assigned to their regular positions and if required to perform service on such rest days they shall be paid at the rate of time and one-half.
- (c) Regular assigned employees diverted under this Rule shall be paid at the time and one-half rate for all time worked outside of the assigned hours of their regular position.”

Based on the foregoing language, the Organization contended that the Claimant clearly suffered lost compensation.

The Carrier refuted the Organization's position by letter dated September 29, 2004. At the outset, it denied that the claim cited by the Organization and attached to its August 5, 2004 letter involved the same issue as contested here. Specifically, the

Carrier pointed out that the claim cited involved an employee who bid to the Extra Board, but was held on his regular third shift position. By contrast, the Carrier reaffirmed its position that although the Claimant here was regularly assigned to a third shift position, she was not qualified on any third shift driving position. Therefore, she was instructed to "train," i.e., not "perform service" on the first shift. The Carrier also cited several employees who had been trained in the same manner (i.e., third shift employees who qualified by training on the first shift). Once again, the Carrier pointed out that this practice had gone on in Selkirk Yard without claim since split date, June 1, 1999.

Further, with respect to the Organization's assertion that the Carrier violated Rule 64, the Carrier countered that the Claimant could not be termed as having been diverted, stating:

"In order for any employee to be diverted, that employee must first be qualified to work the position he or she is diverted to. That is not the case here. This individual was being given the most effective and the safest training but as of the claimed dates she was not qualified on anything.

* * *

Since this individual is not qualified, she would not be eligible to be called for any overtime. Her only option would be to qualify on third shift. She was paid on first shift the equivalent of what she would have made qualifying on third shift."

The Board carefully studied both the relevant contract language and the evidence presented by both parties in this matter. Clearly the provision most relevant to this case is Rule 64, cited above. The situation under which the Carrier elected to move the Claimant, however temporarily, from the third shift to the first shift did not constitute an "emergency." Nevertheless, the Carrier's rationale for training third shift Clerk/Messengers during the day, supported in part by evidence of its long-standing unrefuted past practice in this regard, is neither unreasonable nor pretextual. Nothing in this record suggests that the Claimant was financially disadvantaged in any way by the required training assignment. Accordingly, we find, in the peculiar circumstances of this case, that the Carrier did not violate Rule 64.

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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 15th day of March 2007.