

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 38354  
Docket No. CL-39376  
07-3-06-3-52

The Third Division consisted of the regular members and in addition Referee Martin H. Malin 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 TCU (NEC-2497) that:

1. The Carrier violated the rules of the parties' Agreement dated July 27, 1976, made effective September 1, 1976, particularly Rules 1(c and e), 1-B-1, 4-A-4(1), 4-C-1, 9-A-1, Appendix E, Articles 3(c), 5(a), 15(a), Appendix H-Articles 1(a and b), IV (a and b), among other applicable rules, when it removed regularly assigned Ticket Window Seller E. Stowe and suspended her regular ticket window duties to absorb overtime work and required her to perform duties of completely different position of Cashier, instead of properly filling the day to day vacancy properly by calling and then assigning employee P. Jannes, the incumbent of the vacancy at the time and one half rate of pay.
2. The Carrier shall be required to compensate employee P. Jannes for eight (8) hours at time and one-half rate of pay based on the rate of position daily Window ticket Seller for both days, April 17 and 18, 2004 account of the described violation.
3. This claim has been presented and progressed in accordance with the provisions of Rule 25 of the Corporate Agreement and

Rule 7-B-1 of the Amtrak (NEC) Agreement 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 April 13, 2004, S. Jones, the incumbent of position TAC-12, a partially exempt position, notified the Carrier that she was having gall bladder surgery and would be off for an indefinite period of time. While awaiting completion of paperwork for a medical leave of absence, she marked off sick each day. On April 14, 2004, by memo, the Carrier appointed Ticket Clerk Stowe to the position on a temporary basis, effective April 15, 2004. On April 25, 2004, Ms. Jones had recovered sufficiently to return to work. The Organization contends that the Carrier was obligated to fill the position under the procedures of Appendix E, failed to do so, and the Claimant is entitled to compensation for the lost overtime opportunities on April 17 and 18.

Partially exempt positions are exempt from Rule 2-A-1, the Bulletin and Assignment Rule, but they are not exempt from Appendix E. In Public Law Board No. 4304, Award 32, the Board held that the Carrier violated the Agreement when it made a temporary assignment to cover a two day vacancy in a partially exempt position that resulted from the incumbent's vacation. The Board held that the Carrier was required to follow Appendix E, distinguishing two days of overtime from a temporary assignment.

The instant case differs significantly from Public Law Board No. 4302, Award 32. In the instant case, the incumbent advised the Carrier that she would be absent for an indefinite period of time for surgery and recovery. She was seeking a medical leave of absence and the Carrier could reasonably believe that her absence would be of more than 30 days duration. Although the Carrier had a practice of posting openings in partially exempt positions, the Agreement did not require it to do so. We find that under the circumstances, the Carrier did not violate the Agreement by treating the absence of the incumbent for an indefinite period of time as creating a temporary assignment instead of creating a short-term vacancy to be filled by overtime. With perfect hindsight, we can say that the incumbent missed only nine days and the position could have been covered as a vacancy under Appendix E, but the Carrier's actions must be judged by what it knew and reasonably could have anticipated at the time that it acted.

**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 5th day of September 2007.