Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29766
Docket No. CL-29532
93-3-90-3-471

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
(
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10503) that:

(CARRIER'S FILE NO. TCU-TC-3153; ORGANIZATION'S FILE NO. 393-C9-037)

1. The Carrier acted in an arbitrary and capricious manner and in violation of Rules 2, 5, 6, 11, 12, 13 and Memorandum of Agreement No. 2, Part 4, among other rules of the Agreement, when it established two (2) new positions in a new job category at the Revenue Accounting - West office in Chicago and assigned to those positions Claimants, Mr. Timothy Cagney (who is regularly assigned as a Lead Accounting clerk) and Mr. Jeffrey Smith (who is regularly assigned as an Accounting clerk); and failed to negotiate a rate for the new positions in the new job category and failed to properly bulletin the new positions.

2. The Carrier shall be immediately required, in addition to the eight (8) hours pro-rata pay they receive for their regular Accounting clerk jobs, to compensate Claimant eight (8) hours at the overtime (hours and one-half) rate to be negotiated by the parties for their work on the new positions. Such pay is to be computed to start on or about January 21, 1989 and continue until the violations are corrected and the dispute settled."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

On or about January 23, 1989, the Carrier assigned Claimants, a Lead Accounting Clerk and an Accounting Clerk in the Carrier's Revenue Accounting-West Office in Chicago to perform certain computer program development work called macro programming. Claimants modified existing software programs by creating new menus or paths to adapt the programs to the department's needs. Claimant Cagney performed personal computer related tasks to achieve a more efficient system for processing and controlling revenue items. Claimant Smith helped write the Sales Accounting Documentation Manual, a large book of instructions on how to operate a sophisticated computer program.

Thus, the Organization proffered sufficient evidence that Claimants were performing computer program development work as opposed to mere data entry tasks.

The Organization submits that the Carrier's assignment of these additional duties to Claimants was analogous to establishing completely new positions distinct from Lead Accounting Clerk and Accounting Clerk. Therefore, the Organization asserts that the Carrier should have bulletined two new positions in accord with Rule 6 and it should have negotiated with the Organization concerning the rate attached to those positions per Rule 11(d).

The Carrier raises a number of defenses. First, the Carrier submits that Claimants voluntarily performed the additional work because they were very familiar with personal computers and personal computer applications. Contrary to the Carrier's assertion, the written communications (memorandums) between Claimants and their supervisors in January, February and March, 1989, demonstrate that the Carrier's supervisors actually assigned the macro programming tasks to Claimants. The Carrier correctly argues that they were told to cease performing the work at the end

of March 1989. One Claimant continued to do the work through May 1989, without proper authorization.

Second, the Carrier contends that the disputed work is beyond the applicable Scope Rule. However, the Scope Rule is irrelevant to this case because regardless of whether or not the work is scope-covered the Carrier, as a matter of fact, assigned the work to Claimants. Even if the Carrier could have assigned the work to another craft employee (and the Board does not express any opinion on whether the work is exclusively relegated to clerical employees), Claimants nonetheless, performed the work at the Carrier's behest through March 1989.

Third, the Carrier avers that the tasks were related to Claimants' ordinary duties listed on the job description. We disagree. The duties listed on the job description are filing, typing, data entry and various accounting functions. Neither macro programming nor computer software development functions relate to these duties. The disputed work was over and above the normal duties assigned to Claimants' positions.

Fourth, the Carrier vigorously argues that this Board lacks jurisdiction to determine the pay rate for a position. Pay rates can only be set through Section 6 of the Railway Labor Act. To some extent, this defense is valid. This Board lacks the jurisdiction to set a pay rate for a position because not only does Rule 11(d) require that the pay rate be set through negotiations, but also wages are a product of collective bargaining under Section 6 of the Railway Labor Act. See Fourth Division Award 4800. However, the Board has the authority to determine if the Carrier breached Rules 6(a) and 11(d) by its failure to bulletin a new position and negotiate with the Organization over the rate of pay.

Based on the evidence of record, we find such a violation. Once the Carrier assigned these new computer development tasks to Claimants, it should have negotiated with the Organization over a new rate of pay for what were really new positions. During the period from January 23 to March 31, 1989, Claimants were <u>de facto</u> placed in positions distinct from their regular jobs and these positions lasted for more than thirty days. While we find a violation, this Board lacks the authority to fix a pay rate for the <u>de facto</u> positions. Also, if the Carrier had properly bulletined the positions, Claimants may or may not have been the successful applicants. Thus, we cannot extend any monetary remedy to Claimants.

Award No. 29766
Docket No. CL-29532
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A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin rh
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.

**LABOR MEMBER'S CONCURRENCE AND DISSENT TO THIRD DIVISION AWARD 29766, DOCKET CL-29532 (REFEREE J. LaROCCO)**

The case at bar requires Concurrence and Dissent. We are in agreement with the Neutral wherein he determined that on or about January 23, 1989, the Carrier assigned Claimants a Lead Accounting Clerk and Accounting Clerk in the Carrier's Revenue Accounting-West office in Chicago to perform certain computer program development work called macro programming. Contrary to the Carrier's assertion this work was not data entry. The Claimants were working as developers, using the macro program instructions of the major programs to make the programs conform to the needs of the department. One Claimant performed personal computer related tasks to achieve a more efficient system for processing and controlling revenue items while the other assisted in writing a Sales Accounting Documentation Manual (instructions on how to operate a sophisticated computer program).

The Referee correctly concluded:

> **"Thus, the Organization proffered sufficient evidence that Claimants were performing computer program development work as opposed to mere data entry tasks."**

He then went on to appropriately dispense with three of the Carrier's arguments, but unfortunately erred when it came to their fourth defense. It is at this point we must separate from the Majority Opinion and vigorously Dissent.

With respect to this fourth defense the Referee incorrectly determined in part the following:

> **"Fourth, the Carrier vigorously argues that this Board lacks jurisdiction to determine the pay rate for a position. Pay rates can only be set through Section 6 of the Railway**

**Labor Act. to some extent, this defense is valid. This Board lacks the jurisdiction to set a pay rate for a position because not only does Rule 11 (d) require that the pay rate be set through negotiations, but also wages are a product of collective bargaining under Section 6 of the Railway Labor Act. See Fourth Division Award 4800. However, the Board has the authority to determine if the Carrier breached Rules 6 (a) and 11 (d) by its failure to bulletin a new position and negotiate with the Organization over the rate of pay.**

**Based on the evidence of record, we find such a violation. Once the Carrier assigned these new computer development tasks to Claimants, it should have negotiated with the Organization over a new rate of pay for what were really new positions. During the period from January 23 to March 31, 1989, Claimants were de facto placed in positions distinct from their regular jobs and these positions lasted for more than thirty days. While we find a violation, this Board lacks the authority to fix a pay rate for the de facto positions. Also, if the Carrier had properly bulletined the positions, Claimants may or may not have been the successful applicants. thus, we cannot extend any monetary remedy to Claimants."**

The Referee has disregarded the record in this dispute wherein it is clear that the Organization never asked this Board to set pay rates for the Claimants' position. We instead requested that if the Board determined that the Claimants had been taken off their regular positions by the Carrier and assigned new work the Carrier was obligated to bulletin the new positions as set forth in the first sentence of Rule 6(a) and because they did not do so they violated Rule 6 in conjunction with Rule 11 (d). The remedy for this violation as set forth in our Statement of Claim was found in Memorandum of Agreement No. 2 Part 4 which states:

> **"If an employe works two assignments in one day, he receives straight time pay for his assignment and time and one-half for eight (8) hours for the other assignment."**

The Organization never asked this Board to set new pay rates we simply requested that when the Claimants worked on their position and on the same day were required to work on another assignment

they were entitled to be paid in accordance with the aforementioned Rule. Thus the remedy was very simple, the Carrier can choose not to negotiate and instead pay the claim violation on a continuous basis until resolved.

Last, but not least the Referee suggests that if the job had been properly bulletined the Claimants may not have been the successful applicants. Aside from being speculative the argument was never raised by the Carrier and should not have been considered in denial of proper monies to the Claimants.

The Award is correct in determining that the Carrier violated the Agreement, but it fails in providing relief which only encourages the Carrier to again attempt to violate the Agreement. The Board should have followed those better reasoned Third Divisions Awards such as 9813, 10051, 11701, 12227, 12374, 14732, 16024, 20311, 20476, 21434, 21532, 21663 and 23086 to name just a few which determined that the Board has authority and obligation to impose proper relief, if for no other reason than to uphold the integrity of the Agreement.

For the foregoing reasons Award 29766 requires Concurrence and Dissent.

Respectfully submitted,

William R. Miller

William R. Miller

Date: September 20, 1993