

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33403
Docket No. CL-34185
99-3-97-3-672**

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

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11850) that:

(a) The Carrier violated the Clerks' Rules Agreement effective July 21, 1972, as revised, particularly Rules 6, 14, and other rules when on August 30, 1995, (effective August 31, 1995) they force assigned Claimant Wilsey to Material Control Clerk position, tour of duty various, location Material Control - Turbo Facility, Rennsellaer, NY, instead of force assigning the senior qualified unassigned employee, Norman L. Jette to the position.

(b) The Carrier improperly considered Claimant Wilsey as the senior unassigned employee, when in fact Clerk Jette was the senior unassigned employee, as he did not own a regular assignment on the closing date of the initial advertisement of Material Control Clerk, (BR95-013), August 22, 1995.

(c) Claimant Wilsey should now be allowed eight (8) hours punitive pay based on the hourly rate of \$15.46, commencing August 31, 1995, or the first day she covered the involved assignment, and continuing for each and every day thereafter, until this claim is resolved, on account of this violation.

(d) Claimant Wilsey should also be allowed the difference in earnings that senior unassigned Clerk earned as the most senior unassigned employee, which Claimant Wilsey would have otherwise earned, had the Carrier not made the improper assignment.

- (e) Senior Clerk Jette should be considered the most senior unassigned employee and should be assigned to the involved position.
- (f) This claim has been presented in accordance with Rule 25 and should be allowed.
- (g) Claim is further made that the provisions of Rule 25 were violated when no denial was timely issued, thus the claim is payable 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.

On August 30, 1995, effective August 31, 1995, Carrier forced assigned Claimant to position of Material Control Clerk. Claim was filed by the Vice General Chairman with the Commissary Supervisor on October 12, 1995. After 60 days had passed with no response from Carrier, the Vice General Chairman listed claims in a letter sent to the Division Manager Labor Relations on December 18, 1995. The instant claim was listed in that letter. Carrier responded to the Organization on December 28, 1995, and a conference was scheduled for January 10, 1996. That conference was postponed and was ultimately held on February 14, 1996.

On January 23, 1996, the Manager of Terminal Services responded to the initial (October 12, 1995) claim. In that letter he stated in pertinent part:

"Ellen Rosenberg from Labor Relations has called seeking paperwork on this claim as she has received your appeal on its denial. I cannot locate the

paperwork related to this claim in looking through Mr. Connors' office. Therefore I have reconstructed the answer and am sending it to you with a copy to Ms. Rosenberg. If you have your copy of the denial, please advise Ms. Rosenberg. If you do not, please accept this reconstruction due to the extenuating circumstances involved here."

The "extenuating circumstances" to which this letter refers is the fact that Carrier's Officer, Mr. Connors, to whom the initial claim had been made, had shortly thereafter become seriously ill and, subsequently, passed away.

The Organization has stated that it is not presenting the merits of this claim before the Board. Therefore will make no comment on that subject. Rather, the Organization claims that the Carrier violated the Agreement when it failed to respond to the original claim within the time limits provided by Rule 25 of the Agreement. That Rule provides in pertinent part:

"(a) . . . Should any such claim or grievance be disallowed, the supervisor shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee(s) or the representative) in writing of the reasons for such allowance. If not so notified, the claim or grievance shall be allowed as presented."

In the peculiar facts of this case, it is understandable that Carrier's response to the Organization's claim might have been delayed. However, the delay in this case was lengthy, in part as a result of Carrier's difficulty with succession planning and record keeping. Accordingly, the Board finds that Carrier has a limited liability for the claim as presented; to wit, from the date of the incident (August 31, 1995) until it finally responded to the claim on January 23, 1996.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 13th day of July 1999.

DISSENT
TO
INTERPRETATION NO. 1
OF THIRD DIVISION AWARD NO. 33403
(REFEREE E. C. WESMAN)

Docket CL-34185 which subsequently became Award No. 33403 was presented to the Board by the Organization on the singular issue that the Carrier had violated the time limits of Rule 25 – Grievances. On page 3 of the Award the Board acknowledged such when it stated the following:

“The Organization has stated that it is not presenting the merits of this claim before the Board. Therefore will make no comment on that subject.”

Review of the Award indicates that the Board never addressed the merits, but only examined the question of whether or not the Carrier had violated Rule 25. The Board ruled that the Carrier violated the time limit rule and in the last sentence of the Award the Board determined the remedy to be the following:

“Accordingly, the Board finds that Carrier has a limited liability for the claim as presented; to wit, from the date of the incident (August 31, 1995) until it finally responded to the claim on January 23, 1996.” Underlining our emphasis

The Award was explicit as it stated that the Carrier owed the Claimant from August 31, 1995 until January 23, 1996, eight (8) hours at the punitive rate per day. **The Award offers no rationale nor does it suggest that the Carrier’s period of liability might be something less.**

Nonetheless, the Carrier chose to ignore the clear language of the Award and instead paid the Claimant from August 31, 1995 until November 11, 1995. It took the position that because the Claimant voluntarily bid off the aggrieved position and was assigned to another position on the latter date that its liability ceased on that date. Simply stated it argued that based upon the request set forth in the language of Paragraph (c) in the Statement of Claim the dispute had been resolved because the merits of the issue were no longer debatable.

It was the position of TCU that the Carrier still owed the Claimant for the period of November 12, 1995 until January 23, 1996 because the Rule 25 violation had not been corrected. Because of the parties disagreement the Board was requested to issue an Interpretation to Award 33403.

With its Interpretation No. 1 the Board has now compromised the findings of Award 33403 that the Carrier violated Rule 25 by turning to the merits of the dispute to resolve a time limit issue. It stated:

“...A review of the facts of this case indicates that the Claimant worked the aggrieved position (Inventory Clerk) until November 11, 1995. On that date

she displaced into a Ticket Accounting Clerk position at the higher rate of pay.

In light of that fact, the Board finds that the instant claim was actually "resolved" as of November 11, 1995. After that date, the Claimant was not working at a disadvantaged rate, and therefore, the claim became moot. Accordingly, the Claimant's back pay should be awarded from the date of the incident (August 31, 1995), until it was "resolved," as is requested in paragraph (c) of the Organization's "Statement of Claim" (supra, at page 1); that is November 11, 1995."

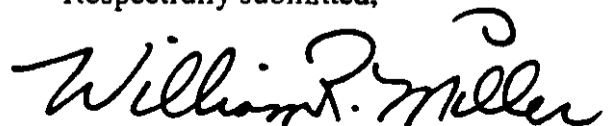
A comparison between the Award and its Interpretation leads to the inescapable conclusion that the Board has fractured its original decision by buying into a "de novo" argument which it never addressed in the Award, that being that the merits should somehow determine whether or not the Carrier violated the time limits. Review of the Award indicates the Board never determined whether or not the Carrier violated Rules 6 and 14 of the Agreement as they pertained to the merits of the dispute. Instead it only addressed the Carrier's time limit violation of Rule 25 because that was the only issue presented to the Board. In its Interpretation it has now incorrectly decided that because the Carrier allegedly stopped violating Rules 6 and 14 on November 11, 1995, that cured its subsequent violation of Rule 25. Even assuming for the sake of argument that Carrier ceased violating Rules 6 and 14 on November 11, 1995, that does not correct the violation of Rule 25. The time limit issue is separate from the merits. Alleged resolution of the merits does not resolve the time limit issue and to suggest such is contrary to a legion of Awards too numerous to cite as well as the Award itself. National Disputes Committee Decision No. 16 in its discussion of a Carrier's time limit violation perhaps stated it best when it wrote:

"...receipt of the carrier's denial letter...stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement."

In the instant dispute the Carrier's violation of Rule 25 ceased on January 23, 1996, it did not cease on November 11, 1995, when the Carrier allegedly stopped violating Rules 6 and 14. The Neutral had it correct in the original Award, but with the Interpretation has allowed the Carrier a "windfall withholding" of monies owed the Claimant.

In summation we would suggest that the Interpretation is comparable to a lifeboat set adrift from the mother ship; the Award which has lost its way in the Carrier's hurricane of hyperbolic assertions not properly before the Board. Therefore, we strenuously Dissent to Interpretation No. 1 of Award No. 33403.

Respectfully submitted,



William R. Miller
TCU Labor Member, NRAB
July 20, 2000

SERIAL NO. 382

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

INTERPRETATION NO. 1 TO AWARD NO. 33403

DOCKET NO. CL-34185

NAME OF ORGANIZATION: (Transportation Communications International Union

NAME OF CARRIER: (National Railroad Passenger Corporation

The Award states in pertinent part, “. . . the Board finds that Carrier has a limited liability for the claim as presented; to wit, from the date of the incident (August 31, 1995) until it finally responded to the claim on January 23, 1996.”

Rule 25 reads:

“(a) All claims or grievances other than those involving Discipline (Rule 24) must be presented in writing by or on behalf of the employee (s) involved, to the supervisor within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the supervisor shall, within sixty (60) days from the date same as filed, notify whoever filed the claim or grievance (the employee (s) or the representative) in writing of the reasons for such disallowance. If no so notified, the claim or grievance shall be allowed as presented.”

It is the Organization's position that Claimant is due compensation, as stated in the Award, August 31, 1995 until January 23, 1996.

INTERPRETATION:

The Parties have requested that the Board render an Interpretation of the above Award. A dispute has arisen regarding the proper date for calculation of the quantum

of back pay to be awarded. A review of the facts of this case indicates that the Claimant worked the aggrieved position (Inventory Control Clerk) until November 11, 1995. On that date she displaced into a Ticket Accounting Clerk position at the higher rate of pay.

In light of that fact, the Board finds that the instant claim was actually “resolved” as of November 11, 1995. After that date, the Claimant was not working at a disadvantaged rate and, therefore, the claim became moot. Accordingly, the Claimant’s back pay should be awarded from the date of the incident (August 31, 1995), until it was “resolved,” as is requested in paragraph (c) of the Organization’s “Statement of Claim” (supra, at page 1); that is, November 11, 1995.

Referee Elizabeth C. Wesman who sat with the Division as a neutral member when Award 33403 was adopted, also participated with the Division in making this Interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of July, 2000.