

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33512
Docket No. CL-34462
99-3-98-3-72**

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 (AMTRAK)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11933) that:

I. Claim of the System Committee of the TCU (AM-934) that:

The following claim is hereby presented to the Company on behalf of Claimant G. J. Paulsen.

(a) The Carrier violated the July 21, 1972, as revised, Amtrak Corporate Clerical Rules Agreement, particularly Rules 7, 14 and other Rules, when it failed to call and work Claimant Paulsen for position of Baggage person, hours 4:00 p.m. - 12:00 Mid., location Albany/Rensselaer Station, Rensselaer, NY, on June 4, 1996, (vice V. Hunter) and instead allowed and permitted unassigned clerical employee Stan Zeh who was assigned to a short vacancy at Hudson, New York to cover same.

(b) Claimant Paulsen should now be allowed eight (8) hours overtime pay based on the pro-rata daily rate of \$123.68 for June 4, 1996, on account of this violation.

(c) Claimant was Senior qualified, was available and should have been called and worked in accordance with the provisions of the Rules Agreement.

(d) This claim has been presented in accordance with Rule 25 and should be allowed.

II. Claim of the System Committee of the TCU (AM-935) that:

The following claim is hereby presented to the Company on behalf of Claimant, G. J. Paulsen

(a) The Carrier violated the July 21, 1972, as revised, Amtrak Corporate Clerical Rules Agreement, particularly Rules 7, 14 and other Rules, when it failed to call and work Claimant Paulsen for position of Baggage person, hours 4:00 p.m. - 12:00 Mid., location Albany/Rensselaer Station, Rensselaer, NY, on May 7, 1996, (vice V. Hunter) and instead allowed and permitted unassigned clerical employee Stan Zeh who was assigned to a short vacancy at Hudson, NY, to cover same.

(b) Claimant Paulsen should now be allowed eight (8) hours overtime pay based on pro-rata daily rate of \$123.68 for May 7, 1996, on account of this violation.

(c) Claimant was Senior qualified, was available and should have been called and worked in accordance with the provisions of the Rules Agreement.

(d) This claim has been presented in accordance with Rule 25 and should be allowed.

III. Claim of the System Committee of the TCU (AM-943) that:

The following claim is hereby presented to the Company on behalf of Claimant, G. J. Paulsen.

(a) The Carrier violated the July 21, 1972, as revised, Amtrak Corporate Clerical Rules Agreement, particularly, Rules 7, 14 and other Rules, when it failed to call and work Claimant Paulsen for position of Material Control Clerk, hours 4:00 p.m. - 12:00 Mid., location Material Warehouse, Turbo Facility, Rensselaer, New York, on October 15, 1996, and instead allowed and permitted unassigned clerical employee, K. Abaire, who was assigned to a Ticket Clerk - "short vacancy" at Rhinecliff Station, Rhinecliff, New

York, and on the assigned rest days, to cover the Material Control Clerk position.

(b) Claimant Paulsen should now be allowed eight (8) hours overtime pay based on the pro-rata daily rate of \$123.68 for October 15, 1996, on account of this violation.

(c) Claimant was senior qualified, was available and should have been called and worked in accordance with provisions of the Rules Agreement.

(d) This claim has been presented in accordance with Rule 25 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.

In the case at hand the Organization alleges that the Carrier violated Rule 7 - Short Vacancies, and Rule 14 - Overtime, of the Agreement when it failed to call the Claimant and instead assigned an unassigned employee to a short vacancy at Hudson, New York.

The Rules at issue read in pertinent part as follows:

“RULE 7 - SHORT VACANCIES

- (a) Vacancies of thirty (30) calendar days or less duration are considered “short vacancies” and may be filled without bulletining.

NOTE: When there is reasonable evidence that a vacancy will extend beyond the thirty (30) calendar days time limit, it shall be bulletined as provided in Rule 6.

When short vacancies are filled, they shall be filled in the following order of precedence:

(1) By calling the senior qualified unassigned employee available at the straight time rate not then filling some other position. (Such unassigned employee not having claim more than forty (40) straight time hours in his workweek.)

(2) By using the senior qualified regularly assigned employee at the location who has served notice in writing of his desire to work such assignment for the duration of the vacancy.

(3) By the hiring of a new employee.

- (b) An employee filling a short vacancy shall assume the rest days of the assignment of the short vacancy.”

* * *

“RULE 14 - OVERTIME

- (a) Except as otherwise provided, time worked in excess of eight (8) hours, exclusive of the meal period, on any workday shall be considered overtime, and paid for on the actual minute basis at time and one-half rate. . . .”

In its initial response to the Organization, the Carrier maintained that the employees actually called (Mr. Zeh and Ms. Abaire) were the senior qualified available

unassigned Clerks at the time the position needed to be filled. According to the Carrier, in all three instances, the employee called had not worked 40 hours in his/her work week, and was, therefore the proper employee to fill the vacancy, in compliance with Rule 7, Section 1. The Carrier's selection of Mr. Zeh and Ms. Abaire is explained again at length in its letters of November 29, 1996, December 4, 1996, and February 7, 1997.

The Board has carefully reviewed the record and finds that the Organization has not shown that the Carrier's explanations for selecting the employees at issue is in any way a violation of either Rule cited above.

In a similar case Second Division Award 10054 held:

"The claim is not supported by probative evidence and thus must be deemed as mere assertion of violation without the proof required. The Carrier established the need for rearranging shift assignments in accord with its right to arrange its forces and manage its business in accordance with operational needs. Lacking proof that Carrier failed to meet its responsibilities under the Agreement in making the changes in shift assignments the claim must be denied. The same principles are involved here as in Second Division Award 3630 as follows:

'It is a fundamental principle of the employer-employee relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law. Contractual surrender in whole or in part of such basic attribute of the managerial function should appear in clear and unmistakable language.

The several divisions of this board have also consistently recognized that the petitioning organization bears the burden of proving that the carrier has surrendered its fundamental rights by agreement"

The Board finds that the Organization has failed to provide any substantive proof that the Carrier violated the Agreement. The Board dismisses this claim for lack of clarity of proof.

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AWARD

Claim dismissed.

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 22nd day of September 1999.

**LABOR MEMBER'S DISSENT TO
THIRD DIVISION AWARD 33512 , DOCKET CL-34462
(REFEREE E. C. WESMAN)**

Dissent to this Award is required because the Majority has ignored a portion of the record which leads to its ill conceived decision.

On page four the Majority buys into the Carrier's argument when it states that Clerks Zeh and Abaire **". . . were the senior qualified available unassigned Clerks at the time the positions needed to be filled."**

It then incorrectly concludes the following:

"The Board has carefully reviewed the record and finds that the Organization has not shown that the Carrier's explanations for selecting the employees at issue is in any way a violation of either Rule cited above."

Carefully reviewed the record in this instance is best described as **"hyperbole"**. Rule 7(a) states:

"When short vacancies are filled, they shall be filled in the following order of precedence:

(1) By calling the senior unassigned employee available as the straight time rate not then filling some other position . . ."

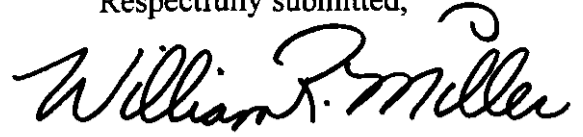
(Underlining our emphasis)

The key phrase is **"not then filling some other position"**. The unrefuted facts as set forth in TCU's letters of October 21, 23 and December 3, 1997 (TCU Exhibit "E" pages 1 - 3) are that in Case No. 1 and 2 Clerk Zeh was already assigned to a short vacancy on Position HUD - 2 and in Case No. 3 Clerk Abaire who had been filling the vacant position at Rhinecliff, N.Y., was removed to fill a vacancy at Material Control. The Rhinecliff position remained vacant and was filled with another unassigned Clerk. TCU also provided the Board with copies of the respective Call Sheets (TCU Exhibits "F1", "F2" and "F3" which clearly proved that Zeh and Abaire were not available for the three overtime vacancies because they were assigned to short vacancies.

It is unfortunate that material and arguments that were raised on the property were not given the proper consideration they should have been given in this dispute. We expected better from an experienced Majority. This Award ignores the facts of record and because of such it cannot be considered precedential.

For the aforementioned reasons, I must strongly Dissent.

Respectfully submitted,

A handwritten signature in cursive script that reads "William R. Miller". The signature is written in black ink and is positioned above the printed name and affiliation.

William R. Miller
TCU Labor Member, NRAB
September 22, 1999