

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35752
Docket No. CL-36336
01-3-00-3-557**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 Organization (GL-12636) that:

1. The Carrier acted arbitrarily and in an unfair manner violating Rules 11, 14, and other related rules of the agreement when on August 18 and 23, and September 15 and 23, 1998, the Carrier refused to compensate Claimant Edward Rogers at the ticket by mail clerk (TBM) rate of time and one-half while performing temporary service at overtime as a janitor and station labor in the building maintenance department of Chicago Union Station.
2. The Carrier shall be required to immediately compensate the Claimant the difference in rate of pay from the janitorial overtime rate, which the Claimant was paid, to the TBM clerk rate of time and one-half, the higher rate that the Claimant should have been paid for the above-mentioned dates.
3. The Carrier shall be required to compensate the Claimant at the higher rate of pay beginning August 18, 1998, and continuing until this claim is honored and this dispute is settled on any position that the Claimant is temporarily assigned to at overtime.”

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 October 12, 1998, the Organization filed a claim on behalf of the Claimant, Edward Rogers when the Carrier refused to compensate him at the TBM Clerk overtime rate of pay and reduced his rate for performing temporary service as a Janitor and Station Labor on August 18 and 23 and September 15 and 23, 1998. The Organization maintains that under Rule 11, employees temporarily assigned to positions in a lower-rated job category shall not have their wage rate reduced. The Organization points out that the Claimant is regularly assigned as a TBM Clerk and applied to work overtime in the janitorial department as a Station Labor and Janitor, and the Carrier has recognized the Claimant as a qualified Janitor and Station Labor because of the fact that it called him repeatedly to work in that capacity. The Organization asserts that the Carrier is required to compensate the Claimant the difference in rates of pay from the Janitorial overtime rate to the TBM Clerk rate beginning August 18, 1998, and continuing until settlement. The Carrier initially denied the claim, but later agreed that the claim had merit and should be paid; however, the Carrier takes exception to the claim being filed on a continuing basis. The Carrier was agreeable to settling this dispute on a without prejudicial basis, which the Organization rejected.

The Organization argues that the Claimant was called by the Carrier and offered overtime out of his job category. The Organization maintains that since the Claimant accepted the temporary assignment, he must be paid in line with the provisions of Rule 11, which states that employees temporarily assigned to positions in a lower-rated job category shall not have their wages reduced. The Organization points out that in the parties' most recent negotiations, the Carrier had proposed to change the Rules so that it would not have to pay the higher rate of pay when an employee worked a lower-rated position, thereby supporting the Organization's position that the Carrier cannot reduce wages when employees are temporarily assigned to positions in a lower-rated job category. The Organization also contends that employees do not have the authority to assign themselves to work vacant positions or to work anywhere but on their own

position and that only the Carrier has that authority regardless of whether it is in the same category or outside the category. Therefore, the Organization argues that it is improper for the Carrier to contend that just because an employee signifies that he or she will work an overtime vacancy on specific positions, he or she is not directed or assigned to work out of category. The Organization asserts that the Carrier made the assignment in this case and Rule 11 mandates how the Claimant is to be compensated.

The Carrier maintains that no Rules have been violated. The Carrier argues that the parties' Agreement makes it clear that if the Claimant volunteered to work overtime out of category, he is not directed or assigned to work overtime out of job category. Therefore, the Carrier argues that because the Claimant requested to be called for out of category overtime work, the Claimant was then offered out of category overtime work and accepted to be paid at the rate of pay of the out of category job. The Carrier asserts that it would not have called him for the work had he not made known his willingness to perform out of category work and that the Carrier did not temporarily assign the Claimant under Rule 11. The Carrier contends that the titles of Janitor and Station Labor carry a different rate of pay than the title of the position that the Claimant currently has as a TBM Clerk. The Carrier asserts that the Claimant is not entitled to transfer the rate of pay of the position he was assigned by bulletin, the TBM Clerk rate, and reap a time and half rate. The Carrier maintains that it paid the Claimant at the time and one-half rate of Janitor on each of the dates in question.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier violated the Agreement when it failed to compensate the Claimant at the rate of his regular assignment on the dates of the claim. The Board is convinced by the previous finding in Award 10 by Public Law Board No. 2792 that when an employee volunteers or accepts an offer of a lower-rated job category on an overtime basis, he still is entitled to receive his/her regular rate of pay if it is higher. Rule 11(i), does not expressly distinguish between volunteer and assignee employees. We agree with the Organization that only the Carrier has the authority to assign an employee to a vacancy. Consequently, just because an employee indicates that he wants to work an overtime vacancy on a specific position does not mean that he/she is not ultimately directed or assigned to work in that category. The Rules require that if he/she works in a category that holds a lesser rate, he/she is paid at his/her normal

rate. We agree with the Organization that the Carrier ultimately makes the assignment, and Rule 11(e) mandates how that employee is to be compensated. We also agree that no employee can work overtime except by the direction of management.

Finally, it should be pointed out that although the Carrier paid the claim and attempted to treat it as a settlement with no precedential value, we find that that aspect of the settlement can be rejected by the Organization and the Organization can still process that claim for a finding on the merits as it has done in this case. See Third Division Award 32457. We agree with the Board in that case that a claim is not moot when the Carrier qualifies its proposed settlement and the Organization rejects that part of the claim beyond the monetary payment. See also Third Division Award 32266.

For all of the above reasons, this claim must be sustained.

AWARD

Claim sustained.

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 24th day of October, 2001.