

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36973
Docket No. CL-37673
04-3-03-3-26**

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
(Kansas City Southern Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the System Committee (GL-12954) that:

1. Carrier violated Rule 23 (s) and other rules of the Agreement on September 18, 1999, September 25, 1999, and October 2, 1999 when it blanked the Dallas Desk position held by Kathy Allen on each of these dates and added the duties of this position to Claimant Donna Gowans along with the duties of her regular assigned job on the AEI Reader Desk.
2. Carrier shall now compensate Ms. Gowans for 4 hours pay at the pro rata rate of \$137.22 per day for each of the 3 days. She divided her time between the 2 jobs and spent about 4 hours each day on each job.”

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 November 15, 1999, the Organization claimed that the Carrier violated Rule 23(s)(2) of the applicable Agreement because the Carrier, on three dates, purportedly blanked a position and then assigned the duties of the blanked position to the Claimant. The Organization specified that on September 18, 25 and October 2, 1999, the Carrier blanked the Dallas desk, Customer Service Relief Position No. 141, because the incumbent was serving a disciplinary suspension.

The Claimant was regularly assigned to the AEI desk, Customer Service Relief Position No. 84, from 12:00 A.M. to 8:00 A.M. The Organization declared that when the Claimant reported for duty on the three dates in question, the Manager directed her to perform the duties of the blanked position (the Dallas desk) as well as the duties of her regularly assigned position (the AEI desk). The Organization further declared that the Claimant worked each position for four hours. The Organization implied, on the property, that the Claimant went from the AEI desk to the Dallas desk. So from the Organization's perspective, the Claimant was away from her regularly assigned work location when she performed the duties of the Dallas desk.

The Carrier denied the claim contending that it had the right to transfer the duties of the Dallas desk to the Claimant because the bulletin advertising the Claimant's position states that she can be assigned "any other duties as may be assigned." The Carrier also characterized the Organization's claim for four hours of pay at the pro rata rate for each of the three days as a request for an impermissible penalty payment.

Rule 23(s)(2) of the Agreement reads:

"(s) When it is necessary to blank a position covered by the Scope Rule, the following will apply:

* * *

- (2) In the event that any of the assigned duties of the blanked position, other than those specified in (1), are performed the Extra Board employee that would have worked had the position not been blanked will be compensated 8 hours at the pro rata rate. If no Extra Board employee is available and the work is performed by an employee covered by this Agreement, then that employee shall be compensated additional pro rata allowance for actual time away from his assigned work location, however, if the assigned duties of the blanked position are performed by an employee not covered by this Agreement, then the senior qualified employee at the nearest location will receive an additional 8 hours at the pro rata rate. It is understood that all payments specified above will be in addition to any other payments the employee may be entitled to on that date. It is further understood and agreed that the above payment will be automatic to the employee entitled to receive same and that copy of notice of payment will be furnished to the Division Chairman and General Chairman in addition to the employee.

NOTE (1) Definition of each occurrence as it appears above is:

For every train order copied, every message of record including track and/or motor car lineup copied and for message of record transmitted, or switch list or interchange report prepared, a separate penalty will be allowed except that it is agreed that no more than one 8 hour or 3 hour payment, whichever applies, will be allowed any one individual if more than one occurrence occurs at the blanked location during a consecutive two (2) hour period.

NOTE (2) At locations other than an Extra Board Headquarters point if no Extra Board employee is available and it is necessary that part of the duties of the blanked position be performed, Carrier may use an employee from an adjacent station to perform those duties. If an on duty employee is used, that employee shall receive compensation for mileage traveled and shall receive the additional allowance on the minute basis at the pro rata rate of the position worked or his position, whichever be the higher."

In its Submission, the Carrier raised two arguments for the first time. First, it asserted that the Claimant probably did not move from her desk, or if she did, she only moved a few feet. The Carrier implies that calls for the Dallas desk were routed to the Claimant's AEI desk. The Carrier therefore concluded that the Claimant was not away from her assigned work location. Thus, she was not entitled to any additional pay per Rule 23(s)(2). The Carrier's second argument is related to its first argument. The Carrier averred that the duties of the blanked position and the Claimant's position were fungible. Thus, the Carrier intimated that it could properly assign the functions of the Dallas desk job to the Claimant because the work was interchangeable with the Claimant's regularly assigned duties.

The Board cannot address or consider these two arguments because they are raised for the first time in the Carrier's Submission. The Carrier failed to raise these arguments on the property. During the appeal on the property, the Carrier also relied exclusively on its contentions that: (1) the claim constituted an improper request for a penalty payment; and (2) that the Carrier could properly assign the duties of the Dallas desk to the Claimant under the language in the bulletin that states, "any other duties as may be assigned." Moreover, the Carrier apparently abandoned the latter argument in its Submission.

Because the Board may not consider the Carrier's arguments that the work was fungible or that the Claimant did not move from her assigned location, the Board is left with only the evidence, submitted by the Organization on the property that alleges that the Carrier violated Rule 23(s)(2).

Pursuant to Rule 23(s)(2) the Carrier may, in its discretion, blank a position. However, a position is genuinely blanked only if nobody performs the work of the position. See Third Division Award 30265. Thus, Rule 23(s) governs a situation where the Carrier decides that some or all of the assigned duties of the blanked position should be performed. On the three claim dates, the Claimant performed the duties of the Dallas desk as well as the duties of her regularly assigned position. The Organization came forward with un rebutted evidence that the Claimant spent four hours performing the functions of the Dallas desk and that she was away from her assigned work location. Therefore, the Claimant satisfied the requirements of the second sentence of Rule 23(s)(2).

The claim for four hours at the pro rata rate for each of the three days is not a penalty claim primarily because Rule 23(s)(2) expressly describes the remedy when the Carrier assigns an employee covered by the Agreement to perform some or all of the duties of a blanked position. The second sentence of Rule 23(s)(2) clearly specifies that the employee performing the duties of the blanked position shall be compensated with an "additional . . . allowance" at the straight-time rate.

Therefore, the Claimant is entitled to four hours' pay at the straight-time rate for each of the three claim dates. The Board stresses that its decision is narrowly restricted solely to the facts, evidence, and arguments of this particular claim. Our ruling therein shall not constitute or be cited as precedent in any future case.

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 21st day of April 2004.