

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37809
Docket No. CL-38214
06-3-04-3-129

The Third Division consisted of the regular members and in addition Referee Martin H. Malin 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-13032) that:

The Carrier violated the Amtrak-NEC TCU Clerks Rules Agreement in the workweek of July 31, 2002, Bulletin No. 31, when it advertised position of Bulletin and Assignment/Clerk Typist (BAC/CT-1) without a proper job title, without the proper primary duties of each position. Carrier failed to seek an agreement with the Organization's General Chairman with its creation, failed to distinguish the rest days for each of the combined two jobs, the location where work would be performed on each position, the proper hours when not performing either the Bulletin Assignment work and Clerk Typist work, then added the additional duties onto the original description of the Bulletin Assignment Work after the proper time to do so (some three years later). Carrier abolished the original position on August 14, 2002, some two (2) weeks after Claimant had qualified onto the position of Bulletin and Assignment Clerk thereby making an exception to the Rules Agreement without the proper signature as required on any position not listed as a takeover position, and failed to advertise the different rates of pay for each job title.

Claimant Dennis Riga now be allowed eight (8) hours at the pro-rata rate for each and every work day from July 31, 2002, thereafter until the violation ceases, receive the difference of the hourly rate of pay at the pro-rata rate from his current rate of pay as a janitor to the Bulletin and Assignment Clerk rate of pay, and until Claimant is

placed back into the proper position bulletin and Assignment Clerk as he had originally owned.

The Carrier is in violation of Rules: 1 Scope (paragraph h) preponderance of work, 2-A-1, 4-F-2, 5-E-1 paragraph (e) subsection, Appendix H - Article IV paragraphs d/h Mediation Agreement April 1, 19292 (New Rule 1) Graded classifications, 3-C-1 paragraph (h), 2-A-5, 3-C-2 paragraph c), and other rules.

Claim has been filed in accordance with NEC Rule 7-B-1 and Mediation Agreement Corporate 25, and should be allowed 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 July 31, 2002, the Carrier advertised Job Symbol No. BAC/CT-1. By letter dated August 6, 2002, the Division Chairman asked the Division Manager Labor Relations to cancel the advertisement, contending that it violated the Agreement. By letter dated August 7, 2002, the General Manager responded rejecting the request. By letter dated September 2, 2002, the Division Chairman filed a formal claim. Although the Carrier apparently prepared a denial to the claim, it did not mail the denial to the Organization. The first denial actually transmitted to the Organization was dated January 3, 2003. The Carrier conceded that it failed to deny the claim within the 60 days allowed under the Agreement. The Carrier maintains that it paid the Claimant

\$10,721.28 in full satisfaction of the claim. The Organization maintains that the amount due is \$18,841.60.

Rule 7-B-1(a) provides, in relevant part:

“When claims for grievances have been presented . . . and are denied, the Corporation shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance . . . in writing, or the reasons for such disallowance. If not so notified, the claim or grievance will be allowed as presented....”

Thus, the claim must be allowed “as presented.” In computing the value of the claim, the period runs from the date of the alleged violation set forth in the claim to the date the Carrier ultimately denied the claim. (See, e.g., Third Division Award 30476, Interpretation No. 1.) Consequently, the relevant time period for computing the payment required in the instant case is from July 31, 2002 through January 2, 2003. During handling on the property, the Organization based its computation on a period from July 1, 2002 through January 2, 2003. That was clearly incorrect.

The Carrier based its payment to the Claimant on the number of days (78) in this period that the Claimant actually worked. The Carrier argues that any greater amount is excessive. However, as the Board stated in Public Law Board No. 4304, Case 10, “These arguments might have merit, but the Carrier’s failure to make a timely denial precludes the Board from considering them. Paragraph (a) of Rule 7-B-1 states that when the carrier’s denial of a claim is not timely communicated to the organization, ‘the claim or grievance will be allowed as presented.’ Prior Awards have recognized this.”

The Carrier also argues that its payment did fully cover the claim as presented. We do not agree. The claim clearly demanded:

“Claimant Dennis Riga now be allowed eight (8) hours at the pro-rata rate for each and every work day from July 31, 2002, thereafter until the violation ceases, receive the difference of the hourly rate of pay at the pro-rata rate from his current rate of pay as a janitor to the Bulletin and Assignment Clerk rate of pay, and until Claimant is placed back into the proper position bulletin and Assignment Clerk as he had originally owned.”(Emphasis added.)

Thus, to allow the claim as presented, the Carrier must make the payment demanded for every work day, not merely for every day the Claimant worked during that period. The Carrier calculates this period as 108 days. At the hearing, the Organization calculated this period at 113 days. The Board performed its own calculation and we agree with Carrier that the period consists of 108 work days. It appears that the Organization's calculation may have included holidays, but holidays are not work days and just as we may not contract the period below what was demanded in the claim, we also may not expand it beyond what was demanded in the claim.

The claim sought eight hours' pay at the pro-rata rate, but did not specify which pro-rata rate. During handling on the property, the Organization calculated the claim using the \$18.56 per hour pro-rata rate of the BAC/TC position. Carrier used the \$15.36 per hour pro-rata rate of the Janitor position that Claimant was working. We agree with the Carrier. The claim was ambiguous as to which pro-rata rate was demanded and the ambiguity should be resolved against the drafter, in this case the Organization. The claim also sought payment for the \$3.20 difference between the Janitor's rate and the BAC rate. Both parties agree on this component of the claim, although they disagree on the number of hours.

Thus, the Claimant should be paid for 108 work days x 8 hours per day = 864 hours x (\$15.36 + \$3.20) = \$16,035.84. From this amount, it is necessary to subtract the amount that the Carrier already paid on the claim. The Carrier represents that amount to be \$10,721.28. There is some ambiguity in the record that the Board cannot resolve. In his letter dated April 2, 2003, the Division Manager Labor Relations advised the Division Chairman, "[T]he amount due claimant for the procedural error has been processed. Payment for 2 days, in connection with another matter, was included." It is unclear to us whether the \$10,721.28 amount included payment for two days in connection with another matter. The Board directs the parties to jointly determine whether the \$10,721.28 is solely for the instant claim or includes two days' payment on another matter. If the latter, those two days must be deducted from the amount paid before subtracting that amount from \$16,035.84. If the former, the entire \$10,721.28 should be subtracted from \$16,035.84 to determine the additional amount that the Claimant is to be paid.

AWARD

Claim sustained in accordance with 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 21st day of June 2006.