

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38119
Docket No. CL-39104
07-3-05-3-563

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc. (CSXT-North)

STATEMENT OF CLAIM:

"Claim of the System Committee of the TCU (GL-13093) that:

1. The Carrier violated the rules of the parties' CSXT-North Agreement made effective June 1, 1999, particularly Rules 24, 40 among other applicable rules when on April 16, 2004 it failed to call and use employee Lee Atwater to perform the duties of Extra Messenger, hours of assignment 3:00 p.m. to 11:00 p.m. at Selkirk, New York, and again instead assigned and permitted Extra List employee Marie [Walsh] to perform the work on that day.
2. The Carrier shall be required to compensate employee Lee Atwater, the qualified and available employee for eight (8) hours at time and one-half rate for April 16, 2004 account of the violation.
3. This claim has been presented in accordance with the provisions of Rule 45 of the parties' Agreement 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.

A. Background

On April 16, 2004, Chief Clerk S. Simonette marked off for vacation. Under the provisions of the Vacation Agreement, the Carrier elected to blank the position. The normal hours associated with the Chief Clerk position are 8:00 A.M. to 4:30 P.M.. On this same date, Marie Walsh, a Guaranteed Extra Board Clerk, was called and assigned to work from 7:00 A.M. to 3:00 P.M. When it became evident that there was a need to input the Selkirk payroll, Terminal Superintendent Bill Keough authorized Walsh to perform the payroll input during her 7:00 A.M. to 3:00 P.M. tour of duty. Because this payroll input duty was associated with the Chief Clerk's position, Walsh was paid at the higher Chief Clerk's rate of pay. On this same date, a vacancy occurred on the 3:00 P.M. to 11:00 P.M. Extra Messenger position. Because no Clerical employee was available to work at the straight time rate of pay, the Carrier called Walsh as the senior qualified employee to work at the overtime rate. The Organization filed the instant claim maintaining that the work was improperly assigned to Walsh and should have been assigned to Lee Atwater, the Claimant herein.

B. Position of the Parties

Organization's Position: It is the Organization's position that as a result of assigning the payroll input function to Walsh, the Carrier effectively elected not to blank the Chief Clerk's position, and in the process, unilaterally changed the duty hours of said position from 8:00 A.M. – 4:30 P.M. to 7:00 A.M. – 3:00 P.M. in violation of Rule 23. Moreover, the Organization notes, had the Carrier not made this unilateral change of time, Walsh would have been required to work the Chief

Clerk's hours of 8:00 A.M. to 4:30 P.M. and accordingly, would not have been available to perform the Extra Messenger's assignment which began at 3:00 P.M. As a result, the Claimant was improperly denied an overtime opportunity.

Carrier's Position: It is the Carrier's position that the Chief Clerk's position was properly blanked on April 16, 2004, and that the Terminal Superintendent properly assigned the payroll input duty to Walsh, a task she performed during her normal work hours. While Walsh was paid the higher rate of pay associated with the Chief Clerk's position as a result of this input function, this does not, in and of itself, prove that the Chief Clerk's position had not been properly blanked, and certainly does not lend to the Organization's claim that the Terminal Superintendent's actions effectively changed the duty hours associated with the Chief Clerk's position. Finally, the Carrier posits that the instant claim must be dismissed due to an irreconcilable dispute in material facts. In this regard, the Carrier maintains that in light of Terminal Superintendent Keough's written statement that he assigned the payroll input duties to Walsh on April 16, the Organization, which bears the ultimate burden of proof in this case, was unable to conclusively establish that the Chief Clerk's position was not properly blanked on that date.

DISCUSSION

As an initial note, it is well settled by controlling authority that the Board has no power to impose principles of equity or justice. Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute, for to do so would deprive them of the bargain struck.

In order for the Organization to be successful in its case, it must establish that the Chief Clerk's position was not blanked on April 16, 2004, and that the Chief Clerk's duty hours were impermissibly changed by the Carrier as part of its plan to permit Walsh to perform the payroll input function on that date. For the reasons that follow, the Board concludes that the Organization failed to meet its burden and, accordingly, the instant case must be denied.

First, the Organization's claim that the Chief Clerk's position was not properly blanked rests on its assertion that because the payroll input duty performed by Walsh was part of the duties performed by the Chief Clerk, ipso facto, the position was not properly blanked on April 16. The Board requires more than an assertion in order to sustain a claim that a Rule has been violated. Given this conclusion, the Board finds no Rule violation in the fact that the Terminal Superintendent took a necessary duty normally performed by the Chief Clerk and assigned it to Walsh to perform during her normal working hours. It is also significant that the Carrier's assertion that Walsh was not qualified to perform the duties of the Chief Clerk's position went uncontested. Accordingly, it would have been an arbitrary act for the Carrier to have assigned Walsh to perform the full list of duties associated with the Chief Clerk's position on April 16.

Second, while admittedly Walsh did perform the payroll input duty, this fact, in and of itself, fails to support the Organization's claim that the duty hours associated with the Chief Clerk's position were unilaterally altered. Again, as in the Organization's claim that the Chief Clerk's position was not properly blanked on April 16, its follow-up claim that the Carrier unilaterally altered the duty hours associated with the Chief Clerk's position rests on assertions with no proof. Accordingly, this contention must be rejected as well. Absent proof that the Carrier's actions violated the parties' Agreement, the claim must be denied.

AWARD

Claim denied.

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 15th day of March 2007.

LABOR MEMBER'S DISSENT

TO

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(Referee Dennis J. Campagna)

On the day under dispute, Guaranteed Extra List employee Marie Walsh was called as an extra from 7:00 a.m. to 3:00 p.m. to input the Selkirk payroll. It is undisputed that this is work normally and regularly performed by Chief Clerk Position No. 4B02-154 during its regularly assigned hours of 8:00 a.m. to 4:30 p.m. It is also undisputed that the regular occupant of Chief Clerk Position No. 4B02-154 was absent this day observing vacation—that a temporary vacancy existed on Chief Clerk Position No. 4B02-154.

In its recitation of the facts, the majority relates these events as though Walsh was innocently called to work at 7:00 a.m. with no thought of using her on Chief Clerk Position No. 4B02-154 and upon arrival was only *coincidentally used* to input the Selkirk payroll when it became evident it needed to be done. This completely distorts the fact that the Carrier knew, in advance, that the Chief Clerk would be observing vacation and knew, in advance, the payroll had to be input.

In its erroneous opinion, the majority found that Chief Clerk Position No. 4B02-154 was *blanked*, even in the face of the undisputed fact that Walsh performed its work from 7:00 a.m. to 3:00 p.m. This flies in the face of the time worn industry standard that if the work of a position is performed, even less than eight hours' worth, it isn't *blanked* — it's filled.

This tangential, but vital, mistake aside, brings us to the main question of whether a 3:00 p.m. Extra Messenger position was properly filled. To get to that question you have to answer three underlying connected questions. Was the 8:00 a.m. temporary vacancy on the Chief Clerk position actually blanked or did Walsh work it? Were the hours of the Chief Clerk position improperly altered? Was Walsh actually available at 3:00 p.m. for the Extra Messenger position or was she unavailable because she should have been working until 4:30 p.m. that day?

The hours for the Extra Messenger were 3:00 p.m. to 11:00 p.m. Obviously, the hours of Chief Clerk position and the Extra Messenger overlapped (between 3:00 p.m. and 4:30 p.m.). Obviously an employee working the Chief Clerk position until 4:30 p.m. would be unavailable for the Extra Messenger position at 3:00 p.m.

If the Chief Clerk position was actually blanked as the majority states, and if the hours of the Chief Clerk position weren't improperly altered, and if Walsh was available for the 3:00 p.m. Extra Messenger position, then the answer to the main question follows easily. The Agreement was not violated—Walsh was senior to Claimant and was properly called. Conversely, if these questions aren't answered affirmatively, the Agreement was violated and Claimant should have been called for the overtime.

Considering the questions one at a time, as already stated, it's obvious the Chief Clerk position was not blanked. There's no dispute that the work of Chief Clerk Position No. 4B02-154 was performed by Walsh. The Carrier candidly admits Walsh spent the day inputting the Selkirk payroll. Accordingly, despite Carrier's doubletalk about using Walsh as an "extra," the Chief Clerk position wasn't blanked—Walsh worked it—it was filled. And Carrier's argument that Walsh wasn't entirely qualified on the vacation vacancy doesn't hold water, either. Whatever Walsh's qualifications, Carrier, not the Organization, made the decision to call her to perform the work of the position. Vacancies are often filled by employee not fully qualified when fully qualified employees are not available. This does not mean the vacancy was not filled or that the work of the position was not performed.

In regard to the second question, since the Chief Clerk position wasn't blanked it's self-evident that Walsh was used to perform the work of the position outside its regularly assigned hours and that Carrier improperly altered the hours of the temporary vacancy. The hours of assignment of the temporary vacancy were 8:00 a.m. to 4:30 p.m., not 7:00 a.m. to 3:00 p.m. when Walsh performed its work as a so-called *extra*. There's no provision in the Agreement that allows Carrier to shift or flex the hours of the position.

The answer to the third question follows simply from the second. If Carrier improperly altered the hours of the vacation vacancy, then Walsh wouldn't have, shouldn't have, been available for the 3:00 p.m. Extra Messenger position had she worked the temporary vacancy during its normal assigned hours. Walsh was senior to Claimant, but it's well settled by this Board that while the factor of seniority is an important determinant in assigning overtime it's not the sole determinate. The second determining factor in assigning overtime is the availability of the employee to work the overtime. Walsh wasn't available. Claimant was.

If any precedential weight was bestowed on the majorities' decision, and none should be, any time the regular occupant of a position was absent an extra could be called for the temporary vacancy outside its regular assigned hours and used to perform the work of the position. This would completely ignore and make meaningless the bulletining rules, the seniority rules and the temporary vacancy calling rules of the Agreement. Because of such, I respectfully dissent.

Stephen F. Watson
TCU Labor Member
March 22, 2007

Carrier Members' Concurring Opinion
and
Response to Labor Member's Dissent
to
Third Division Award 38119
Docket CL-39104

(Referee Dennis J. Campagna)

The Labor Member's Dissent poses a series of questions surrounding the facts of this case in a belated effort to prove that there was, in fact, a violation of the Agreement, and to thereby undermine the Board's denial of the Organization's claim.

In the sixth paragraph of his Dissent, the Labor Member states that if the following three questions can be affirmatively answered, i.e., (1) if the Chief Clerk's position was actually blanked as the majority states, and (2) if the hours of the Chief Clerk's position were not improperly altered and (3) if Walsh was available for the 3:00 P.M. Extra Messenger position, then the Agreement was not violated. Conversely, the Labor Member states that if these questions cannot be affirmatively answered, then the Agreement was violated.

Suffice to say, the Board correctly decided this case. All questions posed by the Labor Member can be affirmatively answered. First, the Chief Clerk's position was actually blanked. Second, the hours of the position were not improperly altered, because they were not changed and the position was not filled. Lastly, Walsh was available for the 3:00 P.M. Extra Messenger position, because she worked extra from 7:00 A.M. to 3:00 P.M.

These are the very conclusions the Referee arrived at during his review of the on-property record of the case. There is no dispute that the incumbent was on vacation and Walsh was not qualified to work the Chief Clerk's position. Granted, the payroll input that Walsh performed was normally performed by the Chief Clerk as part of his assignment. However, those duties were but a single function of the

Carrier Members' Concurring Opinion & Response

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Chief Clerk's position and were properly distributed to Walsh under the provisions of the National Vacation Agreement. It is significant to note that no other duties associated with the Chief Clerk's position were identified as having been performed by Walsh. If other duties associated with the Chief Clerk's position were also performed by Walsh, the Organization had the burden to prove such. It presumably would have been a simple matter for the Organization to obtain a written statement from Walsh attesting to the work she performed on the date in question. Absent evidence that Walsh performed other duties associated with the Chief Clerk's position for her entire tour of duty, the Board properly concluded that she merely worked extra from 7:00 A.M. to 3:00 P.M. during which time she input the payroll. Contrary to the Organization's unsubstantiated assertion, Walsh was not "required" to work the 8:00 A.M. - 4:30 P.M. Chief Clerk position. Saying it is so does not make it so, no matter how many times the assertion is repeated.

In view of the foregoing, the Board correctly determined that Walsh was available to work overtime at 3:00 P.M. and there was no violation of the parties' Agreement.

Michael C. Lesnik

Michael C. Lesnik

Martin W. Fingerhut

Martin W. Fingerhut

Bjarne R. Henderson

Bjarne R. Henderson

John P. Lange

John P. Lange

May 14, 2007