

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39151
Docket No. CL-38390
08-3-04-3-354

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the TCU (GL-13046) that:

- (a.) Please accept this claim from the committee of District #105 on behalf of Claimant R. N. Scott, ID No. 378430, when the carrier violated Rule(s) 64, on (date of violation) 01/23/03.
- (b.) The carrier shall now be required to compensate claimant 8 hours at the pro-rata rate of \$154.69 daily, in addition to all other monies earned starting 01/23/03.
- (c.) A joint check of carrier records be made to determine proper claimants, and monies due if necessary.
- (d.) Claimant is presently assigned to position No. 018A-104, assigned hours, 0700-1500, rest days, Sat. and Sun. with rate of pay of 148.15.”

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.

The essential facts leading to the instant claim are not in dispute. At the time this claim arose, Claimant R. N. Scott was the incumbent of Administrative Clerk Position 4P70-201, with hours from 3:00 P.M. to 11:00 P.M., at Walbridge, Ohio. He was also qualified as a Block Operator at Fostoria Tower in Fostoria, Ohio. On January 23, 2003, the Carrier needed to fill the Fostoria Tower Block Operator Position 4C31-200, working 3:00 P.M. to 11:00 P.M.

Three of the four qualified Block Operators were unavailable under the Hours of Service Act. In addition one regularly assigned Block Operator was off sick. Further, there were no qualified Block Operators on the Guaranteed Extra Board at Walbridge, Ohio (which normally fills Fostoria Tower vacancies). At Walbridge, Ohio, there were three qualified Block Operators including the Claimant. Walbridge is the next closest railroad location to Fostoria. Of those three, only the Claimant was available under the Hours of Service Act. The Carrier diverted the Claimant from his regularly assigned position to the Fostoria Tower Block Operator position.

On February 10, the Organization filed the instant claim, which was denied on February 20, 2003. In its denial, the Carrier contended that its actions were permitted under Rule 64 of the Agreement. It noted:

"Claimant was diverted as convenience to Carrier from regular position 4P70-201 on 1/23/03 to 4C31-103 with position 4P70-201 subsequently filled by extraboard. . . . Please be advised that under the CSXT North Agreement, Rule 64, there is no merit to your claim. You did work job 4C31-200 and your position of 4P70-201 was filled by an extraboard employee. There was no extraboard

employee qualified to fill the job 4C31-200 so payment would not be allowed.”

The Organization appealed on March 25, 2003, and requested that the claim be docketed for discussion at the next CSX-North claims conference. The conference was held on June 19, 2003. In its August 13, 2003 letter to the Organization following that meeting, the Carrier contended that it had legitimately diverted the Claimant pursuant to Rule 64 and that he had been paid in accordance with Rule 64 (d). The applicable portions of Rule 64 are as follows:

“(a) Regular assigned employees will not be required to perform service on other than their regular positions except in emergencies. When they are required to perform service on other than their regular position, they will be paid the rate of the position they fill, but not less than the rate of their regular position.

* * *

(c) Regular assigned employees diverted under this Rule shall be paid at the time and one-half rate for all time worked outside of the assigned hours of their regular position.

(d) In no case will less than one day’s pay be allowed for each 24 hours held out of their regular positions or away from home stations.”

In its September 10, 2003 response, the Organization protested that Rule 64 was not applicable in this situation. It contended that there was no “emergency” under the provisions of Rule 64(a) and thus Rule 64 was not applicable in this case. It further noted that the mere allegation of necessity or convenience does not constitute an “emergency” under the meaning of Rule 64 and does not meet the required standard of proof for such a defense. Rather, the Organization insisted, Rule 30 – Guarantee-Regular Assigned Employees – should have been applied. Rule 30 reads as follows:

“A regular assigned employee who, through no fault of his own, is not used on his assignment shall be paid the amount he would have received had he performed service on his regular assignment.”

Thus, according to the Organization, the Claimant was entitled to eight hours’ punitive pay for being improperly removed from his regular assignment, and an additional eight hours’ straight time pay from his regular assignment as per Rule 30.

In their respective Submissions to the Board, the Carrier asserted the affirmative defense that the situation, as it evolved, constituted a genuine emergency; the Organization contended that it was a situation of the Carrier’s own making because it chose to be understaffed, and therefore did not constitute a genuine emergency. The Organization cited several cases in support of its position. (See, for example, Third Division Awards 36264, 20223, and 18331). All confirm the Board’s position that the affirmative defense of an “emergency” is not one the Carrier may use freely to avoid penalty payments under the Agreement.

The Board concurs with the Organization that the Carrier presented no evidence during the progression of the claim on the property to support its defense that the situation giving rise to the claim constituted a genuine emergency. In its own correspondence with the Organization the Carrier stated that the Claimant had been reassigned “as a convenience to Carrier.” An inconvenience, even one that may – as the Carrier asserted in its Submission – cause the Carrier some measure of expense, cannot per se be viewed as equivalent to a genuine emergency.

With respect to the compensation the Claimant is owed, the language of the Agreement is clear. While it may be argued that even in its clarity it yields an “odd” result, such a dilemma is a matter for negotiation between the parties. It is not the function of the Board to re-write as it sees fit the negotiated language of the parties. Furthermore, the history of this language is evident in prior Awards on this and other Boards. If the parties find the application of the language problematic, then it is up to them to revise it.

Rule 64 (c) clearly states that the Claimant is entitled to straight pay for the hours he worked on his reassigned position that coincided with his regularly

assigned hours. He is also entitled to time and one-half for those hours of the re-assignment he worked that were outside the hours of his regular position. Rule 30 is also clear. Because the Claimant, "through no fault of [his] own," was not used on his regular assignment, he "shall be paid the amount he would have received had he performed service on his regular assignment." Thus, we concur with Referee Zusman's determination in Public Law Board No. 6093, Award 27, in which that Board held:

"We find no language whatsoever, in either Rule [64] or in Rule [30] that indicates a negation of Rule [30] if Carrier utilizes Rule [64]. We find no language that suggests in any form that if paid under Rule [64], the employee is not to be additionally paid under Rule [30]. While the parties were able to write in such exclusions, they sought not to do so. . . ." (Rule numbers were updated to reflect revisions in subsequent Agreements).

Accordingly, the Board finds that the parties should make a joint review of the available employee records and calculate the Claimant's proper compensation in compliance with the holdings of the Board.

AWARD

Claim sustained in accordance with the Findings.

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 7th day of July 2008.