

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40407
Docket No. MS-41196
10-3-NRAB-00003-100161

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(J. S. Miles, Jr.
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“The Carrier violated the SCL/TCU clerical working agreement, Rules 18(f), 19(h), and 20(f), as well as others when, on May 13, 2007, it called guaranteed extra board employee B. R. Lively, ID 145860, on what should have been one of his two not-necessarily-consecutive rest days to protect job number 4J10-101 (the “tag” rest day of regularly assigned employee J. S. Miles, Jr., ID 161675). Employee Lively was unavailable to the Carrier May 7 and May 8, 2007 due to a personal injury, worked 8 hours straight time on position 4J10-101 May 9, 2007, was available to the Carrier but not worked May 10, 2007, worked 8 hours straight time on position 4J10-101 May 11, 2007, was available to the Carrier but not worked May 12, 2007, and should have been allowed to observe one of his two not-necessarily-consecutive rest days in accordance with Rules 18(f) and 19(h) of the collective bargaining agreement on the date in question.

As a result of said violation, the carrier shall now be required to pay Claimant J. S. Miles, Jr., ID 161675, 8 hours and 00 minutes pay at the overtime rate of \$253.82 daily.”

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.

Although notified, the Claimant did not appear at the hearing.

The Claimant was assigned as a General Clerk at the Carrier's Savannah, Georgia Terminal, with a tour of 7:00 A.M. to 3:00 P.M., with Sunday and Monday rest days.

May 13, 2007 was a Sunday (the Claimant's rest day). On that date, the Carrier worked Guaranteed Extra Board employee B. R. Lively at straight time instead of calling the Claimant in at overtime. This claim followed.

GEB employee Lively's work history for the week of Monday, May 7 through Sunday, May 13, 2007 was as follows:

Date	Status	Hours Worked
05/07/07	Did not work	0
05/08/07	Did not work	0
05/09/07	Straight Time	8
05/10/07	Straight Time	8
05/11/07	Straight Time	8
05/12/07	Unavailable (did not work)	0
05/13/07	Straight Time	8
	Total Hours	32

Rule 18(f) governing extra boards provides, in pertinent part:

* * *

“Incumbents of such extra boards will have preferential rights, to the extent of forty (40) straight-time hours, when filling vacancies referred to in paragraph (a), ‘cubbing’ or assisting other occupants of positions covered by the agreement, due to an influx of work, not exceeding five (5) consecutive days.

Extra board employees’ work week shall be Monday through Sunday and rest days need not be consecutive. . . .”

As of May 13, GEB employee Lively did not have 40 straight time hours for the week May 7 through May 13, 2007. Under Rule 18(f) the Carrier had the right to utilize Lively at straight time off the extra board without being obligated to call the Claimant in at overtime. As the Carrier correctly asserts, Rule 18(f) clearly provides that GEB employees have first rights to protect work at the straight time rate of pay until the employee protects 40 straight time hours in a workweek. As of May 13, 2007, GEB employee Lively had not yet reached 40 hours for the week. The Carrier’s use of GEB employee Lively at straight time rather calling the Claimant in at overtime therefore did not violate the Agreement.

The Board carefully considered the Claimant’s Submission. The governing provisions do not impose set rest days for employees like GEB employee Lively. Because GEB employee Lively had not yet reached 40 hours during the relevant week, the Carrier had the right to utilize Lively at straight time rather than calling the Claimant in at overtime. For the Board to adopt the Claimant’s understanding of what the Rule says would require the Board to change the language of the governing Agreement provisions. The Board does not have that authority.

We note that this is not the first time the Claimant has brought this same dispute to the Board. See Third Division Award 39666 which also involved GEB employee Lively and assignment of work to that employee rather than the Claimant. In Award 39666, the Board held:

“On the merits, the record establishes that Lively was called to work on the days in question pursuant to Rule 18(f) which grants a preference to employees who have not already worked 40 straight time hours in the given week.”

Award 39666 is not palpably erroneous and must be followed. See Third Division Award 34204:

“This is, for all purposes, the same dispute that was decided by the Board in Award 33507. We cannot say that Award 33507 is palpably in error. As such, and for purposes of stability, we cannot decide this case de novo, but we are required to defer to that prior Award. To do otherwise would be an invitation to chaos and would result in encouraging parties after receiving an adverse decision to attempt to place a similar future dispute before another referee in the hope of obtaining a different result.

The Organization’s assertion in this case that it has better evidence than in Award 33507 that, in fact, the positions had been ‘switched’ cannot change the result. In the prior Award it was found that for PEP positions, ‘[t]he Carrier has the right to change starting times.’ Coupled with the fact that the positions are designated PEP and thus not covered by bid and bump requirements, for us to use the Organization’s alleged better evidence in this case would amount to an indirect way of reviewing this dispute de novo. At best, as found in Award 33507, ‘the Carrier is sharpshooting the Agreement to keep its excepted positions.’ But that was allowed in Award 33507 and, because that decision was not palpably erroneous, in this same dispute we are required to defer to Award 33507. The bottom line in the prior Award is that under the same basic facts, the Carrier ‘did not violate the Agreement.’ For purposes of stability, the decision must be the same in this matter.”

The Claimant also raises a procedural argument asserting that the Carrier’s response after conference on the claim was untimely. According to the Claimant (Claimant’s Submission at 12):

“... The carrier ... missed its 60 day time limit to decline my appeal.”

The Board disagrees. By exchange of correspondence dated June 3 and 10, 1976, the Carrier and the Organization agreed to modify Rule 37 to provide that “. . . the Carrier will render a decision within sixty (60) days, after the last day of the conference, on each case discussed during that conference.” Here, the claim was

conferenced on January 8, 2008 and the Carrier issued its appeal declination on February 7, 2008. The Carrier's response easily fell within the 60-day time limit.

And again, returning to Award 39666, the Board has previously decided this very same issue raised by the Claimant:

"Our review of this voluminous record does not reveal proper support for the Claimant's procedural contention that the Carrier's responses failed to comply with applicable time limits. The record establishes that the Carrier and the Organization have a valid agreement pertaining to the issuance of Carrier responses following conference on the property. The record does not establish that the Carrier failed to comply with the applicable time limit. Therefore, the Claimant's objection must be rejected."

For reasons stated in Award 34204, that conclusion is not palpably in error and will also be followed.

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 14th day of May 2010.