CORRRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13374
Docket No. 13222
99-2-96-2-132

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen, Division of
(Transportation Communications International Union
(
(CSX Transportation, Inc. (former Louisville and
(Nashville Railway Company)

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Louisville and Nashville Railroad Company, (now a part of CSX Transportation and hereinafter referred to as Carrier) violated the controlling agreement rights of Pensacola, Florida carman J.L. Janes, (hereinafter referred to as Claimant) specifically but not limited to Rules 14, 18, 19, and 29 when Carrier denied Claimant his contractual rights to work the known vacancy of Lead Carman I.E. Ellsworth on November 17 and 18, 1994, and on January 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, and 27, 1995 as requested.

2. Carrier should now be ordered to compensate Claimant for eight (8) hours pay each day at the pro rata Lead Carman rate on November 17 and 18, 1994 and on January 5, 6, 12, 13, 19, 20, 26, and 27, 1995; and for $.50 an hour for 8 hours each day or a total of $5.00 each day on January 4, 9, 10, 11, 16, 17, 18, 23, 24, and 25, 1995."

FINDINGS:

The Second 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.

These two claims raise the issue of whether Claimant, regularly assigned as a Freight Car Repairman in Pensacola, Florida, was entitled to work vacancies on Lead Carman Ellsworth's job on various dates set forth in the claims in preference to the junior employees selected. Claimant was the senior Carman at this location at all relevant times. The following Rules are pertinent to a resolution of this dispute.

"Rule 14 - Changing Shifts

(b) Regularly assigned employees, upon application, will be given preference in filling temporary vacancies known to last more than 7 days, without added expense to the Company, arrangements to be made between the officer in charge and the committee."

"Rule 18 - Bulletining Vacancies

(f) Arrangements will be made between the officer in charge and the local committee in filling, temporarily, bulletined positions pending assignment, or temporary vacancies."

The initial claim involving the two November 1994 dates was filed on January 9, 1995 alleging insufficient compensation for Claimant's off days of November 17 and 18, 1994 when he was not permitted to work the Lead Carman vacancy per local agreement. The subsequent claim of January 29, 1995 seeks payment for Carrier's failure to assign Claimant to a three week vacancy on the Lead Carman's position in January. These claims were denied by Carrier on March 2 and 6, 1995 respectively on the basis that its actions were sanctioned by Rule 14(b).

In its appeal of March 21, 1995 the Organization notes that Claimant verbally requested to fill the vacancies, which were known to last more than seven days, and that there would have been no additional expense to Carrier to permit Claimant to fill these vacancies. The Organization also sets forth facts underlying the local understanding reached between the Local Chairman and General Foreman in November 1994 that the senior available Carman was to fill vacancies which would exist for seven days or more.

Carrier's June 23, 1995 declination letter contends that Claimant had no seniority right to work as Lead Carman, that Ellsworth did not work his position for three weeks between October 31 and November 18, 1994, that Claimant was on vacation during the first two of these weeks and was unavailable, and that the November 14 to 18 vacancy for which Claimant was available did not last over seven days. Carrier also states that the January vacancies in issue were not known to last more than seven days, and asserts that Ellsworth actually worked his assigned position on January 5, 6, and 13, 1995. Carrier did not dispute the terms of the local understanding set forth in the Organization's appeal.

The matter was conferenced by the parties on August 22, 1995, during which time the Organization submitted a letter dated June 26, 1995 outlining which Carmen actually worked the Lead Carman position on each date in January, specifically noting that Ellsworth taught classes in Pensacola on January 5 and 6 and did a derailment inspection prior to leaving work at 12:30 P.M. on January 13, 1995. This document again sets forth the Organization's understanding of the local agreement to pay the senior Carman the Lead Carman's rate during vacancies of seven days or more. In Carrier's September 21, 1995 letter confirming the conference, it submits a copy of Ellsworth's payroll record for January 1995, arguing that it supports Carrier's position that he was paid the Lead Carman rate on January 5, 6 and 13 on his regular position.

It is noteworthy that during the processing of the case, in March, May, July, September and October 1996, the Organization requested, and Carrier granted, five separate extensions of time for further handling the claim. The final time limit for handling this matter was set at December 1, 1996.

By letter dated November 15, 1996, the Organization responded to statements made in Carrier's June 23, 1996 declination letter, and submitted five new documents totaling 111 pages to prove that Claimant was available and qualified to perform the work and that the vacancies were known to exist for more than seven days. This letter

and attachments were received by Carrier on November 18, 1996. The Organization filed its Notice of Intent with the Board on November 19, 1996.

The record reveals that while Carrier telephoned the Organization to indicate that it would review the new documentation and would respond to these new arguments, the Organization indicated that such response would be untimely. Carrier's letter of December 1, 1996 objects to the Organization's attempt to belatedly add a new argument and voluminous documents in the record after the matter had been conferenced and the attempt to preclude it from effectively responding by closing the record. Carrier argues that these documents should not be considered by the Board because they were not discussed by the parties in conference as required by Section 153, First (i) of the Railway Labor Act, and notes that if the Board considers these new matters, it should also find its response timely. In this letter, Carrier also reiterates the local agreement to fill known temporary vacancies of seven days or more, and contends that there is no proof that any vacancy here was of seven days duration. It sets forth inconsistencies in the Organization's new documentation with respect to who actually worked in the Lead Carman capacity on the dates in issue. For the first time Carrier asserts that Claimant was needed on his regular assignment in the train yard during the week of November 14, 1994, and also states that there is no proof that the local agreement was to use the senior employee.

The Organization filed a response on January 13, 1997 noting that Carrier did not request an extension of time to file additional correspondence once it received its November 15, 1996 letter, and objecting to consideration of the December 1, 1996 letter as untimely and certain characterizations made therein.

With respect to the Board's consideration of the new documentation included in the Organization's November 15, 1996 letter and Carrier's December 1, 1996 response, while the Board notes that the statutory process is designed to have the parties discuss and consider in conference the evidence relied upon in an attempt to resolve the claim, the parties run the risk of a situation like this occurring by continually granting extensions of time for filing responses and handling the claim. We have no doubt that Carrier granted the Organization's requests in good faith, and did not contemplate being faced with voluminous new documents without adequate time to respond. Technically, because the documents submitted were in support of a prior argument made by the Organization, e.g., that the January vacancy was known to, and did exist, for over seven days, and not a totally new argument, we will consider them. However,

in order not to countenance inequity in creating a record, we will also consider Carrier's response to these documents set forth in its December 1, 1996 correspondence, but not any new assertions of fact or argument contained for the first time therein.

The Organization appears to agree in its June 26, 1995 letter that there is no Agreement requirement to bulletin the vacancies in issue. Nor is there anything in the language of Rule 14(b) requiring that a vacancy be filled by seniority. Rule 14(b) places an obligation upon both parties to make arrangements for the filling of temporary vacancies known to last more than seven days. Rule 18(f) imposes similar obligations upon the officer in charge and the local committee in filling temporary vacancies.

In this case, the record on the property indicates that Carrier did not dispute the Organization's assertion that a local agreement was reached to fill vacancies known to last seven days or more with the senior Carman, and that any reimbursement paid for filling a Lead Carman vacancy should go to the senior Carman, or Claimant herein. That matter was clearly brought up again by the Organization in conference, and was not objected to in Carrier's September 21, 1996 letter confirming the conference. The major area of dispute between the parties throughout centers on whether the vacancies were known to last seven days or more. For the first time in its December 1, 1996 letter Carrier mentions that there was no evidence of an agreement to use the senior employee. We find this to be a new assertion of fact which is untimely, and, in any event, insufficient to rebut the Organization's evidence of the existence of a local agreement in accord with Rules 14(b) and 18(f) to fill vacancies known to exist for seven days with the senior Carman.

The issue comes down to whether the Organization proved that the claim dates constitute vacancies which fall under the provisions of the local agreement. With respect to the dates of November 17 and 18, 1994, the Organization was unable to prove that the Lead Carman vacancy for which Claimant was available between November 14 and 18, 1994, was known to, or did, last at least seven days from the time Claimant requested such assignment. Thus, the claim requesting pay for those dates is denied.

With respect to the evidence concerning the January vacancy, we find the payroll record of Ellsworth submitted by Carrier to be insufficient to prove that he, in fact, worked on his Lead Carman position in Pensacola on January 5, 6 and 13, 1995 as alleged. The record shows the same payment codes for dates when Carrier admits he was working elsewhere. The Organization's first-hand evidence of who worked the Lead

Carman job on those dates and what Ellsworth did was discussed in conference, and is further supported by written statements from the Carmen involved which were included in the documentation attached to the Organization's November 15, 1996 letter.

Thus, the Board finds that the Organization sustained its burden of proving that the January 1995 vacancies were known to, and did exist for more than seven days, and that according to the local agreement reached, Claimant should be compensated the wage differential of $4.00 each day he did not fill the Lead Carman vacancy on the January claim dates he worked on his regular assignment. There is no proof of any loss of earnings on Claimant's scheduled off days.

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 Second Division

Dated at Chicago, Illinois, this 12th day of April 1999.