

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21691
Docket Number CL-21542

Robert W. Smedley, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station **Employees**
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood,
GL-8130, that:

1 . Carrier violated the Clerks' Rules Agreement when it failed to give "five working days' advance notice in writing" to Clerk A. Stephens, St. Louis, Missouri, who **was** occupying the position of Route and Car Assignment Clerk No. 072, when the position was abolished (Carrier's File 205-4992).

2. Carrier shall now be required to *compensate* Clerk A. Stephens for five (5) days, at eight (8) hours each day, at pro rata rate of \$41.49 **per day**.

OPINION OF BOARD: The issues before the Board are (1) whether the temporary occupant of a **position** is entitled to the required five-day written *notice* of abolishment, and (2) damages.

The regular occupant of Route and Car Assignment Clerk No. 072 retired January 31, 1975. Claimant A. Stephens, a Messenger Clerk, opted to fill the vacancy. This was done pursuant to Rule 9 - **FILLING OF NEW POSITIONS AND VACANCIES OF LESS THAN 30 DAYS, Section (b)**, concerning "temporary positions and vacancies." **Claimant** worked one day on the position, Saturday, February 1, 1975. He then took the position's two rest days, Sunday and **Monday**, February 2 and 3, 1975, only to be called on the phone February 3 to be told the position was abolished and he was to return to his regular job on February 4.

"Rule 14
**REDUCING FORCE, ABOLISHING
POSITIONS, DISPLACEMENTS
AND FURLOUGHS"**

"(b) **When** regularly established positions are abolished, the occupants thereof will be given a minimum of five working days' advance notice **in writing**, copy to Division and General Chairman, except as provided in Section (c) hereof."

"NOTE: The word 'occupant', as used in this rule means the **employee** working the **position** at the time the abolishment notice is issued."

The complaint is **that** Stephens should have been given the five-day written notice. We hold that he should have. The above rule and note are literal and specific on the subject.

Claimant did not lose work. Thus, the **damages** debate is between \$1.75 per day or \$8.75 for the five days, being the difference in rate between the two jobs, or \$41.49 per day, a total of \$207.45, representing five days pay on the abolished position. We are confronted with the recurring issue whether this Board has the power to, and should, add damages beyond compensation for loss.

Having examined all of the citations provided on both sides of this issue, we are convinced that the prevailing rule in this Division allows such damages. Awards 19899.(Sickles) and 20311 (Lieberman). We are also convinced that this is the correct rule where clear rights are being enforced. The common law "make whole" theory often strips a right of any remedy, inviting violation anew. This has a moral base, the imperative being integrity of contract.

Having a moral base, the rule must be applied morally. It **cannot** follow that every violation, technical or otherwise, automatically elicits a **penalty**. We should not **incite** the "caught you" mentality wanting to empty the exchequer on strength of **miscrossed t's**. That is very close to what is being sought in this case. Here we have a technical violation. The carrier **mistakenly** filled the **vacancy** and then decided to abolish the position, omitting the required notice. It got caught in a little web. But there is no invidious threat to contract integrity, no demand of conscience that a wrong be conquered not to wrong again.

We will award the lost pay but not pay for the abolished position.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively **Carrier** and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; end

The **contract** was violated.

A W A R D

Pert 1. of the claim is sustained.

Part 2. of the claim is sustained to the extent **indicated** in the Opinion.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of Third Division

ATTEST:;

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1977.