

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10188) that:

1. Carrier violated the agreement between the parties particularly but not limited to the October 27, 1977 Memorandum Agreement and the Master Agreement dated April 1, 1973, as amended, when on the dates of August 5, September 6, 8, and 9, 1983 Carrier diverted the incumbent of the Clerk's position reporting at 9:00 A.M. to the Agent's position reporting at 7:00 A.M., at Princeton, West Virginia.

2. As a consequence of said violations Carrier shall be required to compensate senior qualified employee eight (8) hours pay at the applicable rate each date who stood to be called for the vacant Clerk's position 9:00 A.M. account of the diversion."

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 employees 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.

On August 5, and September 6, 8, and 9, 1983, Clerk Scandland was diverted from his regular assignment of Clerk (reporting at 9:00 A.M., Princeton, West Virginia) to position of Agent (reporting at 7:00 A.M.). Clerk Scandland's position was not filled. The Organization filed a Claim contending that Carrier violated the Agreement by diverting a regularly assigned employee and then failing to fill the diverted employee's position. The Organization cites Rule 42, Work Week, as its authority in this instance. That Rule reads in pertinent part as follows:

"MEMORANDUM AGREEMENT"

DATED OCTOBER 26, 1977

Section 1. Based on decisions rendered in N.R.A.B. Third Division Award 17550 and Awards 6 and 7 of Public Law Board No. 1790, it is mutually agreed that Rule 42 of the April 1, 1973 Master Agreement between the parties is interpreted to provide that temporary vacancies of thirty calendar days or less and any resultant vacancies will be filled when:

- (c) The Carrier elects to fill a vacancy by use of an employee under provisions of Rule 14 or by diversion of an employee from his regular position."

Carrier denied the Claim on the property, but agreed during a conference on September 20, 1984, to hold the instant Claim in abeyance until a similar Claim listed before the Board was decided. Third Division Award 26316 was issued on May 13, 1987. This Board upheld the Organization's Claim on the facts, but withheld payment of any wages, since no Claimant was identified.

This Board has reviewed Third Division Award 26316 and the record in this case. We find the facts to be all but identical, except that the Organization did identify during discussions on the property the most senior qualified available Clerk to fill Scandland's open position.

In keeping with the Board's desire to bring consistency and predictability to railroad labor relations, we are compelled to follow Award 26316 and sustain the Claim. We will, however, only award payment to Claimant M. R. Shelton on a straight-time basis.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 28264, DOCKET CL-27988
(Referee Rodney Dennis)

The Majority erred in sustaining the claim for eight hours pay.

The claim involved a request for eight hours pay on behalf of the "oldest senior qualified employee" when Carrier failed to fill the clerk to agent's position at Princeton, West Virginia, after the incumbent of said assignment was diverted ("moved up") to the agent's position.

In Award 26316 involving the same parties, same rules, and same facts, claim was presented on behalf of the "senior qualified employee" because the Carrier diverted an employee from his assignment of clerk reporting at 7:00 a.m. to the position of agent reporting at 10:00 a.m. and did not fill the resultant vacancy. In that Award, the Board held that there was a rule violation, but withheld money damages given the absence of a named claimant.

In the instant case, the grievance was filed on September 21, 1983 for the "oldest senior qualified employee." Throughout the handling on the property, the name of the individual on whose behalf a claim was made was not made known to Carrier. At no time did the Organization challenge Carrier's statement that there was no qualified employee on the seniority roster available to fill the resultant vacancy. During conference on September 27, 1984, the parties agreed to close the record in this dispute, hold the claim in abeyance and review it on disposition of the case covered by Award 26316.

It was only after Award 26316 was rendered, some three years and nine months following final handling of the instant claim on the property, that the Organization offered for the first time, evidence to challenge Carrier's position there was no qualified available employee to fill the resultant vacancy.

The Carrier pointed out that the Organization's argument that Clerk M. R. Shelton was available to fill the resultant vacancy came too late, that the record was closed in 1984, and further arguments could not be developed. Most importantly, the Carrier furnished the Organization a handwritten statement from the alleged claimant that he was not qualified to work the clerk to agent position.

Nevertheless, the Majority has held that:

"...the Organization did identify during discussions on the property the most senior qualified available Clerk to fill Scandland's open position."

For the obvious reason that this Award is based on an erroneous understanding of the facts, we dissent.

James E. Gost

Robert L. Hicks

Martin W. Ingirant

Michael C. Louie

B V Vaya