

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28389
Docket No. CL-27552
90-3-86-3-828

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood GL-10145 that:

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, Kansas on November 8, 1985, when it failed and/or refused to call R. L. Berry to fill the short vacancy of Diesel Clerk Position No. 6005, and

(b) R. L. Berry shall now be compensated eight (8) hours' pay at the overtime rate of Position No. 6005 for November 8, 1985, in addition to any other compensation Claimant may have received."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

As of Claim date, Claimant was regularly assigned to a relief position covering Diesel Clerk positions, Saturday to Wednesday, with rest days of Thursday and Friday. On Friday, November 8, 1985, a known vacancy arose on Diesel Clerk Position No. 6005, 8:00 A.M. to 4:00 P.M., due to regular incumbent vacation. Filling of such short vacancy relief is governed by Rule 14 of the Agreement:

Rule 14

"Order of Precedence

14-C. When providing short vacancy relief the following order of precedence will be observed:

- (1) By calling the senior qualified off-in-force-reduction employee available at straight time rate not then protecting some other vacancy. (Such off-in-force-reduction employee not thereby to have claim to work more than 40 straight time hours in his work week beginning with Monday).
- (2) By using the senior qualified regularly assigned employee at the point who has served notice in writing of his desire to protect such service.

If Not Filled Under Rule 14-C

14-D. If the above alternatives do not provide an occupant for the short vacancy, it may be filled without regard to the seniority rules of this Agreement; however, when the vacancy is protected on an overtime basis (other than overtime that may accrue to an employee filling the vacancy under provisions of Rule 14-C), the following shall apply:

- (1) If the vacancy is on a rest day relief position the regular occupants of the positions being relieved shall protect the rest days of their own position if they so desire.
- (2) Vacancies, including vacancies on rest day relief positions not filled by (1) above, shall be protected on a day to day basis by the senior qualified and available employee in that class of service at the point who has served notice in writing of his desire to protect such service. Such employee is not to be considered available to protect such service on any day it would prevent him from protecting his own assignment.

14-E. If the above alternatives do not provide an occupant for the short vacancy, it may be filled by forcing the junior qualified and available off-in-force-reduction employee to protect the vacancy."

It is not disputed that there were no Rule 14-C(1) employees available and therefore coverage of the November 8, 1985 short vacancy went under Rule 14-C(2), to wit: "By using the senior qualified regularly assigned employee at the point who has served notice in writing of his desire to protect such service."

Claimant was number two on the Rule 14-C list behind a senior employee who had also filed Rule 14-C(2) desire to protect such service.

Carrier utilized the senior employee to fill the short vacancy 8:00 A.M. to 4:00 P.M. on November 8, 1985. Subsequently Claimant filed the present Claim asserting that she should have been called instead. On its face, the foregoing facts appear to show that Carrier complied to the letter with Rule 14-C(2) in calling the senior employee. However, the question of the senior employee's "availability" for such a call is much in issue because of the undisputed fact that on November 8, 1985, he was assigned regularly to work Janitor Position No. 6027, 6:30 A.M. to 3:00 P.M. In appealing the Claim on the property, the Organization asserted the material facts as follows:

"Claimant R. L. Berry was available and qualified to protect the short vacancy here involved in line with her Rule 14-C(2) request; however, Carrier improperly required that the vacancy be protected by S. R. Clampitt, who was already protecting his own regular assignment on Janitor Position No. 6027 which works 6:30 a.m. to 3:00 p.m., Monday through Friday with Saturday and Sunday as rest days and a rate of pay of \$91.85 per day."

In denying the Claim on appeal, Carrier asserted the material facts as follows:

"My investigation developed that senior employee S. R. Clampitt was called for the vacancy in question pursuant to his written 14-C(2) request on file to protect this position. Therefore, Claimant Berry was not entitled to this vacancy."

As Carrier was unable to fill the resulting vacancy on Janitor Position 6027 and there was work to be performed, Carrier used Mr. Clampitt on an overtime call basis and required him to work a call on this position before protecting the short vacancy on Position No. 6005. Therefore, no rules of the Agreement have been violated, particularly those cited by you."

On the basis of the facts as developed on the property, the Organization has met its burden of proving that the senior employee was not "available" for assignment to the short vacancy relief as Diesel Clerk from 8:00 A.M. to 4:00 P.M. on Friday, November 8, 1985, without suspending work on his regularly assigned position as Janitor, 6:30 A.M. to 3:00 P.M. Additional factual allegations which might have rebutted this showing of prima facie violation of Rule 14-C(2) were not raised by Carrier until after submission of the Claim to the Board for determination. These belated assertions by Carrier were disputed with additional factual assertions by the Organization.

Leaving aside all of these belatedly raised de novo arguments and confining ourselves to the record on the property, we find Carrier violated Claimant's rights under Rule 14-C(2) by using the senior employee rather than the Claimant to cover the short vacancy on November 5, 1985. Had Claimant been called and used on her rest day as Rule 14-C(2) required, she would have earned the overtime rate and therefore that is the appropriate measure of damages for the proven violation.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1990.