

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40593
Docket No. CL-40006
10-3-NRAB-00003-070234
(07-3-234)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that (GL-13182):

Case No. 1 (02030264)

- (a) Carrier violated the rules of the current Clerks Agreement at Topeka, Kansas commencing July 19, 2003, when they diverted claimant to Position No. 9266 off of training on her own job.**
- (b) Claimant R. S. Nelson-Miller shall now be returned to Position No. 6884 and compensated eight (8) hours pay at the rate WG 11 of the position for July 19, 2003. Claimant was wrongly withheld from her position, and is entitled to eight (8) hours compensation in addition to any other compensation Claimant may have received for this day.**

Case No. 2 (02050168)

- (a) Carrier violated the rules of the current Clerks Agreement at Topeka, Kansas commencing April 9, 2005 and April 10, 2005, when it wrongfully diverted D. Musquiz; and**

- (b) Claimant D. Musquiz shall now be returned to Position No. 9205 and compensated eight (8) hours' pay at the rate of the position for each work day Claimant is wrongfully withheld from the position, in addition to any other compensation Claimant may have received for these days.**

Case No. 3 (02-05-0223)

- (a) Carrier violated the rules of the current Clerks Agreement at Topeka, Kansas commencing June 1, 2005 when it wrongfully diverted S. B. Phillips; and**
- (b) Claimant Phillips shall now be returned to Position No. 6271 and compensated eight (8) hours' pay at the rate of the position for each work day Claimant is wrongfully withheld from the position, in addition to any other compensation Claimant may have received for this day.**

Case No. 4 (02-05-0242)

- (a) Carrier violated the rules of the current Clerks Agreement at Topeka, Kansas commencing July 13, 2005 when it wrongfully diverted M. J. Ditsch; and**
- (b) Claimant Ditsch shall now be returned to Position No. 6851 (relief Pos. 9711) and compensated eight (8) hours' pay at the rate of the position for each work day Claimant is wrongfully withheld from the position, in addition to any other compensation Claimant may have received for this day.**

Case No. 5 (02-05-0266)

- (a) Carrier violated the rules of the current Clerks Agreement at Topeka, Kansas commencing July 24, 2005, when it wrongfully diverted G. W. Pruitt; and**

- (b) Claimant Pruitt shall now be returned to Position No. 6251 and compensated eight (8) hours' pay at the rate of the position for each work day Claimant is wrongfully withheld from the position, in addition to any other compensation Claimant may have received for this day.

Case No. 6 (02-06-0012)

- (a) Carrier violated the rules of the current Clerks Agreement at Topeka, Kansas commencing September 25, 2005, when it wrongfully diverted G. W. Pruitt; and
- (b) Claimant Pruitt shall now be returned to Position No. 6892 and compensated eight (8) hours' pay at the rate of the position for each work day Claimant is wrongfully withheld from the position, in addition to any other compensation Claimant may have received for this day."

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.

The parties agreed to progress the six cases listed in the Statement of Claim as one single Submission. In each case, a short term vacancy was filled in the same

allegedly improper manner, giving rise to these claims. The only distinguishing factor in each of the six cases is the reason behind each vacancy. In Case Nos. 1 and 5, the absent employee was observing a vacation. In Case Nos. 2 and 3, the absent employee was on sick leave. Case No. 4 involved a paid personal leave and Case No. 6 involved jury duty.

The Claimants work in the Crew Department Office in Topeka, Kansas. The employees in this office are known as Crew Callers and are responsible for calling train, engine, and yard employees for train service throughout the entire system. In each of the six cases, the Claimant was newly assigned to a specific crew calling position and, as such, was serving an on-the-job break-in period. In each of the six cases, a second clerical employee had been called in as a “pilot” to train the Claimants. The Carrier was unable to fill the six short vacancies in question and pulled the Claimants from their new positions’ break-in-periods to fill the vacancies.

The relevant Rules in question are as follows:

“9-C. Cooperation will be given employees by all concerned in their efforts to qualify. If Management requires an employee to break-in on a position to which he is assigned for the purpose of familiarization or if the employee requests break-in time and it is granted by Management, the employee will receive the rate of the position. All break-in time must be for a full eight hours and during the regularly assigned hours of the position. As of the date the break-in commences, such employee will be considered as the occupant of the position. Management will determine the total number of break-in days required. The number of days allowed hereunder will not be counted as part of the 45 working days referred to in Rule 9. During the break-in period, an employee will not be considered available under Rule 14-C(2) nor will he be diverted under Rule 32-N.

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.**

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.

32-N. (1) In the event Carrier is not able to fill a short vacancy under the applicable rules of the Agreement and Carrier requires an employee to relinquish the assignment he is to protect that day to provide such short vacancy relief on another position, such employee will be paid at the time and one-half rate, at the higher rate of the two positions, while protecting such other position.”

The Organization contends that the Carrier violated the Agreement when it diverted the Claimants from their positions in the six cases discussed above. According to the Organization, under Rule 9(c) quoted above, it is impermissible to remove employees during break-in periods and place them elsewhere. According to the Organization, because the vacancies were not filled pursuant to Rule 14, the Claimants could not be removed from their break-in periods. Therefore, the Agreement was violated and the Claimants must be made whole. As a remedy, the Organization requests that the Claimants be compensated for eight hours in addition to any compensation that they had already earned during the days that they were diverted.

Conversely, the Carrier contends that it acted properly in diverting the Claimants. According to the Carrier, the Claimants filled the vacancies pursuant to Rule 14(d). As such, Rule 9(c) does not apply and, therefore, the Claimants were not precluded from being diverted to the vacancies. Rule 9(c) only applies when individuals are not moved pursuant to Rule 14. In this case, the Claimants were diverted pursuant to Rule 14(d) and, therefore, Rule 9(c) does not apply. In addition, the Carrier contends that Third Division Award 37684 controls the instant situation. In that case, Referee James E. Conway reviewed a similar set of facts and determined that due to an irreconcilable conflict of fact, the matter must be dismissed. The Carrier asks that the claims be denied in their entirety.

Referee Conway specifically addressed this question in Award 37684:

“The Organization asserts that the Claimant was plainly diverted while in training. Rules 9-C and 32-N of the Agreement – the so-called diversion and break-in Rules – prohibit the Carrier from making such reassignments. The Claimant is accordingly entitled to another eight hours of straight time pay.

The Carrier denies the claim on the grounds that the record supplies no information on how the Rules at issue are to be applied; that read together they cannot fairly be understood as an absolute prohibition against diverting in emergency situations.

* * *

In our review of this case we considered the various ‘fact’ contentions of the parties as they have been expressed and find that the evidence does not preponderate to the benefit of either party. The Organization contends that the Carrier was abusing the Rule and deliberately creating shortages while the Carrier asserts that the emergency diversion was justified under the circumstances. There is nothing in the record to persuade us to accept the version of one side as opposed to the other. Accordingly, due to the irreconcilable dispute in facts, we will dismiss the claim.”

After a review of the evidence and the positions of the parties, the Board finds that the Organization failed to meet its burden to prove that the Carrier acted improperly. We concur with the Board’s prior determination as set forth in Award 37684, i.e., “There is nothing in the record to persuade us to accept the version of one side as opposed to the other. Accordingly, due to the irreconcilable dispute in facts, we will dismiss the claim.” After reviewing all of the facts and circumstances of this case, the Board finds that the instant cases are not distinguishable and, accordingly, we reaffirm the findings of that Award. We specifically note that the Carrier requested information from the Organization to show how the instant cases were different from those adjudicated in Award 37864. The Organization was

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unable to provide such additional information. Therefore, the instant claims must be dismissed. See Third Division Award 34204, as well as Public Law Board No. 5180, Award 100.

AWARD

Claim dismissed.

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 27th day of August 2010.