# Award No. 14110
# Docket No. TE-14053

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Levi M. Hall, Referee

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## PARTIES TO DISPUTE:

## TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

## THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (Western Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Atchison, Topeka & Santa Fe Railway, that:

1. The Carrier violated the Agreement between the parties on or about September 29 and 30, 1961, by failing and/or refusing to permit Extra Telegrapher G. D. Wiegman, the senior available extra telegrapher, to protect a temporary vacancy on the 11:30 P. M. to 7:30 A. M. third trick printer clerk position at Wellington, Kansas, and thereafter refused and continues to compensate claimant in accordance with claim, and,

2. Carrier shall now be required to pay Claimant Wiegman an additional eight (8) hours' pay at the Wellington, Kansas, printer clerk rate for each day September 29 and 30, 1961, in addition to what was earned on assignment at East Tower, Amarillo, Texas.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect an Agreement between the parties bearing the effective date of June 1, 1951, on file with your Board and is thereby made a part hereof.

The Claimant, G. D. Wiegman, is an extra employe assigned to the Plains Division of the Carrier. In accordance with the terms of the Agreement, Claimant **must protect in his seniority turn,** unless physically incapacitated, such work on his seniority district as he is capable of performing, in order to retain his seniority.

On September 29, 1961, a temporary vacancy occurred on the 11:30 P. M. to 7:30 A. M. third trick printer clerk position at Wellington, Kansas, lasting for two days, September 29 and 30. Claimant was available to protect this extra assignment beginning on date at issue, however, a junior extra employe, B. J. Utz, was assigned the Wellington vacancy.

Claimant was assigned to a vacancy at East Tower, Amarillo, Texas, beginning at 11:45 P. M., September 29, 1961.

"It is a fundamental principle of law that damages for a breach of contract is the amount which the Claimant actually suffered by reason of such a breach. Consequently an employe wrongfully discharged is entitled to the amount he would have earned if he had not been so wrongfully discharged. See Award No. 1638 (Carter) Second Division. In Award No. 8673 (Vokoun) this Board said:

'. . . In the assessment of penalties the usual penalties are based on losses to individuals who are caused monetary loss because of a contractual violation, in order to make one "whole." Punitive damages are not ordinarily approved by the Board.'

Also see Awards 3651 (Miller), 5186 (Boyd), 7309 (Rader) and 8674 (Vokoun).

We cannot see how it will benefit the relationship between the Organization and the Carrier and effectuate the purpose of the Agreement to assess punitive damages on the evidence contained in the record."

Attention is also directed to the following statement contained in the "Findings" of First Division Award No. 16021:

"Our American courts of justice have consistently adhered to the prinicpal that when a penalty is sought to be exacted grossly disproportionate to the actual damage sustained, convincing evidence is required to prove a willful or deliberate breach of an agreement."

Attention is again directed to the following excerpt that is quoted from the "Opinion of Board" in Third Division Award No. 6701:

"Claimant was entitled to be made whole for the rule violation and this has been done in this case. No express penalty is provided for under the Agreement, but desipte that fact, **an employe wrongfully deprived of work is entitled to be made whole. Carrier recognized this obligation and discharged it and nothing further is payable.**" (Emphasis ours.)

Like the carrier in Award No. 6701, the respondent Carrier recognized and discharged its obligation for its action in failing to use the claimant Mr. Wiegman to protect the vacancy at Wellington, Kansas on September 29 and 30, 1961 when it made the claimant whole for the loss in compensation he suffered by reason thereof. Nothing further is payable.

In conclusion, the Carrier respectfully reasserts that the claim of the Employes in the instant dispute is entirely without merit or support under the Agreement rules, for the reasons heretofore stated, and should be denied in its entirety.

**OPINION OF BOARD:** On September 29, 1961, a temporary vacancy occurred on the 11:30 P. M. to 7:30 A. M., third trick printer clerk position at Wellington, Kansas, lasting for two days, September 29 and 30. Claimant was available to protect this extra assignment. However, a junior extra employe was assigned to the Wellington vacancy.

Claimant was assigned to a vancancy at East Tower, Amarillo, Texas beginning at 11:45 P. M. September 29, 1961. Had Claimant been assigned to the Wellington printer clerk position he would have received greater compensation and deadhead pay to and from his assignment. This claim is an attempt to exact a penalty from the Carrier for the breach of the Agreement.

Carrier has admitted it violated the Agreement and has made the Claimant whole in wages reimbursing him for any loss in compensation. It is Carrier's position that those in charge inadvertently overlooked the fact that the temporary vacancy at Wellington, Kansas, commenced at 11:30 P. M., some fifteen minutes earlier than the vacancy on the Towerman position at East Amarillo, Texas, which commenced at 11:45 P. M.

The rules of the Agreement prevailing on this property do not provide for any penalty where there has been a violation of the rules. Claimant's contention that Carrier's conduct was willful, arbitrary and deliberate is not convincing. The instant dispute does not include any claim for deadhead compensation in behalf of the claimant nor was it even raised on the property.

Claimant is limited to his actual loss of wages and, no monetary loss having been proven, paragraph 2, of the Statement of Claim cannot be sustained.

See Awards 12961, 12962 and 13376.

**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 Employes involved in this dispute are respectively Carrier and Employes 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; and

That the Agreement has been violated.

AWARD

Claim — Paragraph 1 — sustained.

Paragraph 2 — denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of January, 1966.