

Award No. 18056

Docket No. TE-17752

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David L. Kabaker, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Chicago, Rock Island and Pacific Railroad, that:

1. Carrier violated the Telegraphers' Agreement on June 20, 1966, when it failed to use the senior available telegrapher to fill a vacancy in the Relay Office at El Reno, Oklahoma.
2. Carrier shall compensate H. L. Turner, senior available Morse class employe assigned to the El Reno Office, eight hours' pay at time and one-half rate which he was denied.

EMPLOYEES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties, dated August 1, 1947, as amended and supplemented, is on file with your Board and by this reference is made a part hereof.

Claim was timely presented, progressed, including conference with the highest officer designated by the Carrier to receive appeals, and has been declined. The Employes, therefore, appeal to your Honorable Board for adjudication of this dispute.

The claim arose when the Carrier used a regularly assigned telegrapher in the Relay Office at El Reno, Oklahoma on his rest day to fill a vacancy in that office. Claimant, who is also regularly assigned telegrapher in the same office and who was also on rest day and available on date of occurrence, asked the Carrier to pay him the damages suffered because he was denied the right to fill the vacancy in preference to the junior employe. Carrier responded with the plea that Claimant had made an oral statement that he never wanted to be used on his rest days, which Claimant vigorously denies having made either in writing or orally as contended by the Carrier. The rules provide that office seniority will prevail and be effective when vacancies occur.

ELRENO, JAN. 21, 1966.

MR. C. J. NELSON
CHICAGO, ILLINOIS.

AT APPROXIMATELY 145PM JANUARY 20TH OPERATOR J. G. WOOLSEY ADVISED THAT HE WAS TOO ILL TO WORK THE REMAINDER OF HIS SHIFT AND ASKED TO BE RELIEVED AT 2:00PM.

ATTACHED IS FORM CT-8 GIVEN ME BY WIRE CHIEF H. L. TURNER ASKING FOR PAYMENT FOR TIME NOT WORKED DUE TO A YOUNGER MAN BEING CALLED.

ON DECEMBER 22, 1965, MR. TURNER DECLINED TO WORK HIS REST DAY TO COVER AN OPEN POSITION ON DECEMBER 23RD. AGAIN ON DECEMBER 29, 1965, MR. TURNER DECLINED TO WORK HIS REST DAY ON DECEMBER 30TH. WHEN ASKED ON DECEMBER 29TH, MR. TURNER TOLD ME THAT HE "DIDN'T EVER WANT TO WORK HIS REST DAYS" IF IT COULD BE AVOIDED. BOTH THE ABOVE DAYS WERE COVERED BY OPERATOR J. H. HALLER, A YOUNGER MAN, WHO ALSO WAS ON HIS REST DAY.

IT WAS ON THE STRENGTH OF MR. TURNER'S DECLINING TWO PREVIOUS REQUESTS TO WORK HIS REST DAY WHEN A YOUNGER MAN WAS AVAILABLE, AND ON HIS STATEMENT TO ME ON DECEMBER 29TH, THAT I CALLED OPERATOR HALLER TO WORK HIS REST DAY IN PLACE OF MR. WOOLSEY. I CONSIDER THIS AMPLE REASON FOR NOT WORKING MR. TURNER.

/s/ S. P. Lamb

4. This dispute was handled on the property in accordance with the applicable Time Limit On Claims Rule of the Agreement between the parties, and the Railway Labor Act, as amended.

5. To avoid burdening the record, Carrier has not included copies of the correspondence presented on the property concerning this claim as it is anticipated the Employees will produce such correspondence as a part of their submission. However, Carrier will refer to various portions of this correspondence, as necessary, and will reproduce pertinent portions of same where appropriate. Carrier will also take exception in its rebuttal statement to any errors or omissions in the Employees' reproduction of such correspondence.

OPINION OF BOARD: The claim presented avers that the Claimant, the senior available telegrapher, should have been called, on his rest day, to fill a temporary vacancy in a position, to which his seniority would have entitled him to be called to protect such vacancy.

Carrier admits that Claimant's seniority would have permitted him to fill the temporary vacancy, but asserts that Claimant had orally informed

Company, prior to the present incident, that he did not wish to be called on his rest days.

The Employees properly contend that since the Claimant's right to be called, based upon his seniority is not disputed, a prima facie case has been established by the Claimant and that the burden of proving a defense to such claim rests upon the Carrier.

The Board finds that Carrier did not call the Claimant to offer him the opportunity to fill such temporary vacancy.

The record reveals that Carrier's Manager-Wire Chief asserted in a letter, on the property, that Claimant orally informed him that Claimant did not work on his rest days. Claimant denied making such statement as alleged by Carrier. We find that Carrier failed to rebut the Claimant's denial by proof and failed to establish its assertion by tangible proof. This Board has ruled on numerous occasions that mere assertion of a fact, which is denied, can not be accepted as proof thereof.

The Board must conclude that the Carrier has not sustained its burden of proof to justify its failure to call the Claimant to fill the temporary vacancy to which he was entitled by virtue of his seniority.

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; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1970.