Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28906
Docket No. CL-28519
91-3-88-3-341

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10298) that:

CLAIM NO. 1:

(a) Carrier violated the rules of the current Clerks' Agreement at Topeka, Kansas on July 17, 1987, when it failed and/or refused to call Claimant Berner for Head Clerk Position No. 6170, and

(b) Claimant Berner shall now be compensated for eight (8) hours' pay at the time and one-half rate of Position No. 6170, in addition to any other compensation Claimant may have received.

CLAIM NO 2:

(a) Carrier violated the rules of the current Clerks' Agreement at Topeka, Kansas on July 17, 1987, when it failed and/or refused to call Claimant Bollinger for Lead Head Clerk Position No. 6158, and

(b) Claimant Bollinger shall now be compensated for eight (8) hours' pay at the time and one-half rate of Position No. 6158, 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.

This dispute concerns the allegation that the Carrier failed to follow the order of call procedure to fill short vacancies. The relevant rules provide:

"RULE 14 - FILLING SHORT VACANCIES

14-A. Vacancies of 15 work day or less duration shall be considered 'short vacancies' and, if to be filled, shall be filled as hereinafter provided in Rule 14.

14-B. Employes hereafter hired must, for 180 consecutive days following the date they establish seniority, make themselves available, except while regularly assigned, for short vacancies and vacation relief and will be called under the provisions of Rule 14-C and must promptly report for duty or forfeit all seniority rights. Off-in-force-reduction employes with seniority in excess of 180 days, who desire to be used for short vacancies and vacation relief, must file written notice of availability with their employing officer, with copy to the Division Chairman, designating points and grades of work (as defined in Rule 2) for which they will make themselves available. In the application of this Rule, Grades 1 and 2 are considered one grade. Notices of availability may be changed and/or withdrawn by giving ten days written notice to parties receiving original notice. Those with notice on file, will be called as provided in Rule 14-C and must promptly report for duty. The senior qualified off-in-force-reduction employe available at the point where the vacancy exists may be used on a day to day basis pending arrival of the senior off-in-force-reduction employe called for such vacancy.

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 employe 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 employe at the point who has served notice in writing of his desire to protect such service.

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 employe 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 employe in that class of service at the point who has served notice in writing of his desire to protect such service. Such employe 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.

14-F. An off-in-force-reduction employe, upon being relieved from a short vacancy due to having worked 40 straight time hours in his work week beginning with Monday or upon completion of a short vacancy may, if request is made within 72 hours, place himself upon another short vacancy (including the one from which relieved) occupied by a junior off-in-force-reduction employe, except such placement shall not be permitted until such senior off-in-force-reduction employe can assume the position without working in excess of eight hours on any day or 40 straight time hours in his work week beginning with Monday. A junior off-in-force-reduction employe affected by such placement may then have the same rights."

Claimants Berner and Bollinger hold seniority dates of September 20, 1967, and May 4, 1955 respectively. At the time these disputes arose, Claimant Berner was regularly assigned to Machine Operator Position No. 6187 with a schedule of 11:00 P.M. to 7:00 A.M., Monday through Friday. Claimant Bollinger was regularly assigned to Position No. 6177 with a 3:00 P.M. to 11:00 P.M. schedule and with the same scheduled days as Berner.

On Friday July 17, 1987, a short vacancy existed on Head Clerk Position No. 6170 (3:00 P.M. to 11:00 P.M.) as a result of the regularly assigned occupant being off on a personal leave day. No qualified off-in-force-reduction employee was available at the straight time rate not then protecting some other vacancy. In an effort to fill the position, the Carrier called the senior qualified and available employee at the point who had served notice of a desire to protect short vacancies such as Position No. 6170. However, he was not available when called. There were no other regularly assigned employees at the point who served written notice of a desire to protect such service in accord with Rule 14-C(2). Claimant Berner had a request on file under Rule 14-D(2) to fill this short vacancy. However, Claimant Berner was not called. Instead, the Carrier moved an off-in-force-reduction employee from Machine Clerk Position No. 6122 (3:00 P.M. to 11:00 P.M.) which she was protecting at the time to Head Clerk Position No. 6170 for July 17, 1987.

The facts concerning Claimant Bollinger are similar. On July 17, 1987, a short vacancy existed on Lead Head Clerk Position No. 6158 as a result of the regularly assigned occupant being off on union business. As with Claimant Berner, no qualified off-in-force-reduction employee available at the straight time rate not then protecting some other vacancy existed. Further, there were no employees meeting the qualifications of Rule 14-C(2). Although Claimant Bollinger had served a Rule 14-D(2) notice for Position No. 6158, the Carrier did not call Claimant Bollinger for the short vacancy, but instead required an off-in-force-reduction employee who was assigned to protect Machine Operator Position No. 6102 to protect the short vacancy on Position No. 6158 for July 17, 1987.

Therefore, the record sufficiently establishes that off-in-force reduction employees were working at and protecting other vacancies when the Carrier transferred them to fill the short vacancies in dispute before using Claimants. Under Rule 14-C-(1) those employees could not be transferred over Claimants in the positions in dispute because they were "then protecting some other vacancy."

The Carrier argues that with respect to Claimant Berner's claim (and, Claimant Bollinger's claim as well, Carrier Submission at 6-7, emphasis in original):

> "...Claimant Berner was <u>not</u> called under the provisions of Rule 14-D(2) as Carrier elected <u>not</u> to fill the vacancy on an overtime basis. Rather, Carrier elected to use the first part of Rule 14-D which is permissive and gives the Carrier two options: (1) to fill the vacancy without regard to the seniority rules of the Agreement (at the straight time rate) or two (2) fill one position on an overtime basis under Rule 14-D(1) or(2)."

We disagree with the Carrier's reading of the required progression under Rule 14. Under Rule 14-C, the Carrier was obligated ("the following order of precedence will be observed" [emphasis added]) to first call the senior qualified off-in-force-reduction employee available at the straight time rate "not then protecting some other vacancy" and second, by using the senior qualified regularly assigned employee who had a notice on file of a desire to protect such service. Under Rule 14-C(1), the Carrier could not use either individual they used to cover the short vacancies at issue because, as off-in-force-reduction employees, they were protecting other vacancies. At the time one was protecting Machine Clerk Position No. 6122 and the other was protecting Machine Operator Position No. 6102. By operation of the procedure, the Carrier was then obligated to drop to Rule 14-C(2), which mandated "using the senior qualified regularly assigned employe at the point who has served notice in writing of his desire to protect such service." After the senior qualified employee was deemed unavailable for Position No. 6170 and because no other notices were on file pursuant to Rule 14-C(2) and, similarly, because no such notices were on file for Position No. 6158, it follows that the short vacancies could not be filled under Rule 14-C. The Carrier was therefore next obligated to move on to Rule 14-D ("If the above alternatives do not provide an occupant for the short vacancy ....").

The Carrier asserts, however, that its actions of transferring off-in-force-reduction employees already covering vacancies to the short vacancies in dispute were taken in accord with the first part of Rule 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"). The Organization argues in response that "It was never the intent nor has it heretofore been interpreted to mean that such provision superseded the clear provisions of the Agreement ...[but] it has been the accepted understanding that the provision was intended to allow Carrier to hire a new employe to fill a vacancy rather than requiring it to be filled on an overtime basis." In support of its position that the Carrier has previously accepted the Organization's interpretation and that off-in-force-reduction employees can only be removed from an assigned vacancy to protect another vacancy in line with Rule 14-F, the Organization cites us to a February 11, 1985, declination in another matter where the Carrier stated that the Claimant therein was [emphasis added]:

> "protecting a short vacancy on File Clerk Position No. 6012 which commenced on October 8, 1984, hence Claimant was tied to this vacancy and was not available in the event Carrier had decided to fill the short vacancy of Position No. 6001."

Therefore, the Organization has demonstrated that in the past the Carrier has agreed with the position that similar employees protecting short vacancies cannot be transferred to cover other short vacancies unless the procedure in Rule 14-F is followed. In this matter, the Carrier has not rebutted that showing. The Carrier's Rule 14 argument therefore cannot stand in this case.

The Carrier's position that the first part of Rule 14-D gives it the authority to transfer off-in-force reduction employees from one short vacancy to another having been rejected, the operation of the process set forth in Rule 14 must be continued. The facts show that Rule 14-D(1) is not applicable to this case. Rule 14-D(2) then requires that vacancies "shall be protected on a day to day basis by the senior qualified and available employe in that class of service at the point who has served notice in writing of his desire to protect such service." In these cases, those individuals were Claimants. By not calling Claimants, the Carrier violated Rule 14-D(2).

The question now becomes whether Claimants are entitled to compensation for the failure to call at the straight time or overtime rate. We recognize the split in authority that exists concerning awarding overtime pay for work not actually performed. One line of authority adopts the rationale that an overtime award is not appropriate where work is not actually performed by the aggrieved employee. See e.g., Third Division Awards 26488 ("Since the violation encompassed loss of work opportunity for Claimants they will be compensated at straight time rates, rather than at the punitive rate") and 27973 ("... the appropriate rate of compensation for work not performed is at the pro rata, straight time rate"). The other line of authority typified by Third Division Award 13738 states that the employee suffering a loss of work opportunity as a result of violation of the Agreement is entitled to be compensated that amount the employee would have earned absent the contract violation.

We have considered the above arguments concerning the awarding of compensation at the straight time or overtime rate and believe that in this case compensation should be at the overtime rate. Here, as a result of the Carrier's violation of the Agreement, Claimants clearly lost work opportunities that, by terms of the rules, were designated as overtime assignments. The rule that was violated specifically was that provision requiring assignment of the position on an overtime basis (Rule 14-D - "...when the vacancy is protected on an overtime basis...)." Therefore, because Claimants were deprived of the ability to work overtime due to the Carrier's failure to follow Rule 14, in order to make Claimants whole, compensation must be at the overtime rate.

The Carrier's well-framed arguments on the amount of compensation do not require a different result. First, Third Division Award 26919 is distinquishable from the instant matter. That Award was premised upon Third Division Award 26340 which found:

> "While previous Awards have reached varying conclusions on this point, the Board finds in this instance that payment at the straight-time rate is more appropriate. The Claimant was not inconvenienced by having to perform the work, and the Carrier can by credited with a sincere (if insufficient) effort to meet the requirements of Appendix 'F'."

We cannot say that the same mitigating factors exist in this matter. Here, the Carrier took a position diametrically opposed to a previously stated interpretation of its ability to transfer employees covering short vacancies under Rule 14. See the Carrier's February 11, 1985, declination quoted above. We are thus unable to find that the Carrier made "a sincere effort to meet the requirements ..." of Rule 14.

Second, the Carrier correctly argues that an established method of resolution on the property for compensating loss of work opportunities is a relevant consideration in formulating the remedy in these kinds of cases. In this light, the Carrier cites us to Third Division Awards 28202 and 28186 on this property which remedied the violations found at the straight time rate. However, those matters did not involve violations of Rule 14-D(2) which specifically concerns overtime assignments for short vacancies. Award 28202 involved a dispute under Rule 32-G and Award 28186 involved a dispute mainly under Rule 32. Further, those Awards did not address a situation where the Carrier gave a previous conflicting interpretation of the rule at issue. On balance, we believe that our conclusion must remain that the loss of work opportunity in this case should be compensated at the overtime rate.

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 29th day of August 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 28906, DOCKET CL-28519
(Referee Benn)

The predicate for the Majority's decision in this case is a letter allegedly written by the Carrier on February 11, 1985. The Majority construes that letter as a concession by the Carrier that its assignments of work in this case were in violation of the Agreement.

There are two serious problems with the Majority's predicate.

First, the letter of February 11, 1985, was never presented by the Organization in the handling of the dispute on the property. A review of the on-property correspondence makes such fact undeniable. The letter was attached as an exhibit to the Organization's Submission. It pertains to a matter unrelated to the dispute, and the Organization did not even suggest in its Submission that the letter was part of the on-property handling of the case. Accordingly, the Majority's conclusion that the Carrier "has not rebutted" the implication of the letter is inappropriate as the Carrier could hardly rebut something not raised.

Second, to add injury to the injury, when the Organization raised the letter in its Submission, it did so in the context of arguing that the Carrier's work assignments were not appropriate under Rule 14-C(1) of the Agreement. The Carrier's position on the property, and before the Board, however, was that the Carrier's action was in accordance

with Rule 14-D of the Agreement. The Carrier did not contend that Rule 14-C(1) was the basis of its action.

We thus have an Award that is based upon a letter that was not presented on the property and which, even if it had been presented, would have been irrelevant as not relating to any issue involved in the dispute.

Finally, with respect to the precedent value of this Award, inasmuch as the Majority relies upon a letter which the Organization asserts is relevant only to Rule 14-C(1) of the Agreement, the very most that can be said of this Award is that it is a holding that when it is factually determined that an off-in-force reduction employee is not available because he is then protecting some other vacancy, such employee is not subject to call under Rule 14-C(1).

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost