Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29443
Docket No. CL-29863
92-3-91-3-258

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles 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 Organization (GL-10583) that:

CLAIM NO. 1

(a) Carrier violated the provisions of the current Clerks' Agreement at Kansas City, Kansas, on August 5, 1989, when it diverted J. R. Myers from his assignment on Janitor Yards Position No. 6122 to perform relief work and then failed and/or refused to compensate him, and

(b) J. R. Myers shall now be compensated eight (8) hours' pay at the pro rata rate of Janitor Yards Position No. 6122 for August 5, 1989, in addition to any other compensation already received for this date.

CLAIM NO. 2

(a) Carrier violated the intent and provisions of the current Clerks' Agreement at Kansas City, Kansas commencing September 7, 1989, when it diverted J. R. Myers from his assignment on CLIC Position No. 6098 to perform relief work and then failed and/or refused to compensate him, and

(b) J. R. Myers shall now be compensated one hour and 30 minutes at the half time rate of Cashier Position No. 6054, plus eight (8) hours' pay at the pro rata rate of CLIC Position No. 6098 for each day of assignment, September 7 through September 15, 1989 (seven total days), in addition to any other compensation already received for these dates."

NOTE: Claim for half time rate, by convention, is based on one hour and 30 minutes rather than one hour and 29 minutes.

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.

The Claimant was in off-in-force reduction status and on August 4, 1989, was called to provide short vacancy relief on Position 6122. He worked on that position on August 4. On Saturday, August 5, 1989, he was scheduled on Position 6122 from 7:00 AM to 3:00 PM but he was instructed to protect a short vacancy on Relief Position 7713 because there were no other employees available to do so. He protected Position 6098, rather than (as the Organization categorizes it) his "regular assignment" and is therefore entitled to compensation under the December 7, 1977 Letter of Understanding.

Carrier denied the Claim on December 12, 1989, stating:

> ""Pursuant to recent Award No. 8 of Public Law Board No. 4157, concerning this same claimant, off-in-force reduction employees are not entitled to diversion payment under Rule 32-N account Rule 32-N pertains to regularly assigned employees only."

Rule 32-N provides that:

> "A regular assigned employee will not be taken off his assignment to perform relief work except in case of an emergency which creates a vacancy on a position which cannot be filled in the normal way without interruption of required service;..." (Emphasis supplied).

Since, according to Carrier, the Claimant was not a "regularly assigned employee," Rule 32-N was not applicable.

Short vacancies under Rule 14-A are:

> "Vacancies of 15 work days or less duration shall be considered 'short vacancies' and, if filled, shall be filled as hereinafter provided in Rule 14."

Under Rule 14-B employees, except while regularly assigned, must make themselves available for short vacancies, and off-in-force reduction employees who desire to be used for short vacancies must file written notice of availability. The Claimant had a notice of availability on file. There are specified methods of releasing an off-in-force reduction employee from a short vacancy, i.e., [1] having worked 40 hours in a work week, [2] completion of the short vacancy, or [3] displacement by a senior employee. But here, the Organization argues that the Claimant was required to suspend work in order to absorb overtime which would have occurred on another short vacancy.

The same Claimant was called to provide short vacancy relief on CLIC Position 6098 on September 1, 1989, and worked on that date. On September 4, 5, and 6, 1989, the Claimant was off due to illness, but on September 5, he was instructed that upon his return to work he would protect a short vacancy on Cashier Position 6054. He complied with that instruction.

The claims, contentions, and arguments of the parties on the property concerning the September incident basically parallel those urged concerning the August assignments.

Certainly the issue which must be decided in this case is whether or not the Claimant was a "regularly assigned employee" when he was used on different positions on August 5 and September 7, 1989. The Organization argues that, in essence, the Claimant was "regularly assigned" since, of necessity, he "stood in the place" of the normal incumbent.

The Carrier denies that the employee was "regularly assigned", but in reality, he was an "off-in-force" employee. In support of its position, the Carrier cites two precedent Awards on this property and insists that the matter has been decided and thus the doctrine of res judicata controls.

On October 26, 1988, Award 8 of Public Law Board No. 4157 considered a dispute between these same parties which considered the same basic issue. The Award recognized that the outcome depended upon an answer to the question of whether or not the Claimant there was a "regularly assigned employee or not under Rule 32(N) (1)." The Award concluded that the Claimant "...was not regularly assigned."

On June 25, 1991, this Board issued Third Division Award 28831 which considered the Organization's contention that the positions "...became regular assignments and both Claimants were de facto incumbents, "and" the Carrier's argument that they were not "regularly assigned". The Award favored the Carrier's conclusion.

The Organization has relied upon Third Division Award 28906. The Claimants were regularly assigned employees who objected to the use of off-in-force personnel already assigned another short vacancy. The Award considered that there was merit in the Claimants' contentions.

This Board is of the view that the doctrine of res judicata has appeal in this dispute. As we read the entire Agreement, we conclude that it is a strained interpretation to conclude that the off-in-force employees become, de facto, regularly assigned in the context here under review. There are too many contractual items of distinction between the two concepts for us to decide that the Claimant became "regularly assigned."

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.