

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30402  
Docket No. CL-29500  
94-3-90-3-442

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10490) that:

- (a) Carrier violated the provisions of the current Clerks' Agreement at San Bernardino, California on June 13, 1989, and
- (b) Claimant R. E. Wible shall now be compensated for every work day on Position No. 6141 at the rate of pay of \$108.10 per day in addition to any other compensation he may have received for these days from June 13, 1989 until July 27, 1989."

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 waived right of appearance at hearing thereon.

Claimant, with seniority date of April 27, 1973, on the Los Angeles Station Departmental Seniority District, successfully bid off Position No. 6462 on the Zone Extra Board/ Training to an advertised vacancy on Position No. 6141, effective July 27, 1989. The latter position had been vacated since May 24, 1989, when J. E. Benson, former regular incumbent, was utilized by Carrier as a "relief" Assistant Trainmaster. Carrier filled Position No. 6141 from May 24 to July 26, 1989, by utilizing Rule 14-Filling Short Vacancies, reading in pertinent part as follows:

"Vacancies of 15 work days or less duration shall be considered 'short vacancies'...."

Although a number of Rules were cited by the Organization, the crux of this Claim is an alleged violation of Rule 11-A, which reads in pertinent part as follows:

"Except as otherwise provided in Rule 11-C, new positions, permanent vacancies and temporary vacancies of more than 15 work days known duration will be promptly bulletined in established places accessible to all employees affected in the seniority district where they occur...Rule 14 will govern the filling of positions which are vacant during the bulletin period."  
(Underscoring added)

To recover claimed monetary damages in this case, the Organization must carry the burden of proving, by a preponderance of record evidence: 1) that Carrier in fact violated the Agreement and 2) as a consequence of that violation, Claimant suffered actual damages. Turning to the first point, Carrier's continuous utilization of the "short vacancy" Rule for some 39 days arguably makes out a prima facie case of Rule 11-A violation, shifting the burden of justification to Carrier. Carrier's colorable explanation, i.e., that it was not possible to determine the duration of Mr. Benson's utilization on the Assistant Trainmaster position prior to July 19, 1989, is bottomed on bare self-serving assertions, with no supporting evidence. In the final analysis, we conclude that the Organization has carried its burden of proving that Carrier violated Rule 11-A in these circumstances.

With respect to damages, however, the Claim for daily earnings of Position No. 6141, on top of other earnings by Claimant during that period, is plainly excessive and patently punitive, neither of which is condoned by this Board. Carrier correctly points out that under Rules 11-A and 14, it was not obligated to bulletin Position No. 6141 until June 17, 1989, and the bulletin would not have "closed out" until June 23, 1989. Under the plain language of Rule 11-A, Rule 14 governed during the bulletined period. Therefore, the appropriate remedy for the proven violation is an award of differential earnings, if any, i.e., the difference between the earnings of Positions No. 6141 and No. 6462 during the period June 24, 1989, through July 27, 1989.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Dated at Chicago, Illinois, this 8th day of August 1994.