

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37642
Docket No. CL-38223
05-3-04-3-136

The Third Division consisted of the regular members and in addition Referee Elisabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12973) that:

Carrier violated the TCU Agreement at Birmingham, Alabama on February 17, February 18, March 5 and March 11, 1999, when Carrier allowed or instructed non-clerical employees to perform duties of clerk Telegrapher whereas clerical employees performed said duties prior to violation.

Carrier shall now compensate the Guaranteed Rotating Extra Board (GREB) employee, and if unavailable, for the Senior Extra List employee for eight (8) hours at the pro rata rate of \$141.60 per day, and if unavailable, for the Senior Qualified employee per Rule 37 at the applicable overtime rate of \$141.60 per day, for each and every violation date listed above.”

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 were given due notice of hearing thereon.

The basic facts of this case are not in dispute. On the dates in question, the Carrier used non-clerical employees to fill Clerk Telegrapher Job No. 314. Further, Clerk Telegrapher Job No. 314 is an "hours of service" position and, accordingly, must not be left vacant. On March 23, 1999, the Organization filed the above claim. In that letter it cited Agreement Rule 26 B(2) which reads as follows:

"(2) Promoted Train Dispatchers or Yardmasters will not be permitted to work under the Clerk's Agreement while they are in the service of the Train Dispatcher or Yardmaster classification."

The Organization contended that the Carrier had moved a Yardmaster off of her assignment to work a clerical job. It further noted that "it is not the responsibility of the TCU to have enough clerical employees to fill these jobs."

In its May 19, 1999 response to the claim, the Carrier protested that the vacancies at issue were a direct result of TCU-represented employees laying off. Thus, the Carrier maintained, the Clerks themselves created an "emergency" situation whereby available qualified personnel were used. The Carrier asserted that it made every effort to fill Clerk Telegrapher Job No. 314 with a TCU-covered employee; however, they either "became unavailable" or were laying off sick. Accordingly, the Carrier contended, it exercised its right to insure that the duties of the job were performed.

On July 6, 1999, the Organization appealed the Carrier's May 19, 1999 denial of the claim. In that letter the Organization maintained that, in addition to Rule 26, the Carrier violated Rules 1, 12, and 37. The relevant parts of those Rules read as follows:

"Rule 1 – SCOPE

- (A) Work now covered by the scope of this Agreement shall not be removed except by agreement between the parties.**

Rule 12 – FILLING OF SHORT POSITIONS AND VACANCIES

(A) (4)

- (a) The first out qualified Rotating Extra Board employee will be called to fill the position, if available, at the pro rata rate in accordance with the provisions of Rule 13.**
- (b) If there are no Rotating Extra Board employees available to protect the position at the pro rata rate, then the senior qualified and available Extra List employee will be called at the pro rata rate in accordance with Rule 14.**
- (c) If the position cannot be filled in accordance with the above provisions, then the position may be filled by a regularly assigned qualified employee working that day in the same immediate office or station on the same shift (as defined in Rule 35-A) in seniority order if practicable with the requirement to accept the vacancy in reverse order of seniority. The employee filling the vacancy will be compensated at the rate of the highest rated position involved including overtime for hours outside of his assigned position for that day, plus an additional payment of one (1) hour at the pro rata rate.**
- (d) If the position or vacancy cannot be filled from the above sources then the position will be filled in accordance with the provisions of Rule 37 – Assignment of Overtime.**

Rule 37 – Assignment of Overtime

- (C) When it becomes necessary to fill short vacancies by working overtime, such overtime will be worked by available incumbent or incumbents of the classification where the vacancy exists by calling the senior available employee from that shift who is off duty that day. If unable to fill the vacancy from this source, calls will then be made in seniority order to available qualified employees from the other shifts in that classification who can be doubled or are off duty that day. If unable to fill by this method, available**

qualified senior employees from other classifications in the same immediate office will be called.”

The Organization pointed out that there had been no agreement between the parties to remove the work at issue from Clerk Operators at Birmingham, Alabama, and allow non-TCU employees to perform those duties.

In its August 5, 1999 response to the Organization’s appeal, the Carrier noted that the dispute was a scope claim and that, accordingly, the burden of persuasion was on the Organization to show that a violation of the Scope Rule had occurred. It insisted that there was no evidence that TCU-represented employees had suffered a loss of work or that “the positions involved were performing less than the amount of scope covered work performed on December 1, 1980.” The Carrier maintained that on each occasion at issue it had called all of the rested and qualified TCU personnel at the location in question, all of whom were either unavailable or unwilling to work. Thus it was forced to assign Yardmaster J. Burr who was qualified and held clerical seniority.

Following several conferences on the property, the Organization summed up its position in a letter to the Carrier dated October 24, 2002. At the heart of that position was the Organization’s argument that the Carrier failed to maintain a sufficient work force to cover the shift in question, and, therefore, had created its own “emergency.” The Organization also noted that if, in fact, this was an “emergency,” then the Federal Hours of Service Act allows for extensions to service. Finally, the Organization insisted that if the Carrier chose not to recall clerical employees who were in Reserve Board status, it should have hired an additional new employee to make up for the clerical shortage.

The Carrier responded to the Organization’s letter on April 29, 2003. In its letter, the Carrier reiterated its point that no qualified employees were available to fill the vacancies at issue in this case. In support of this point, the Carrier provided a chart showing the employees’ status on the dates in question. Further, the Carrier noted, Agreement Rule 12 provides in part that:

“UNDERSTANDING: An employee will not be called to protect overtime on a position when it will result in his not being available to work his own position due to overlapping hours or the Hours of Service Law.”

The Carrier contended that it had shown clearly that all rested and qualified clerical employees were depleted prior to utilizing Yardmaster Burr, who was qualified and held clerical seniority. Moreover, the Carrier disputes the Organization's claim that it did not have sufficient clerical employees to staff the positions during normal times; rather, it insisted that only under the unusual circumstances giving rise to these claims (refusing to work, absenteeism, and not responding to calls) was it forced to utilize an otherwise qualified employee to fill a position that could not go unfilled.

With respect to the Hours of Service Act exception cited by the Organization, the Carrier noted that it did, in fact, require some employees to work considerable overtime, in order to protect the Control Operator position. It pointed out that on several dates, including the ones at issue, the Placement Center first utilized all "available" clerical employees and any other qualified employee, prior to extending the on-duty hours of service. The Carrier also denied that it violated Rule 26, because employee Burr was not returning from a Leave of Absence. Instead, insisted the Carrier, she was used to fill a must-fill vacancy as a last resort, and in accordance with Rule 12.

Finally, the Carrier dismissed the Organization's contention that a new employee or employees should have been hired to provide adequate staffing. It pointed out that the position of Control Operator requires extensive training; thus it cannot be filled by a temporary day-worker; nor is the Carrier obligated to hire an employee as a full-time standby employee just to deal with circumstances such as the ones giving rise to the instant claims.

The Board made a thorough review of the record in this case and of the evidence and arguments presented by both sides. We do not find that the Carrier violated the Agreement in using Yardmaster Burr to fill the vacancy at issue. The Organization's claim arose, in essence, because qualified and available clerical employees (either intentionally or unintentionally) made themselves unavailable to fill the essential position at issue.

There is no indication in this record that the Carrier created the problem by failing to staff its facility adequately. Moreover, there is ample evidence that every reasonable attempt was made to fill the position with a clerical employee prior to utilizing Yardmaster Burr -- including, on some occasions, requiring considerable overtime. Nowhere in the record has the Organization proposed that the position in

question was not a must-fill position; thus, the Carrier did not have the option of leaving it vacant, in the event it was unable to fill it with a clerical employee.

In circumstances such as the one giving rise to these claims, the Carrier finds itself in a "Catch-22" situation – one in which the TCU-represented employees have precipitated situations, and then consequently file grievances protesting the Carrier's defensible actions in response to those situations. In light of the foregoing we find no basis upon which to sustain the claims herein.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of October 2005.