

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37684
Docket No. CL-38450
06-3-04-3-443**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (a) Carrier violated the rules of the current Clerks’ Agreement at Topeka, Kansas on June 8, 2002, when it wrongfully diverted B. J. Morse from Position No. 6107; and**
- (b) Claimant B. J. Morse shall now be returned to Position No. 6107 and compensated eight (8) hours’ pay at the rate of the position for each work day Claimant is wrongfully withheld from the position, in addition to any other compensation Claimant may have received for these days.”**

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.

While Claimant Moore was training on Coordinator Position No. 6107 in the Carrier's Crew Support Office at Topeka, Kansas, pursuant to Rule 9-C of the Agreement, a one-day vacancy developed on Crew Technician Position No. 6261 in the same office and with the same hours of service. After unsuccessfully trying to fill the vacancy under Rule 14, the Carrier moved the Claimant to Position No. 6261.

The Organization asserts that the Claimant was plainly diverted while in training. Rules 9-C and 32-N of the Agreement – the so-called diversion and break-in Rules – prohibit the Carrier from making such reassignments. The Claimant is accordingly entitled to another eight hours of straight time pay.

The Carrier denies the claim on the grounds that the record supplies no information on how the Rules at issue are to be applied; that read together they cannot fairly be understood as an absolute prohibition against diverting in emergency situations.

The Rules implicated by the dispute are as follows:

RULE 9 - QUALIFYING

"9-C. Cooperation will be given employees by all concerned in their efforts to qualify. If Management requires an employee to break-in on a position to which he is assigned for the purpose of familiarization or if the employee requests break-in time and it is granted by Management, the employee will receive the rate of the position. All break-in time must be for a full eight hours and during the regularly assigned hours of the position. As of the date the break-in commences, such employee will be considered as the occupant of the position. Management will determine the total number of break-in days required. The number of days allowed hereunder will not be counted as part of the 45 working days referred to in this Rule 9. During the break-in period, an employee will not be considered available under Rule 14-C(2) nor will he be diverted under Rule 32-N."

RULE 14 – FILLING SHORT VACANCIES

“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 employee 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 employee 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 employee 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 employee in that class of service at the point who has served notice in writing of his desire to protect such service. Such employee is not to be considered available to protect such service on any day it would prevent him from protecting his own assignment.”**

32-N. EMERGENCY RELIEF WORK

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“32-N. (1) In the event Carrier is not able to fill a short vacancy under the applicable rules of the Agreement and Carrier requires an employee to relinquish the assignment he is to protect that day to provide such short vacancy relief on another position, such employee will be paid at the time and one-half rate, at the higher rate of the two positions, while protecting such other position.”

In our review of this case we considered the various “fact” contentions of the parties as they have been expressed and find that the evidence does not preponderate to the benefit of either party. The Organization contends that the Carrier was abusing the Rule and deliberately creating shortages while the Carrier asserts that the emergency diversion was justified under the circumstances. There is nothing in the record to persuade us to accept the version of one side as opposed to the other. Accordingly, due to the irreconcilable dispute in facts, we will dismiss the claim.

AWARD

Claim dismissed.

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 30th day of January 2006.