AWARD NO. 455
Case No. CL-143-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE ) Gerald V. Graphia and Atchison, Topeka and Santa Fe Railway Company

QUESTION AT ISSUE: In his letter of September 26, 1985, addressed to C. I. Hopkins, Jr. Chairman, National Railway Labor Conference, Claimant G. V. Graphia enclosed two (2) copies of his appeal/presentation to Special Board of Adjustment No. 605 for the purpose of resolving a dispute with the Atchison, Topeka and Santa Fe Railway Company wherein it is alleged that he has been improperly deprived of protective benefits under the Collective Bargaining Agreement, effective June 1, 1981.

OPINION OF THE BOARD: Pursuant to proper notice, this Board held a hearing on this dispute on August 21, 1986 at Washington, D.C. Claimant and his counsel personally appeared before the Board and presented extensive oral arguments. On July 1, 1987, the Board granted Claimant's motion to reopen the record because Claimant wished to submit additional evidence. The Board notified Claimant that he should submit his evidence on or before August 15, 1987. Despite his request to reopen the record, Claimant did not avail himself of the opportunity to file supplemental evidence.

As a result of a job abolition, a senior employee displaced Claimant from his Relief Clerk position on October 7, 1983. Claimant lacked sufficient seniority to hold a regular position on the Southern Division Station Seniority District and so he assumed off-in-force reduction status.

Two days before being displaced, Claimant informed the Manager-Regional Freight Office that he did not intend to protect extra work or fill short vacancies outside of the Galveston, Texas area because Claimant wanted to devote time to his own business enterprise. Claimant furnished the Manager with a completed Rule 14-B Notice of Availability form and an incomplete Rule 17-C(6) form. The Regional Manager imprudently completed the unfinished 17-C(6) form and delivered it along with the 14-B form to the Superintendent's office. At Claimant's behest, the Regional Freight Office Manager later rescinded the 17-C(6) form but Claimant's 14-B Notice of Availability remained effective.

On February 15, 1984, the Carrier unilaterally revoked Claimant's 14-B Notice because Claimant missed calls, refused calls or laid off when called for extra work on five days within a thirty day period. The Carrier similarly retracted the Notices of Availability for four other off-in-force reduction Galveston employees. Claimant filed the appropriate application for protective benefits covering February, 1984. The Carrier denied Claimant's request for benefits for the last half of February since his Notice of Availability had been cancelled effective February 15, 1984. The Carrier cited Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, which reads in part: "The protected status of an employe who ... fails to respond to extra work when called, will be suspended until such time as he obtains a regular position."

In its February 15, 1984 revocation letter, the Carrier asserted that Claimant was unavailable to either fill

temporary vacancies or perform extra work on January 19, 1984; January 27, 1984; January 28, 1984; January 29, 1984 and February 14, 1984. Specifically, Carrier records reveal that Claimant refused a call to protect service at Alvin, Texas on January 19, 1984. On January 27, 1984, the Carrier was unable to contact Claimant to fill a position vacant due to the incumbent's illness. Claimant missed a call for the same vacancy on January 28, 1984. On January 29, 1984, Claimant was contacted to fill the vacancy created by an ill employee but Claimant also laid off sick. Finally, on February 14, 1984, Claimant missed a call to fill Position 6031. Also, Claimant missed a call on January 24, 1984; laid off sick when called on January 26, 1984 and laid off sick when called on February 13, 1984. However, the Carrier did not count these last three days against Claimant. In addition, the Carrier compiled a summary showing that Claimant was unavailable to perform service when called on forty-eight days during 1984. Most often, Claimant laid off due to illness or to conduct personal business. Since Claimant's 14-B Notice had been revoked and Claimant was frequently unavailable, the Carrier similarly denied Claimant's monthly petitions for protective benefits subsequent to February, 1984.

The Carrier contends that, in the past, it has always cancelled 14-B Availability Notices for those employees who miss calls, refuse calls or lay off, for whatever reason, on any five days within a thirty day period. According to the Carrier, Claimant was treated no differently than the other Galvaston

workers who had their Notices of Availability revoked in February, 1984.

Claimant concedes that he was aware that the Carrier might nullify his Notice of Availability if he made himself unavailable to perform service on any three days within a single month. Thus, Claimant has not challenged the Carrier's right to revoke a Schedule Rule 14-B Notice of Availability but instead claims that the Carrier erred in concluding that he was unavailable on the five dates in dispute. Claimant declares that he was either unavailable for a good reason or had permission to mark off on each of the dates in question. In his submission, Claimant explained why he failed to protect service when called on the five dates triggering the revocation of his 14-B Availability Notice. Although Claimant admits that he refused to work the Alvin, Texas job on January 19, 1984, Claimant submits that an off-in-force reduction employee could not fill the vacancy since the Carrier utilized a regularly assigned Extra Board Clerk. With regard to January 27, 28 and 29, 1984, Claimant declares that he entered into a special "local agreement" with the Regional Freight Office Manager permitting him to mark off indefinitely beginning on January 22, 1984 so Claimant could attend his grandfather's funeral in New Orleans. According to Claimant, the Manager agreed to mark Claimant sick on any day which he was called during his absence from Galveston. Thus, when called on January 29, 1984, Claimant mistakenly laid off sick. Inasmuch as he had not marked up yet, it was unnecessary for Claimant to lay off sick. Claimant

successfully underwent a polygraph examination attesting to the veracity of his rendition of the facts. Thus, Claimant urges this Board to disregard the Carrier's denial of the existence of the local agreement. Lastly, Claimant represented to the Board that on February 13, 1984, the Regional Freight Office Manager told Claimant that the Carrier would not need him to perform service on February 14, 1984. Claimant relied on the Manager's statement and thus, Claimant was out of town on February 14, 1984.

Claimant alleged that the Regional Freight Office Manager altered payroll records which initially granted Claimant sick leave for the days Claimant was in New Orleans. On the other hand, Carrier records reflect that Claimant was denied sick leave on some dates because instead of being ill, he was attending a funeral.

While this Board need not address the Carrier's right to void an Availability Notice, the Board emphasizes that nothing in our Opinion should be construed to endorse the Carrier's unilateral revocation of Availability Notices based solely on a strict quantitative standard for measuring employee unavailability. (See Question and Answer No. 4 under Article II, Section 1 of the Agreement.)

After carefully reviewing the entire record, the Board concludes that Claimant made himself unavailable, for many reasons, during 1984 which was the sole cause of the suspension of Claimant's protective benefits. Aside from his bare, unsubstantiated assertions, Claimant has not presented any

reliable, probative evidence proving the existence of the special arrangement that he purportedly reached with the Regional Freight Office Manager. Rather, the most objective evidence, the Carrier's business records, demonstrates that on January 26, 1984 and January 29, 1984, Claimant laid off sick which belies his assertion that he was indefinitely marked off, with authority, beginning on January 23, 1984. Moreover, since Claimant was attending a funeral, he was entitled to three days of funeral or bereavement leave. Thus, it would be unnecessary for the Manager and Claimant to surreptitiously mark Claimant sick to excuse Claimant's missed calls. Starting on January 27, 1984, Claimant should have been available for service because his funeral leave had expired.

Although the Carrier removed a regularly assigned Extra Board Clerk from his usual assignment to fill the Alvin vacancy on January 19, 1984, the Carrier's action was not planned but instead a consequence of Claimant's refusal (as well as the refusal of other off-in-force reduction employees) to accept the call. The Extra Board Clerk did not have a superior right (over Claimant) to fill the vacancy. Claimant's failure to protect the vacancy is not excused simply because the Carrier was ultimately forced to utilize an Extra Board Clerk to prevent disruption to railroad operations.

Finally, Claimant did not substantiate his rather convenient assertion that the Regional Freight Office Manager permitted him to miss a call on February 14, 1984.

Claimant submitted his polygraph results to corroborate his story but a polygraph examination is an unreliable, scientifically unacceptable method to verify facts. Moreover, the Board can give little weight to the results of Claimant's polygraph test because the Carrier did not participate in either the selection of the examiner or the administration of the test. In summary, the record does not contain any stipulation that both Claimant and the Carrier would be bound by the polygraph test results.

Claimant clearly manifested his desire to avoid protecting extra work on his seniority district beyond the Galveston area. During 1984, Claimant was unavailable for work an inordinate number of days relative to the number of times that he was called for service. Per Article II, Section 1 of the February 7, 1965 Agreement, as amended, the Carrier was not under any duty to pay protective benefits to an employee who has demonstrated an almost constant reluctance to fill short vacancies or perform extra work available on the employee's seniority district. Apparently, Claimant was more interested in tending to his own business as opposed to making himself available in accord with Rule 14-B.

Even though we are denying this claim, our Opinion does not bar Claimant from filing a new Rule 14-B Notice of Availability form provided he is ready and willing to regularly perform service when called. If Claimant files a Rule 14-B Notice, the Carrier shall restore Claimant's protective benefits effective with the filing date.

AWARD

Claimant's petition is denied.

John B. LaRocco
Neutral Member

Dated: October 27, 1987