AWARD NO. 458
CASE NO. CL-148-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Transportation-Communications International Union and The Atchison, Topeka and Santa Fe Railway Company

QUESTIONS AT ISSUE:

1. Has an extra protected employe who was not available for work on four occasions, three of which were with proper cause, "engaged in a consistent pattern of conduct of refusing to accept calls to perform extra work" within the meaning of award No. 16, Case No. H&RE-1-E, of Special Board of Adjustment No. 605?

2. Should Carrier be required to restore protection to R. A. Kaminskas and compensate him for all loss of compensation as a result of Carrier rescinding his protection?

OPINION OF THE BOARD: Sometime before May, 1985, Claimant, a protected employee on off-in-force-reduction status on the Chicago Terminal Division Station Department Seniority District, filed a schedule Rule 14-B notice of availability to protect extra work and temporary vacancies.

On May 20, 21 and 22, 1985, the Carrier called Claimant to perform extra work. Stating that he was ill, Claimant declined to respond to the three calls. Claimant also either missed a call or failed to respond when called on May 11, 1985. The record does not reflect Claimant's reason for not protecting extra work on May 11, 1985.

The Carrier unilaterally established a policy (which, according to the Carrier, was a longstanding practice) of revoking an employee's Rule 14-B notice if the employee failed to

protect extra work more than twice within thirty calendar days regardless of the employee's reason for missing or failing to respond to three or more calls. Consistent with its policy, the Carrier revoked Claimant's Rule 14-B notice of availability on June 13, 1985 which consequently caused the suspension of Claimant's protective status. Thus, the Carrier denied Claimant's application for his protective guarantee for the period from June 13, 1985 through June 30, 1985. After the Carrier rescinded his Rule 14-B notice, Claimant produced hospital records and a physician's note indicating that he had suffered an injury on May 18, 1985 and was under a physician's care until May 23, 1985. The doctor released Claimant to return to duty on May 23, 1985. According to Claimant, he was the victim of an assault and attempted robbery on May 18, 1985. His injuries prevented him from protecting extra work on May 20, 21 and 22, 1985.

The second sentence of Article II, Section 1 of the amended February 7, 1965 Job Stabilization Agreement on this property provides that an employee's protected status is suspended if he fails to make himself available to perform extra work. The second sentence of Article II, Section 1 reads:

> "...The protected status of an employe who fails to obtain or retain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or fails to accept employment as provided in this Agreement, or fails to respond to extra work when called, will be suspended until such time as he obtains a regular position...." [Emphasis added.]

Agreed-upon Question and Answer No. 4 under Article II sets forth guidelines for applying the extra work provision of Article II, Section 1. Agreed-upon Question and Answer No. 4 states:

> "Question No. 4: Does the phrase 'fails to respond to extra work when called' apply to isolated instances of not receiving a call or being unavailable to respond?
>
> "Answer to Question No. 4: The provisions of Article II, Section 1, of the Agreement do require a furloughed employe protected under Article I, Section 1, to respond to a call for extra work in order to preserve the protected status. Isolated instances such as referred to in the Question should be handled on an equitable basis in the light of circumstances involved. Seasonal employes must respond when offered employment as provided in Article 1, Section 2."

The Organization charges that the Carrier improperly and unilaterally instituted various policies for applying Article II, Section 1 of the February 7, 1965 Mediation Agreement, as amended. According to the Organization, the number of calls that an employee is permitted to miss varies from location to location but nevertheless the policies are unenforceable because they were not the product of negotiations between the Organization and the Carrier. The Organization further argues that Claimant's conduct did not manifest a consistent pattern of refusing to accept calls to perform extra work without good cause. The Organization emphasizes that Claimant suffered serious injuries as a result of being assaulted, and thus he was excused from failing to perform the extra work on May 20, 21 and 22, 1985.

The Carrier contends that Article II, Section 1 expressly and literally requires off-in-force-reduction employees

to protect all extra work as a condition of retaining their protected status. The Carrier logically argues that since it is obligated to call workers who file Rule 14-B notices to perform extra work, the employees have a concomitant duty to respond to the calls. Whenever an employee misses a call or lays off after being called, the Carrier treats the employee as if he is voluntarily absent regardless of the worker's reason for failing to protect the extra work. In addition, the Carrier denies that each point has differing limits on the number of times an employee may lay off or miss extra work calls. The Carrier's policy of three instances of unavailability within a thirty-day period is a well-established past practice uniformly applied across the system. Although Claimant's excuses for laying off when called were irrelevant, the Carrier questions the veracity of Claimant's reasons for marking off on May 20, 21 and 22, 1985. The Carrier stresses that Claimant neither mentioned an assault nor conveyed to his supervisors that he was under a physician's care on the dates he was called. Finally, the Carrier asserts that Claimant was unavailable for service on seven dates between June 14 and June 27, 1985 which constitutes a consistent pattern of failing to protect extra work.

Initially, this Board notes that it must disregard the dates Claimant purportedly missed or failed to respond to extra work calls subsequent to June 13, 1985, the date the Carrier formally revoked his Rule 14-B notice of availability. Assuming Claimant filed another Rule 14-B notice after June 13, 1985, we do not express any opinion concerning whether or not the Carrier had

grounds for rescinding a subsequent Rule 14-B notice based on Claimant's alleged unavailability during June, 1985.

This Board has interpreted Article II, Section 1 on numerous occasions. In summary, our prior decisions held that an employee's protected status is suspended if the employee's conduct evinces a consistent pattern of refusing to accept calls to perform extra work without proper cause. (See, for example, SBA No. 605, Award No. 16.) A finding that a protected employee was unavailable on a single date is, in and of itself, insufficient to suspend the employee's protected status. SBA No. 605, Award No. 185. Question and Answer No. 4 clearly provides that isolated instances of employee unavailability should be equitably handled according to individual circumstances. Instead of constructing a rigid, quantitative formula for determining employee unavailability, Question and Answer No. 4 envisions that the parties will apply Article II, Section 1 to isolated instances of unavailability in an equitable and prophylactic fashion based on the surrounding circumstances of each case. Therefore, the Carrier's strict numerical quota for measuring employee unavailability is contrary to Question and Answer No. 4. This Board does not mean to suggest that three missed calls (or layoffs when called) within thirty days will always be inadequate to justify revocation of an employee's Rule 14-B notice with the consequential suspension of his protection. Rather, three missed calls in a thirty day period may be sufficient to revoke the employee's Rule 14-B notice in some instances, but, under other circumstances, an employee could permissibly miss six or seven or more calls within the same period.

It is impossible for this Board to establish a fixed formula for determining employee unavailability.

Citing an April 19, 1966 letter from the Organization's former General Chairman to one of his Vice Chairmen, the Carrier alternatively argues that the Organization has acquiesced in the Carrier's policy. The internal union correspondence, however, does not condone the Carrier's policy. On the contrary, the letter alludes only to the Carrier's right to revoke a Rule 14-B notice when a worker fails to accept calls without good and sufficient reasons. Moreover, the Carrier is using the correspondence out of its proper context. Apparently, the letter was primarily concerned with the Carrier's utilization of employees, who had not filed Rule 14-B notices, to perform extra work.

To comply with Question and Answer No. 4, the Carrier must, at a minimum, consider two factors besides any numerical quota before revoking an employee's Rule 14-B notice. First, the Carrier must ascertain if an employee missed or laid off from a call with good cause. The Carrier must take into account the "circumstances involved" or the reasons for the employee's absence. Obviously, the Carrier's strict quantitative policy for determining employee unavailability improperly ignores the employee's excuse for being unavailable. Second, the Carrier should measure the quantum of an employee's availability on both a numerical and a percentage basis. Comparing the number of days an employee is unavailable against the number of times that he's called will often show whether an employee is only unavailable on isolated occasions or has developed a consistent pattern of failing to protect extra

work. The Carrier's quota of three misses in thirty days disregards how many times the worker was called. Put simply, there is an equitable distinction between a worker who misses three of three calls within one month and an employee who misses three of twenty calls. On the other hand, a worker who is only called three times in thirty days and misses all calls may not have established a consistent pattern of unavailability if, in the long run (say, one year), the worker protected all but these three calls. In summary, evaluating employee unavailability according to more than one measurement conforms to the "equitable basis" enunciated in Question and Answer No. 4.

Applying the analysis enunciated above to the particular facts in this case, the Board concludes that Claimant was not consistently unavailable during May, 1985. Claimant had a good reason for three of his four failures to protect extra work when called. Claimant presented hospital emergency and physicians reports confirming that Claimant was injured on May 18, 1985. While Claimant should have disclosed his injuries to the Carrier when he was called, there is nothing in the record undermining the authenticity of the hospital records. Claimant was negligent by failing to tell the Carrier about his injuries, but his negligence does not exculpate the Carrier's wrongful revocation of his Rule 14-B notice. Neither Question and Answer No. 4 nor this Board's precedents require the employee to provide immediate documentary verification showing why he failed to respond to a call or be forever barred from presenting evidence demonstrating that he was justifiably away from work. We conclude that Claimant had proper

cause to lay off when called for extra work on May 20, 21 and 22, 1985. Thus, we are left only with Claimant's failure to respond to extra work on May 11, 1985 and this single instance of unavailability, standing alone, was insufficient to result in the suspension of Claimant's protected status.

AWARD

The Answer to Question at Issue No. 1 is No.

The Answer to Question at Issue No. 2 is Yes.

John B. LaRocco
Neutral Member

Dated: November 7, 1988