

PUBLIC LAWBOARD NO. 3314

Parties: Brotherhood of Railway and Airline Clerks
and
Union Pacific Railroad. Company - Eastern District'

Statement of Claim: "Claim of System Committee of Brotherhood that:

1. The Company violated the Rules Agreement effective June 1, 1975, particularly the Zone Guaranteed Extra Agreement, when they arbitrarily ran around Guaranteed Extra Board Clerk Caryle T. Ashbacher for the position of TOALBMTTC (Telegrapher-Operator Asst. IBM Train Checker) on November 1, 1977.

2. The Company shall now be required to compensate Clerk Caryle T. Ashbacher, eight (8) hours pay at the pro rata rate of pay on date of claim November 1, 1977, In addition to her monthly guarantee based on the Extra Board monthly rate of \$1,176.58."

Background: Article I, Section 6(a) of the Zone Guaranteed Extra Board Agreement states in part:

"(a) Except as otherwise provided, employees assigned to extra board positions under this agreement shall, subject to qualifications, be called in rotation for service in accordance with this agreement, and shall hold themselves available for call at their designated calling place during each of three two-hour periods daily which shall be specified by the Carrier at the location of each extra board."

The Claimant Clerk was placed on the Extra Board at 12 noon October 31, 1977 and was No. 4 out. Clerk Bowhay placed on the Extra Board at 11:00 P.M. on October 31 and was listed No. 5. The Carrier called Clerk Bowhay for a TOALBMTTC position at 11:00 P.M. on November 1. The Claimant was not called on November 1, 1977.

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The Claimant was available and waiting for the call on the claim date.

Organization's Position

The Organization contends the Carrier breached the Guaranteed Extra Board Agreement when it failed to call the Claimant in proper rotation order, and instead called Clerk Bowhay ahead of Claimant. The Organization adds there is no merit to the Carrier's contention that the Extra Board was manipulated because clerk Bowhay was not qualified for position of Bill Clerk that would become available on November 2, 1977 and therefore it used Clerk Bowhay out of turn on November 1, 1977. The Organization asserts that both Claimant and Clerk Bowhay had worked the position of Bill Clerk in the past and both employees were qualified to work the positions of both TOA/BMTC and Bill Clerk. It adds that the Carrier had a contractual procedure for determining qualifications but it did not invoke this procedure, but rather chose to breach the mandatory requirement of Section 6(a) of the Guaranteed Extra Board Agreement requiring the Carrier to call in rotation employees properly listed.

The Organization also denies there is any merit to the Carrier's contention that even if it violated the Guaranteed Extra Board Agreement, the Claimant is not entitled to her claim because of the monthly guarantee that she received for the month of November 1977. The Organization states that to accept the Carrier's rationale would permit it to ignore the provisions with impunity. There are no provisions in the Guaranteed Extra Board Agreement that allows the Carrier to violate the said Agreement and then use the monthly guarantee as an offset against a valid claim. The Organization stresses the claim is a violation that

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occurred on November 1, 1977 and not for the entire month of November 1977. To accept the Carrier's position is tantamount to **discarding** the Agreement.

The Organization asserts that most monthly guarantees are not offset by valid penalty claims.

The **Organization** cites several **awards** which it **con-**tends support its position on **damages**.

Carrier's Position

The **Carrier** advances two reasons why the claim lacks **merit**. The Agent on the **site** determined **that** the affected employee lacked qualifications to fill the position and it notes that Article I, Section 6(a) of the Zone Guaranteed **Extra** Board Agreement provides that, subject to qualifications, employees assigned to the Extra Board shall be called in rotation. The Carrier **states** the determination of an employee's qualification **is** vested in it unless the **Organization** can prove that the Carrier acted in an arbitrary or capricious manner. It adds the Organization's statement that the affected employee was qualified for the position **is** not sufficient proof to **warrant the** Board finding that the employee **was** qualified within the meaning of Section 6(a) of the Guaranteed Extra **Board** Agreement.

The Carrier states that even **if, arguendo,** it breached the Agreement, the claim must fall because the Claimant suffered no monetary loss. In the **case** at hand, the **Claimant** suffered no loss because she received an adjustment to her monthly compensation **that brought** this compensation **up** to an earnings level equivalent to the monthly **guarantee** on the **Guaranteed Extra Board**. The Carrier states that if it

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had paid the claim, it would have been reduced from the monthly guarantee **and** the Claimant's compensation would have remained the same. The Carrier stresses that the Claimant has already been compensated for any **loss** resulting from its failure to call the Claimant in the manner the **Organiza-**tion contends the Claimant should have been called in this case. The **Carrier** maintains that penalty payments granted Claimant are offset against the monthly guarantee due her. The **Carrier** further maintains that historically it had deducted penalty payments from any guarantee payment due the employee, unless expressly prohibited by agreement. **The** Carrier notes that Section 4 of the **Guarantee** Agreement expressly provides that a travel allowance is excluded from being considered as compensation **in** determining the guarantee. The **Carrier** also notes that the Guarantee Agreement expressly **provides** that overtime on penalty payments **will** be considered in applying the guarantee.

The carrier **further** notes that it only acted to protect the needs of service and did not seek to violate **wilfully** the Guarantee Agreement.

The Carrier reiterates **regardless** of the alleged merits of the claim, the Claimant In this case is not entitled to any monetary sum over the contractually **prescribed** monthly guaranteed compensation.

Findings: The **Board**, upon the **whole** record and all the evidence, **finds** the employee and **carrier Employee** and carrier within the **Railway** Labor Act; that the Board has **jurisdiction** over the dispute and that the parties to the dispute **were given** due notice of the hearing thereon,

The **Board** agrees that the core issue **In this** dispute is whether the **Carrier** is entitled to offset a penalty payment against the

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contractually prescribed monthly guarantee to employees on the guaranteed extra board.

The main thrust of the **Organization's** position is that a denial of the claim leaves it powerless to enforce an agreement which the contracting parties have voluntarily agreed to honor and to comply **with**. The Organization asserts that failing to require the Carrier honor the claim leaves the Carrier at liberty to ignore the covenant it has made **with** the Organization. The Organization stresses that the purpose of negotiating the Guaranteed Extra **Board was** not to show damages but rather to have the contracting parties live up to their contractual **commitments** regarding the operation and administration of the Guaranteed Extra. Board.

The **Board finds** that despite the **Organization's** cogent plea for a **sustainer award**, it cannot comply **with** the **Organization's** plea. To do **so** would violate the **basic** law of damages pertaining to **contract breaches**. Under our system of contract law, monetary damages are awarded when the aggrieved party has been monetarily or financially harmed. absent a clear showing of a **wilful** and malicious breach of the contract. In the case at hand, the Claimant received her monthly guaranteed **earnings** despite the fact **that** she **was** not called. for her assignment on November 1, 1977.

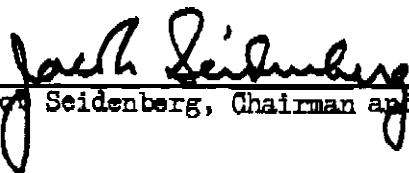
If the Organization **wishes** to secure penalty payments that will not be offset against the minimum monthly guarantee, it **will have** to secure this right by negotiations in the **same** way it secured the **right to have travel allowances** excluded from the minimum monthly guarantee,

The Board must note that it is compelled to **reach** **this** result **because** the courts of law when called upon to rule on this

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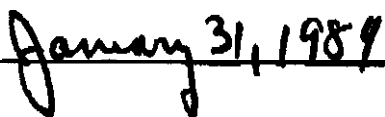
specific issue, have refused to grant monetary awards to claimants contractually aggrieved, in the absence of a showing of financial or pecuniary damages or loss. The Board believes it would be impolitic for it to render an award that is at variance with the weight of judicial authority on this issue of damages.

Award: Claim denied.


Jacob Seidenberg, Chairman and Neutral Member


R. H. Meredith, Carrier Member


W. E. Granlund, Employee Member


January 31, 1989