Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36053
Docket No. CL-33210
02-3-96-3-646

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Burlington Northern Santa Fe Railroad (formerly The
( Atchison, Topeka and Santa Fe Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL11406) that:

(a) Carrier violated the rules of the Clerk's Agreement at Redondo Tower, commencing on January 3, 7, 8, 9, 11, 17, 18, 1995 and February 1, 1995, when it failed and/or refused to call the senior available employe to fill the short vacancies of Towerman Position No. 6327, 6326, 6325; and

(b) The senior available qualified employe shall now be compensated eight (8) hours' pay at the time and one-half rate of Towerman Position No. 6327 for January 3, 7, 9, 17, 18, 1995, Position 6326 for January 9, 1995, and Position No. 6325 for January 11, 1995, and February 1, 1995, and for all future dates, continuing until such violation ceases, in addition to any other compensation Claimant may have received"

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 claim arose when the Carrier used a non-Agreement employee to fill eight separate one-shift short vacancies at its Redondo Tower facility in January and

February 1995. The Carrier conceded that if sufficient qualified employees had been available, they would have been used. But the Carrier maintained that such employees were not available. As a result, the Carrier filled the vacancies with a former employee who had left the Carrier's service and was working for a temporary employment service.

In justification for its action, the Carrier raised a number of defenses to the claim, which ranged from allegations that the claim was vague, indefinite and lacking in specifics to the contention that the Organization failed to name specific Claimants. In addition, despite the fact that the Organization cited 11 different Rules by number in the initial claim and its first appeal, the Carrier asserted the Organization had also failed to cite "... any specific rule." The Carrier also maintained that the Claimants were not available for some of the subject vacancies due to their required attendance at Rules classes.

We find the Carrier's defenses, especially those based on staffing shortages, to lack merit. The claim was apparently sufficiently clear and specific enough for the Carrier to provide detailed responses to it and the subsequent appeals. In addition, it is well settled that the Carrier's reserved right to determine staffing levels carries with it the responsibility to have sufficient resources available to meet foreseeable obligations under the Agreement. See Third Division Awards 17737, 20150, and 24644. See also Third Division Awards 18331 and 12374. On this record, the Carrier failed in that responsibility. The evidence does not establish that the short vacancies in question were unforeseeable. Indeed, information contained in the Carrier's Submission shows the situation was exacerbated when it assigned qualified employees to attend Rules classes on days when three of the short vacancies existed, thereby making the employees ineligible under Hours of Service provisions. Finally, an Award cited by the Carrier recognizes that the Claimants need not be specifically named if they are readily identifiable. See Third Division Award 21516.

We are compelled to find, therefore, that the Carrier violated the spirit and intent of the Agreement as well as its obligations under Rule 14 by failing to maintain sufficient resources to meet its Agreement obligations. To hold otherwise would effectively condone the Carrier's action to let its staffing dwindle down to the point where it could claim it was short-staffed! See Third Division Award 12374. We note also from the record that Rule 14-C (1) recognizes the Carrier's ability to assure staffing flexibility by means of using surplus qualified employees from furlough status and via the use of zoned extra boards under Appendix 10 of the Agreement.

Turning to the remedy issue, we are confronted by an unusual situation. The Organization recognized, in its January 5, 1996 appeal, that none of the qualified employees might have been available on the dates of the subject vacancies. It suggested, therefore, that the senior employee not on duty or in a Rule class was entitled to payment. This suggestion, in our view, presents a different claim than was advanced to the Board. It is clear from the text of the initial claim and the first appeal, which was

virtually a verbatim restatement of the initial claim, that the Claimants were limited to those employees who were available and qualified. The Organization's Notice of Intent to the Board contained the identical language limiting the class of the Claimants to available qualified employees. We do not believe, therefore, that we can extend a remedy to employees who were not qualified to perform tower service and, as such, were not encompassed in the Statement of Claim.

Having determined that the Claimants are limited to qualified employees, we note that three of the qualified employees were made "unavailable" due to the Carrier's assignment of them to Rules classes. On this record, we do not find that a Carrier-created staffing shortage is a viable "unavailability" defense. Accordingly, we find that Claimant Galvan was not unavailable, within the meaning of Rule 14, for the vacancy of January 9, 1995. Similarly, Claimant Ketring was not unavailable for the vacancy of January 11 and Claimant Gayton was not unavailable for the vacancy of January 18. But for their assignments to Rules classes, if they would have covered the respective vacancies on an overtime basis, they should be compensated for the vacancies at overtime rates. See Third Division Awards 28906 and 29321 between these same parties. If they would have protected the vacancies on a straight time basis, then they should be compensated at straight time rates.

Although the Claimants noted above were paid for attending the Rules classes, compensating them as described does not create a penalty payment situation. Rather, it merely requires the Carrier to pay for the short vacancies as it would have if it had maintained sufficient staffing to fulfill its Agreement obligations.

## AWARD

Claim sustained in accordance with the Findings.

## ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of May, 2002.