

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Form 1

Award No. 30550
Docket No. TD-30920
94-3-92-3-775

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers
 (Association
 (
 (Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim No. 1

Please accept this claim submitted in behalf of L.H. Smith and E.J. Head for four(4) hours each at the punitive rate for November 19, 1990.

On the claim date, the Carrier assigned a non-agreement trainmaster, S.M. Timko, to work 2nd trick, Youngstown Line, D-8-2, in violation of the Scope Rule and Rule 5 of the existing agreement.

Claim No. 2

Please accept this claim submitted in behalf of T.L. Vrabel and B.P. Bickart for four (4) hours each at the punitive rate for November 21, 1990.

On the claim date, the Carrier assigned a non-agreement trainmaster, S.M. Timko, to work 1st trick, Youngstown Line, D-8-1, in violation of the Scope Rule and Rule 5 of the existing agreement.

Claim No. 3

Please accept this claim submitted in behalf of T.L. Vrabel and B.P. Bickart for four (4) hours each at the punitive rate for November 22, 1990.

On the claim date, the Carrier assigned a non-agreement trainmaster, S.M. Timko, to work 1st trick, Youngstown Line, D-8-1, in violation of the Scope Rule and Rule 5 of the existing agreement.

Claim No. 4

Please accept this claim submitted in behalf of T.L. Vrabel and B.P. Bickart for four (4) hours each at the punitive rate for November 23, 1990. On the claim date, the Carrier assigned a non-agreement trainmaster, S.M. Timko, to work 1st trick, Youngstown Line, D-8-1, in violation of the Scope Rule and Rule 5 of the existing agreement."

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 waived right of appearance at hearing thereon.

The Organization claims that the Carrier used a non-agreement Trainmaster on the dates in question, instead of providing the Claimants with work which is reserved for Train Dispatchers under the Agreement. The Organization claims that the Claimants should have been allowed to fill the vacancies, by working an additional four hours on each shift and claim date even though they had already performed or were scheduled to perform service during the claim periods.

The Carrier asserts that the Pittsburgh office was experiencing an unusual number of vacancies and had exhausted all means to fill the vacancies with Train Dispatchers. Thus, when work arose and there were no rested Train Dispatchers, the Carrier filled the positions by using an ATDA rostered supervisor. The Organization asserts that it is the Carrier's responsibility to have sufficient employees available to fulfill the requirements of the service.

The Carrier argues that it is not compelled to assign overtime in violation of the Federal Hours of Service Act to avoid possible violation of the collective bargaining agreement.

The Federal Hours of Service Act restricts the availability of Train Dispatchers to nine hours of service within any 24-hour period (Section 3(a)). However, Section 3 (c) of that same law provides:

"Notwithstanding subsection (a) of this section, in case of emergency the employees named in such subsection may be permitted to be and remain on duty for four additional hours in any period of twenty-four consecutive hours not exceeding three days in any period of seven consecutive days."

It is the Carrier's position that "emergency" within the meaning of this section refers to problems such as derailments, snowstorms and other activities beyond the control of the Carrier requiring immediate action. In the Carrier's view, an emergency did not exist.

Nevertheless, the Carrier concedes that because of vacancies no Train Dispatchers were available to cover the work in question.

The Carrier suggests that it was faced with a choice between using Dispatchers beyond the nine-hour limit and using a supervisor, a violation of the Conrail/ATDA Scope Rule. The Carrier cites previous Awards in which held that the Hours of Service Act must prevail in situations where there is a conflict between the Act and the Agreement (Third Division Award 17928, 6843, 8981, 15947 see also 4975).

However, such a choice would not exist if the Carrier viewed the situation as an "emergency"; use of the Claimants in that situation would not have resulted in either a violation of the Hours of Service Act or the collective bargaining Agreement. A situation where the Carrier has an unusual number of vacancies which it has not been able to fill - which is what is claimed here - is not unlike a situation where there is an unusual number of illnesses in the workforce. Both are beyond the control of the Carrier and require extraordinary action on the part of the Carrier. In this instance, the Carrier chose to act by having supervisory personnel perform the job of Train Dispatcher. It would not have been a violation of the Hours of Service Act to have

used Agreement Train Dispatchers under the emergency provision in Section 3(c). While this Board cannot declare an emergency for purposes of the Hours of Service Act, it can declare that the Scope Rule was violated unnecessarily.

A W A R D

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants 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 9th day of November, 1994.