Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31177
Docket No. TD-31259
95-3-93-3-340

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

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

STATEMENT OF CLAIM:

"Please allow W. R. Dailey (889885) the difference in rates between straight time on Desk "H" and overtime on Desk "I" account not being called to cover the 1st trick "I" desk on February 17, 1992 and using a junior employee at the overtime rate instead. This violates the ATDA Agreement that stipulates how and to whom overtime will be offered."

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.

In this unique situation, the facts are not in dispute. The controversy is over which body of precedent should govern.

As the claim indicates, a 2nd trick junior employee was assigned to cover an overtime vacancy. Claimant, a more senior 2nd trick Dispatcher, was not offered the opportunity. In the absence of Extra Dispatchers, which was the case here, Rule 5(e) of the parties' Agreement provided for a three step order for filling the vacancy. Steps 2 and 3 provide that the overtime opportunities be offered in seniority order to the named class of employees. There were no other employees that qualified for any of the three steps. Given that circumstance, Carrier chose to offer the overtime opportunity to the junior employee because he provided relief to Desk "I" five days per week while Claimant only relieved that desk one day per week. Except for this and the difference in seniority, the two employees were similarly situated in all other respects.

There is no dispute that the Agreement does not explicitly cover the unique situation that emerged in this case. Nonetheless, the Organization says that a body of precedent has been developed by this Division establishing that seniority applies to the assignment of overtime service even in the absence of a rule explicitly applicable to the circumstance. It cites Third Division Awards 14161, 19758, 21421, 24526 and 27593 in support of this contention.

Carrier, on the other hand, essentially contends that the claim must fail for lack of a citation of a violated rule. It, too, cited a number of prior awards of this Division.

These lines of established precedent are in conflict here.

Given the extraordinary facts of this record, we find that the better approach to resolution of the matter is represented by the precedent cited by the Organization. We believe this approach more closely gives effect to the intentions of the parties to the extent they expressed their intention in the Agreement. Rule 5(e) clearly shows the parties intended to have overtime opportunities offered in seniority order within the classes of employees that they foresaw would be available to fill vacancies. They apparently did not anticipate the precise situation that arose in this case. But nowhere does the Agreement explicitly provide that seniority should be ignored for instances that did not precisely fit the situations the parties did foresee. For these reasons, the claim is sustained as presented.

AWARD

Claim sustained.

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 26th day of September 1995.

CARRIER MEMBERS' DISSENT
TO THIRD DIVISION AWARD NO. 31177
(Docket TD-31259)
(Referee Wallin)

The Referee has overstepped the authority of this Board in issuing an Award which, in effect, adds a provision to the controlling Collective Bargaining Agreement without the agreement of the parties.

The Carrier followed the three steps outlined in Rule 5(e) of the Collective Bargaining Agreement in its attempt to assign the subject overtime. The Agreement is silent on the steps to be taken in the event that no employee is available to fill an overtime vacancy after all agreed-upon steps have been followed. In the instant case, the Carrier chose to use the employee who best suited its needs after all the steps in the Collective Bargaining Agreement were exhausted. In so doing, no rule of the Agreement was violated.

The Referee acknowledges that the situation in the instant case was not contemplated in Rule 5(e), but sustains the claim on the basis that "...nowhere does the Agreement explicitly provide that seniority should be ignored for instances that did not precisely fit the situations the parties did foresee." Clearly, the parties to the Agreement understood that the three steps they agreed upon may, on occasion, fail to produce a senior, available employee. The parties also understood that from time to time it may become necessary to divert an employee from one position to another. They specifically agreed to the time and one-half rate of pay in the latter circumstance but made no reference to seniority.

Had the parties wished to limit such work on the basis of seniority, they had ample opportunity to do so; that they did not speaks loudly to the interpretative rule that the inclusion of one or more discrete items implies the exclusion of others. Thus, there is no basis in the Agreement for concluding that there is a fourth step the Carrier must follow when filling vacancies, other than diverting an employee and paying the prescribed rate of pay.

The Board mistakenly construes this as a case involving the distribution of overtime. It is not. This is a case involving diversion of an employee when there are no employees available to fill a vacancy pursuant to the overtime rule. It is with good reason that the Agreement remains silent with respect to seniority when it becomes necessary to divert an employee: if the Carrier were required to divert the senior qualified employee, there would be no way to ensure that the resulting vacancy could be filled; in the end, the Carrier's ability to protect train operations easily could be placed in jeopardy. The freedom to select which employee to divert permits the Carrier to ensure that the resulting vacancy will be the least disruptive to its operation. As evidenced by the absence of a fourth step in Rule 5, the parties understood that, even if this Board did not.

By holding that the overtime vacancy in this case should have been filled on a seniority basis after all means within the Agreement had been exhausted, the Referee is effectively adding a provision to the Agreement which was not negotiated by the parties.

This exceeds the Board's authority under the Railway Labor Act, as amended. For this reason, we dissent to the Award, and will not consider it as binding precedent in the resolution of similar future disputes.

We Dissent.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik