Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33949
Docket No. TD-34263
99-3-97-3-751

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claims No. 1-6 Carrier File NEC-ATD-SD-194, 195, 197, 198, 203, and 206.

Please accept this appeal from decision of J.F. Dooley,..denying claims of Member Train Dispatchers P.C. Gadomski, M. Piechowski, and D. Nash.

It is the position of the Amtrak System Committee of ATDD – BLE that NRPC/Amtrak's practice of 'shifting,' 'sliding,' or 'diverting,' a regularly assigned employee from his/her regular position to another position is a violation of Rule 5, Rule 7, Rule 8 and/or Rule 12, and that doing so to avoid the provisions of Rule 13 constitutes a violation of that Rule as well. We also contend that this practice violates letter of agreement dated August 20, 1982, from Amtrak AVP-Labor Relations G.R. Weaver to ATDA Vice-President R.E. Johnson, letter of agreement dated August 20, 1982, from Amtrak VP-Labor Relations G.F. Daniels to ATDA President R. E. Johnson, as well as longstanding custom, practice, and precedent on this property."

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.

In each of the claims presented herein the Carrier, on various dates as alleged in the claims, moved on duty Train Dispatchers from their regular assignment to fill temporary vacancies despite the fact that qualified Train Dispatchers were available, for example, employees on rest days, to perform the work in question.

The Organization contends that in doing so the Carrier violated various Rules in the parties' Agreement that govern, among other things, the abolishment of positions and the exercise of seniority (Rule 5), bulletining and assignments (Rule 7), temporary vacancies (Rule 8), rest days (Rule 12), and/or overtime (Rule 13). The Carrier on the other hand asserts that under Rule 14 it has the authority to assign on duty, available, and qualified Train Dispatchers so long as it follows the compensation provision of that Rule.

Rule 14, as amended by the parties, provides that a "...regularly assigned employee required by the Management to perform service or work temporarily at other than his regular position..." shall be reimbursed at a specified rate of pay and reimbursed for any expenses associated with the assignment. Thus, the Rule specifically sets forth that Train Dispatchers may be required by the Management to work temporarily at other than their regular positions. Clearly in this dispute that is precisely what happened. A temporary vacancy existed and the Carrier required employees to work in that vacancy, and thus in a position other than that to which they were regularly assigned. The only question therefore is whether there is some other provision, either in Rule 14 or elsewhere in the parties' Agreement that restricts the Carrier from so acting.

We find no such restriction in Rule 14. Rather, the only restriction in that Rule is that any such employee assigned in the fashion carried out by the Carrier be qualified. The Organization makes no claim to the contrary. Similarly, we find no such

restrictions in the other Rules cited by the Organization. For example, Rule 12 relating to rest days provides that relief requirement of less than four hours duration must be performed by extra employees at a specified rate of pay. The record discloses no such action by the Carrier contrary to that Rule. Similarly, the Organization makes no claim that the Carrier did not follow the order in which employees were to be assigned to the vacancies that would violate Rule 13. Finally, neither Rule 5 nor 8 is implicated because the positions were neither abolished nor advertised.

Rather, the Organization appears to weave together these Rules, in combination with the parties' Letter of Understanding that agreed-upon revisions to Rule 14 were not to obviate those Rules, to argue that the Carrier cannot use on-duty, qualified Train Dispatchers to fill temporary vacancies. We do not agree. First, as noted above, the specific Rule, as opposed to the other Rules which have general, if any, application to the dispute, clearly provides that the Carrier can require regularly assigned employees to work outside of that regular assignment. Second, the record discloses that the Carrier acted in this fashion for an extended period of time and that the Organization has not, until now, objected. Thus, this combination of the specific, controlling provision and the manner in which it has been carried out without objection leads us to conclude that the Organization's attempt to weave together the various Rules upon which it relies into a fabric that prohibits the Carrier's action in this matter unravels into something less than it believes to be true.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February, 2000.

Labor Member's Dissent
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(Referee Perkovich)

In denying this claim, the Majority states that "the Organization makes no claim that the Carrier did not follow the order in which employees were to be assigned to the vacancies that would violate Rule 13". One doesn't have to look any further than the "Statement of Claim" to see that this is incorrect.

> "It is the position of the Amtrak System Committee of ATDD - BLE that NRPC/Amtrak's practice of 'shifting,' 'sliding,' or 'diverting,' a regularly assigned employee from his/her regular position to another position is a violation of Rule 5, Rule 7, Rule 8 and/or Rule 12, and that doing so to avoid the provisions of Rule 13 constitutes a violation of that Rule as well." (Underscoring added.)

And, as the Organization stated in its appeal letters to the Carrier on the property:

> "Rule 13 paints a detailed picture of the agreed-upon procedure when a temporary position is to be filled on an overtime basis. This rule does not contemplate that NRPC/Amtrak be allowed to manipulate the regular workforce in order to make the overtime go away, or to push the overtime onto the position of its choice. If it did, then 'Item 1' would read, 'Put all the names in a hat...'. The practice that NRPC/Amtrak now defends nullifies the rest day and incumbency preferences dealt with in existing Items 1, 2 and 3."

Rule 13 very clearly provides for an order of call when there are no extra dispatchers available at the straight time rate of pay. Rule 14, while it may be considered a "specific" Rule, its specificity deals with what "a regularly assigned employee required by Management to perform service or work temporarily at other than his regular position" is paid. No where does it even come close to implying that it supercedes or otherwise supplants the requirements of Rule 13. In fact, when the revisions were made to Rule 14, the parties' Letter of Understanding made that clear, as the pertinent part below shows.

> "This refers to our discussion in connection with Letter No. 2 of Exhibit A to the Agreement of August 20, 1982, and will confirm the following understandings:
>
> 1. The provisions of amended Rule 14 (Part I) of the collective bargaining agreement...will not serve to obviate the provisions of Rule 12, REST DAYS, (Part I)...of the collective bargaining agreement.
>
> 2. The provisions of amended Rule 14 (Part I) of the collective bargaining agreement...will not serve to obviate the provisions of Rule 13, OVERTIME, (Part I)...of the collective bargaining agreement."

The Majority also incorrectly states that "the record discloses that the Carrier acted in this fashion for an extended period of time and that the Organization has not, until now, objected". The "record" discloses no such thing.

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When the Carrier first made an assertion of a past practice, it attached letters from two Carrier Managers "regarding the long-standing application of Rule 14". The General Chairman refuted the Carrier's position concerning a so-called "long-standing application of Rule 14" and pointed out to the Carrier that the two letters actually supported the Organization's position.

For instance, one Carrier Manager stated:

> "Again, throughout my management tenure, regularly assigned Train Dispatchers have been shifted to cover vacancies when there were no qualified and available personnel to fill the vacancy."

The other Carrier Manager stated:

> "In accordance with Rule 14, the carrier is permitted to 'protect' temporary vacancies by utilizing regularly-assigned Train Dispatchers when necessary. This 'shifting' of personnel, whether on the same tour or to a different tour of duty, is only done when there are no available and/or qualified Train Dispatchers to protect a specific position which becomes vacant by reason of sickness, personal days, vacation, discipline, etc....If and when 'overtime' becomes necessary, then the provisions of Rule 13 are strictly adhered to in filling a vacancy. Even then, if there is no one available, we may be forced to resort to 'shifting of forces' as an option....
>
> Again, then as now, shifting of forces was a last resort when circumstances dictated. The only difference, at least as far as Amtrak is concerned, is that up to the mid-eighties when an individual was shifted from his regularly-assigned position to another desk, even on the same tour, he or she, received compensation of two days at the pro-rata rate."

This claim was not about whether the Carrier had the right to "shift" train dispatchers. Rather, it was about <u>when</u> the Carrier had that right. Clearly, as the Organization argued, the Carrier did not have this right under Rule 14 until Rule 13 was exhausted. The Organization's arguments are not only valid given the parties' Letter of Understanding, but were confirmed by the Carrier's own evidence in the way of the statements referred to above.

For whatever reason, the Majority decided to ignore the parties' agreed-upon Understanding of the interplay of these Rules in favor of its own. In doing so, the Majority erred. This Award is erroneous and holds no precedential value.

I dissent.

Respectfully submitted,

David W. Volz

David W. Volz
Labor Member