

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34156

Docket No. TD-34187

00-3-97-3-743

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

(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Burlington Northern and Santa Fe Railway Company

STATEMENT OF CLAIM:

Claim No. 1 Carrier file DIA 960724AK

“The Burlington Northern Santa Fe Railway Co. (hereinafter referred to as ‘the Carrier’) violated the current effective agreement between the Carrier and the American Train Dispatchers Department, Brotherhood of Locomotive Engineers (hereinafter referred to as ‘the Organization’), Article 2(e) in particular when E. C. Rigsby was instructed to do the following:

November 12, 1995 - Work Cuba and River Subdivisions.
November 14, 1995 - Work Thayer Subdivision.
November 15, 1995 - Work Thayer Subdivision.
November 21, 1995 - Work Thayer Subdivision.
November 22, 1995 - Work Thayer Subdivision.
November 26, 1995 - Work Thayer Subdivision.
December 5, 1995 - Work Thayer Subdivision.
December 6, 1995 - Work Thayer Subdivision.
December 10, 1995 - Work Cuba and River Subdivisions.
December 12, 1995 - Work Thayer Subdivision.
December 13, 1995 - Work Thayer Subdivision.
December 17, 1995 - Work Cuba and River Subdivisions.
December 19, 1995 - Work Thayer Subdivision.
December 20, 1995 - Work Thayer Subdivision.
December 24, 1995 - Work Cuba and River Subdivisions.

**December 26, 1995 - Work Thayer Subdivision.
December 27, 1995 - Work Thayer Subdivision.**

Mr. Rigsby Jr. should have been paid at the overtime rate for each of these days, as he was used off his assignment position RD6 as bid on bulletin.

Claim No. 2 Carrier file DIA 960812AC

**December 31, 1995 - Work Cuba and River Subdivisions.
January 2, 1996 - Work Thayer Subdivision.
January 3, 1996 - Work Thayer Subdivision.
January 7, 1996 - Work Cuba and River Subdivisions.
January 9, 1996 - Work Thayer Subdivision.
January 10, 1996 - Work Thayer Subdivision.
January 14, 1996 - Work Cuba and River Subdivisions.
January 16, 1996 - Work Thayer Subdivision.
January 17, 1996 - Work Thayer Subdivision.
January 21, 1996 - Work Cuba and River Subdivisions.
January 23, 1996 - Work Thayer Subdivision.
January 24, 1996 - Work Thayer Subdivision.
January 28, 1996 - Work Cuba and River Subdivisions.
January 30, 1996 - Work Thayer Subdivision.
January 31, 1996 - Work Thayer Subdivision.
February 6, 1996 - Worked Thayer Subdivision.
February 7, 1996 - Worked Thayer Subdivision.
February 13, 1996 - Worked Thayer Subdivision.
February 14, 1996 - Worked Thayer Subdivision.
February 15, 1996 - Worked Thayer Subdivision.**

Mr. Rigsby Jr. should have been paid at the overtime rate for each of these days, as he was used off his assignment position RD6 as bid on bulletin.

Claim No. 3 Carrier file DIA 960812AD

"The Burlington Northern Santa Fe Railway Co. (hereinafter referred to as 'the Carrier') violated the current effective agreement between the

Carrier and the American Train Dispatchers Department, Brotherhood of Locomotive Engineers (hereinafter referred to as 'the Organization'), Article 2(e) in particular when E. C. Rigsby was instructed to do the following:

**March 27, 1996 - Work Thayer Subdivision.
April 2, 1996 - Work Thayer Subdivision.
April 3, 1996 - Work Thayer Subdivision.
April 9, 1996 - Work Thayer Subdivision.
April 10, 1996 - Work Thayer Subdivision.**

Mr. Rigsby Jr. should have been paid at the overtime rate for each of these days, as he was used off his assigned position RD6 as bid on bulletin.

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 Organization alleges that the Carrier violated the Agreement when on the dates listed in the claim, the Carrier worked the Claimant off of his assigned territory. Specific to Claim No. 1, the Organization alleges that the claims filed were not declined by the Carrier within the time frame of the Agreement and stand as presented. On the merits, the Organization argues that all three claims represent a violation of Article 2(e) of the Agreement in that the Claimant was forced to work an assignment other than the assignment he obtained by the exercise of his seniority. This action was a continuing violation of Article 2(e) of the Agreement.

The Carrier maintains that the only procedural error was committed by the Organization. It argues that this is not a continuing violation, but represents a change which occurred in consolidation on June 26, 1995. Prior thereto, the Claimant was awarded Relief Position No. 6 at the Springfield Dispatching Office. That position was split and worked either the River and Cuba Subdivisions or Thayer with another position working the remaining Subdivision. Claimant made his seniority selection to work all three territories and was assigned. On June 26, 1995, following the consolidation, the Claimant was moved to Fort Worth, Texas and continued to perform the work without complaint until this claim. The definitive action was June 26, 1995. No claim was filed until January 12, 1996. The Carrier argues that all of these claims are barred as they were not filed within sixty days of the occurrence upon which they were based. Further, it argues that with regard to the Organization's allegation of untimely response to Claim No. 1, the response was timely presented by Mr. Dent on January 18, 1996.

On the merits, the Carrier denies the violation and maintains that the Claimant had been working in the same manner since the position was split on April 18, 1995 in Springfield. Further, the position continued to be split after consolidation and transfer to Fort Worth, Texas on June 26, 1995. This practice at Fort Worth did not change after June 26, 1995 for the Claimant or for the first and second trick positions. The Claimant continued to perform work on split territories until he was displaced April 30, 1996.

Turning first to the procedural issues at bar, with regard to Claim No. 1, a full and careful review convinces the Board that the Carrier did not properly respond to the Organization while the dispute was on the property. After the Organization advised the Carrier on March 31, 1996 that there was a time limit violation, the Carrier indicated that they had been properly declined with declinations attached. The Organization responded that they were not attached. Our review finds no proof that while this dispute was on the property the claim declinations were properly handled. Accordingly, Claim No. 1 must be sustained on violation of time limits.

With respect to the dispute over continuing or non-continuing claim, the Board finds the Organization's position must prevail. This is not a definitive action. In this instance, the Carrier had bulletined territories and when there was increased traffic they notified the Organization that they would split the position. They did split the position and utilized the Claimant on various intermittent dates when traffic justified.

There is no record that this occurred every day. In analyzing the dates the Carrier alleges represent definitive acts at either Springfield or Fort Worth, they are discontinuous. In fact, there is a record that Springfield worked under an entirely different contractual Agreement than did Fort Worth and the Organization states without rebuttal that it had no right to police the Springfield Agreement.

On the merits, the Agreement provision in dispute is Article 2(e). That provision states as follows:

“Service on Positions Other Than Seniority Choice

An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority, except an assigned train dispatcher who is used on the position of chief dispatcher, or assistant chief dispatcher, shall be compensated thereof at the overtime rate of the position worked. . . .”

The Board's review of these instant facts finds that the Organization has provided sufficient proof that the Claimant was working an assignment other than the one he obtained in the exercise of his seniority. The Claimant's bulletined assignment was to work Relief Dispatch Desk 6 covering all of the territory of Cuba, Thayer and River Subdivisions. The evidence indicates that Claimant's assignment was often rearranged and he sometimes worked territory other than obtained by seniority. Under the Article, supra, this requires compensation at the overtime rate. There is nothing in the Carrier's attached statements to prove otherwise.

As for the Carrier's argument that the claim is excessive, the Board disagrees. This is not a penalty claim, but an overtime compensation governed by Agreement. Additionally, as a continuing violation the compensation is Agreement controlled for a period of time prior to claim date and in this instant case, ending when the Claimant was displaced from his position.

AWARD

Claim sustained in accordance with the Findings.

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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 19th day of June, 2000.

Carrier Members' Dissent
to Award 34156 (TD-34187)
Referee Zusman

At page 4 of this Award we find the following:

"On June 26, 1995, following the consolidation, the Claimant was moved to Fort Worth, Texas and continued to perform the work without complaint until this claim. The definitive action was June 26, 1995. No claim was filed until January 12, 1996."

It should be obvious from the foregoing that no claim was filed with the Carrier within 60 days as is required by Article 24. That was the Carrier's noted objection to these claims. They were void ab initio!

The Majority's conclusion that the Carrier January 18, 1996 denial was not "properly handled" says nothing about the claims being untimely in the first instance. One cannot resurrect a dead claim on the alleged defect of the receiving party. The Majority is dead wrong on this point.

Secondly, on the merits, Claimant had chosen, prior to the relocation to Fort Worth, the appropriate position. Nothing changed in the relocation of the position. Claimant, as is noted, "...continued to work without complaint..."

Third, at page 5 of the decision we find that "Claimants' bulletined assignment" Relief Dispatch Desk 6, "...Covering all of the territory of Cuba, Thayer and River Subdivisions...." was exactly the same position occupied on each of the claimed dates. There is no basis for this decision.

We Dissent.



Paul V. Varga



Martin W. Fingerhut



Michael C. Lesnik