

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34989
Docket No. TD-30569
00-3-92-3-317**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(American Train Dispatchers Department
(International Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company**

STATEMENT OF CLAIM:

“Claim of Train Dispatcher Daniel R. Russell for time and one-half rate of pay accounted forced to work Console #2 [instead of his] regular assignment on Console #1, in violation of Article 3(d) and 4(h).”

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.

This case involves a claim by the Organization that the Carrier violated the Agreement on November 3, 1990 when it instructed the Claimant, a Dispatcher regularly assigned to work Console No. 1 at in Shreveport, Louisiana, to fill a vacancy on Console No. 2. The Claimant's regular position on Console No. 1 was filled that day by another regularly assigned Train Dispatcher who was then observing one of his weekly rest days.

The dispatching office contains three desks or consoles that control train operations over the entire system. Each console covers a different territory. The Organization insists that under Articles 3(d) and 4(h) of the Agreement, a vacancy that is less than four days per week properly should be deemed "extra work" to be performed by the senior available extra Train Dispatcher. In the absence of an available extra Train Dispatcher, according to the Organization, the vacancy may be filled by a regularly assigned Train Dispatcher observing a rest day, in accordance with seniority.

The Organization asserts that the Claimant was not eligible to fill the Console No. 2 vacancy, because on that day he was neither an extra Train Dispatcher, nor an assigned Dispatcher observing a rest day. Further, it maintains that the Claimant obtained the Console No. 1 position in the exercise of his seniority, and he has the inherent right to work that position in the absence of an emergency, which here is not present. Recognizing that the Claimant suffered no loss of pay, the Organization, on the Claimant's behalf, asks for the assessment of a penalty equal to eight hours of compensation at one and one-half times the Claimant's regular rate of pay.

The Carrier, on the other hand, insists that it properly directed the Claimant to work Console No. 2 because the Dispatcher called to protect the existing vacancy was not familiar with the territory covered by Console 1. To have allowed the extra Dispatcher to work an unfamiliar territory, the Carrier asserts, "could have jeopardized the safety of countless train and enginemen as well as Maintenance of Way employees."

Further, the Carrier insists that the Claimant was not harmed by his temporary assignment to Console No. 2. Indeed, the Carrier points out that the Claimant worked his regular day and regular shift; suffered no loss of earnings; and worked an assignment that he willingly has worked as overtime on his rest days.

The Organization counters that the Carrier is obligated to provide adequately trained relief personnel to avoid violating the Agreement, and refers the Board to Third Division Awards upholding its position. It argues that a Dispatcher unfamiliar with the territory covered by Console No. 2 was not eligible for the vacancy and should not have been called. Further, in response to the Carrier's assertion that the Claimant suffered no monetary loss, the Organization asserts that a penalty is necessary in order to prevent future violations of the Agreement and protect other employees from having

their seniority rights violated by the Carrier's improper assignment of temporary work.

After reviewing the record evidence, we are convinced that the Carrier violated the Agreement when, on November 3, 1990, it took the Claimant off of a position he obtained through the exercise of his seniority and directed him to fill a vacancy that he was not eligible to fill under established Rules governing extra relief service. The terms of the Agreement plainly provide that any Dispatcher vacancy of less than four days shall be performed by extra Dispatchers. According to record evidence, moreover, the senior extra Dispatcher must be called first to protect any such vacancy, and in the absence of extra Train Dispatchers, regularly assigned Train Dispatchers observing rest days may be used. There are no facts present here that permit the Carrier to shift a senior Dispatcher from his regular position to perform relief service of less than four days. We thus follow Third Division Awards 2942, 4150, 5002 and 5899 in concluding that the Carrier cannot violate the seniority of a regularly assigned Dispatcher by claiming a shortage of trained personnel to cover extra work.

Having found a violation of the Agreement, we next address the Organization's claim that a penalty properly should be assessed against the Carrier. We find that a penalty is not warranted.

Plainly, the Claimant suffered no economic loss. He worked the same location and the same basic job for the same rate of pay as he would have had there been no violation. Further, record evidence indicates that the Carrier obtained no economic windfall from its violation.

In rejecting the Organization's request for a penalty, we are mindful of its concern that continuing violations of the Agreement with respect to the assignment of extra work may reduce the value of employees' seniority rights. We are not persuaded, however, that a penalty is an appropriate or necessary remedy for the discrete violation that occurred in this case.

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 20th day of September, 2000.