

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35089
Docket No. TD-31728
00-3-93-3-751**

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: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“This is a claim for 8 hrs pay at overtime rate for Friday July 10, 1992 acct I was not called for Desk 6 3rd trick dispr on my rest day. Instead regular man R. W. Fogerty was diverted from posting 3rd trick Asst. Chief Cleve to cover Desk 6. This claim in accordance with Rule 5, Section 2 Paragraph (e) of agreement between Conrail and ATDA.”

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 on behalf of the Claimant, a special duty Train Dispatcher, for eight hours of pay at the overtime rate for Friday, July 10, 1992. It is undisputed that by strict application of Rule 5, Section 2 of the Agreement governing Relief and Extra Work, the Claimant should have been called for a vacancy on the third shift Desk 6 Trick Train Dispatcher's position. However,

the Carrier, at the time it made the assignment, believed that the Claimant could not fill the position without violating the Hours of Service Act. The July 9, 1992 duty log indicated the Claimant had worked two hours of overtime, and the Carrier assumed that those two overtime hours occurred at the end of the Claimant's July 9 tour. Accordingly, the Carrier utilized a regularly assigned employee to fill the vacancy.

The Organization states that the Claimant's overtime service on July 9, 1992 preceded his regular hours. Accordingly, it argues that he was fully available, under the Hours of Service Act, for assignment on the third shift on July 10, 1992. It asserts that the Carrier failed to make any effort to determine the Claimant's availability. It argues that with "a little effort," the Carrier easily could have determined the Claimant's availability.

The Carrier, on the other hand, asserts that it reasonably believed that the Claimant could not legally work the July 10, 1992 assignment on account of the entry the Claimant made on the duty log. The Carrier argues that the Claimant was responsible for entering his on and off duty times on the log, but did not do so. Rather, the Carrier points out, the Claimant merely wrote "Special Duty + 2 HRS OT." According to the Carrier, the Supervisor - Train Operations reasonably concluded that the Claimant had worked the two overtime hours after his third shift tour on July 9. That being so, the Supervisor - Train Operations concluded that the Claimant was unavailable for service and did not call him for the overtime. Thus, the Carrier argues, its conclusion with respect to the Claimant's availability was the result of the Claimant's failure to provide the required information on the duty log. According to the Carrier, the Claimant knew about the Hours of Service Act restrictions, and if he wanted to be considered for overtime, he should have taken care to advise the Carrier on the duty log that the overtime duty on his July 9 shift occurred prior to the beginning of his tour.

After carefully reviewing the record evidence, we have determined that the Organization's claim must be sustained. The Claimant was not disqualified under the Hours of Service Act, and the Carrier's failure to call him in was its own error.

We agree with the Carrier that if its mistake was attributable to the Claimant, he should not benefit. We are persuaded, however, that the Claimant cannot be deemed responsible for the Carrier's error. The Claimant's entry on the July 9, 1992 duty log, while unclear, is not misleading. The duty log does not ask for Dispatchers'

hours, and the entry does not indicate that the Claimant's two overtime hours were at the end of his shift. Indeed, as the Carrier explained, the Claimant was a special duty Train Dispatcher who had the latitude to alter his start and quit times. Accordingly, the Supervisor - Train Operations fairly could not assume that the overtime the Claimant entered on the duty log occurred at the end of his shift. We think, therefore, that the Supervisor - Train Operations properly should have called the Claimant to determine when the overtime was worked.

Nevertheless, the Carrier asserts that the Claimant had a duty to log his on and off duty times on the duty log. We observe that there is no place on the form for such entries. We also note that none of the other Dispatchers entered their on and off duty times on the July 9, 1992 log. So, too, the record contains no evidence of any prior instruction to the Claimant individually, or to Dispatchers generally, to enter on and off times on the daily log.

Based on the foregoing, the Claimant shall be compensated for eight hours at the straight time rate. We have considered the Organization's argument that the Claimant should be paid at the overtime rate. We think the better practice on overtime claims of this type is to award straight time pay.

AWARD

Claim sustained in accordance with the Findings.

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 15th day of November, 2000.