Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35618
Docket No. TD-35215
01-3-99-3-32

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(American Train Dispatchers Department/
(International Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

"The Burlington Northern Santa Fe Railroad Company (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'), Articles 2(e) and 3(b) in particular, when between December 18 1997 and December 27 1997 train dispatcher G. A. Armitage following the instructions of the Carrier, was not allowed to protect his assigned position and instead required, on December 18, 19, 20, 21, 22, 25, 26 and 27 1997, to protect a position other than the one obtained by the exercise of seniority. Mr. Armitage was compensated at the pro rata rate of pay, rather than at the overtime rate of pay as required, for each of these aforementioned dates."

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 facts in this case are not in dispute. The Claimant was regularly assigned to a third shift Train Dispatcher position in the Carrier's consolidated train dispatcher office located at Fort Worth, Texas. He was the successful bidder on a temporary vacancy on a third shift position that was to begin on December 18, 1997. He was held on his regular assigned third shift position through December 27, 1997, and first worked the temporary vacancy on December 28, 1997. Thus, counting rest days, there was an eight day delay in the Claimant being placed on the temporary vacancy.

On December 28, 1997, the Claimant filed a claim for the difference between straight time and the penalty rate for the eight days he was delayed from occupying the temporary position. That claim was denied on February 2, 1998. In that denial, the Carrier stated that the Claimant had been released to his temporary position as soon as it was possible. The denial was subsequently appealed and progressed in the usual manner.

This case is nearly identical to the case in Third Division Award 35616. The only difference is in the actual number of days the Claimant was retained on his regular assignment. The Board will not repeat here its reasoning in the former Award. However, suffice it to say that the Organization has not shown that the Carrier's delay in assigning the Claimant was unreasonable, capricious or arbitrary. Nor did the Claimant sustain any loss of earnings.

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 24th day of July, 2001.

Labor Member's Dissent
To Third Division Award Nos. 35616, 35617, 35618
Docket Nos. TD-35240, TD-35214, TD-35215
(Referee Elizabeth C. Wesman)

In reaching its decision, the Majority not only ignored common sense, it ignored the basic principles of contract construction. In doing so it has changed the Agreement between the parties. Something it doesn't have the authority to do. Therefore, the decision is not worth the paper it is printed on.

The dispute was really rather simple. The Carrier posted a notice of a temporary position. The Claimant bid on the position. The Carrier awarded the temporary position to the Claimant. Then, the Carrier refused to allow the Claimant to move to the temporary vacancy in accordance with the clear provisions of the Agreement.

Article 12 (i), captioned "FILLING TEMPORARY POSITIONS", of the Agreement provides:

> "Prompt notice of each temporary position shall be posted on bulletin boards in the office where the position exists; assigned train dispatchers in such office **may transfer thereto** subject to seniority." (Emphasis added.)

Article 12 (j), captioned "ADVICE OF AVAILABLE POSITIONS", of the Agreement provides:

> "Advice of regular and temporary positions shall, whenever possible, be posted sufficiently in advance to enable the successful bidders or applicants for such positions **to transfer thereto on their effective date**." (Emphasis added.)

The parties' intent is clear. Temporary positions would be posted and awarded to the successful bidder so that he/she could "transfer thereto on [the] effective date" of the temporary position.

The Majority, however, chose to apply another provision of the Agreement, which had nothing whatsoever to do with temporary positions, to justify its decision. That provision being Article 12 (h), captioned "FILLING REGULAR POSITIONS", which reads:

> "Each new position that is authorized to continue for more than ninety (90) days, or a vacancy of more than ninety (90) days occurring on an existing regular position, shall be promptly bulletined and posted in the dispatching office where such new position or vacancy occurs.
>
> The senior train dispatcher holding a regular assignment in such office, who, within three (3) days after bulletin is posted, files written application with the Superintendent, shall be assigned thereto.
>
> Each resulting vacancy shall be bulletined and posted until there are no applications from regularly assigned train dispatchers in that office.
>
> The position finally left unfilled shall then be promptly bulletined to all offices (including office where vacancy exists) on the seniority district for a period of six

> (6) days. The senior bidder shall be assigned thereto within three (3) days from close of bulletin. Every reasonable effort shall be made to promptly place dispatchers on positions awarded to them under bulletin and assignment rules."

It was this provision of the Agreement, dealing only with the filling of regular positions, that the Majority clutches to when it says, "the Board finds that the Organization has failed to show that the Carrier delayed transfer of the Claimant for an unreasonable amount of time". This rationale is even contrary to the Carrier's position as indicated on page 5 of its Submission to the Board, which reads:

> "While Article 12 (h), dealing with permanent positions, contains language providing that 'Every reasonable effort shall be made to promptly place dispatchers on positions awarded to them under bulletin and assignment rules', **there is no such provision for assigning temporary positions**." (Emphasis added.)

The Carrier's foremost argument was that Article 12 (i) (Filling Temporary Positions) contained no time limit provision for placing a train dispatcher to a temporary position; therefore it was free to place the Claimant on the Temporary Position at its leisure. However, given the obvious meaning and clear language of Article 12 (h), (i) and (j), an exception, such as the one included in Article 12 (h), is necessary to override the requirement of a transfer to the temporary position on its effective date.

Article 12 (i) requires that successful bidders for regular and temporary positions "transfer thereto on their effective date." Article 12 (h) provides an exception for transfer to permanent positions. There is no such exception contained in Article 12 (i) concerning temporary positions, therefore none can be taken, contrary to the Majority's opinion.

Another flaw to the Majority's decision is concerning Article 2 (e) and its application. The Majority found that "the language of 2 (e) can only come into effect once a regular position has been awarded and worked". With regard to the application of Article 2 (e) for "regular" or "permanent" positions, given the exception contained in Article 12 (h) dealing with permanent positions, that is correct concerning permanent positions. However, for the Majority to say that Article 2 (e) has no application with regard to temporary positions is contrary to the clear language or Article 2 (e), which reads in part:

> "An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority..."

There is no mention at all in Article 2 (e) that says it only applies to being required to work a position other than a "regular" or permanent position. It very clearly pertains to working any position "other than the one...obtained in the exercise of his seniority."

Labor Member's Dissent
To Third Division Award Nos. 35616, 35617, 35618
Docket Nos. TD-35240, TD-35214, TD-35215
(Referee Elizabeth C. Wesman)

The only way a train dispatcher can "obtain" a temporary position is by exercising his/her seniority. This is clear by the provisions of Article 12 (i) and (j). Once a train dispatcher bids on and is awarded a temporary position, that temporary position has been obtained and transfer thereto has to be on the effective date. If the Carrier does not allow the transfer on the effective date of the temporary position, then Article 2 (e) applies and the train dispatcher is entitled to compensation at the overtime rate for being "required to work a position other than the one he obtained in the exercise of his seniority".

The Majority's decision, if accepted as precedent, renders the provisions of the Agreement concerning temporary positions meaningless. For the Majority to say that the Agreement provides for the Carrier to post notice of a temporary position, award the temporary position to the senior bidder and then not allow the successful applicant to transfer to the temporary position, is nonsensical. The parties would not have gone to all the trouble of making these Agreement provisions for nothing. And, given the fact that when these provisions were agreed to a temporary position was one that would be vacant for as little as five days, makes the Majority's decision that the Carrier has not violated the Agreement when is prevents someone from transferring to a temporary position for five days even less plausible.

The Majority's decision is palpably erroneous and holds no value as precedent.

I dissent.

David W. Volz
Labor Member

Carrier Members' Response
to Organization's Dissent to Awards
35616, 35617, 35618
(Dockets TD-35240, 35214, 35215)
(Referee Wesman)

It is difficult to understand the Organization's Dissent to Third Division Awards 35616, 35617 and 35618 although we do agree that the "disputes" were "really rather simple". Each of the Claimants had been assigned/awarded a position but were held to protect necessary work. Organization's claims were that Article 12 (i) required the immediate movement to these positions on the effective date.

Article 12 (i) does not provide any time frame. However, the Board held that movement must be in reasonable time and this corresponds to the "reasonable" requirement of Article 12 (h). As the Dissenter notes at page 2, Article 12 (h) provides that "reasonable effort" would be made to place dispatchers on positions. That caveat, such as it is, does not exist for temporary positions. Therefore, there was no contractual bar to the Claimants' being held on their former positions. It was unrefuted on the property that:

> "...there has been a long standing practice of transferring such employees within a reasonable time, i.e., as soon as practicable. In addition... there is no language in the Agreement establishing a penalty payment for delaying the transfer of employees to temporary positions." (Page 3 of Award 35616)

The Dissent does not address these facts. These decisions do not make the handling of temporary positions "meaningless". What they do substantiate is there is no contractual penalty when dispatchers are not immediately moved to a temporary position.

P V Varga
Paul V. Varga

M W Fingerhut
Martin W. Fingerhut

Michael C. Lesnik
Michael C. Lesnik

Labor Member's Response
To Carrier Members' Response
To Labor Member's Dissent
To Third Division Award Nos. 35616, 35617, 35618
Docket Nos. TD-35240, TD-35214, TD-35215
(Referee Elizabeth C. Wesman)

It is not difficult to understand why the Carrier Members found it difficult to understand the Dissent to these Awards, given their Response.

In their Response, the Carrier Members say that "It was unrefuted on the property that:" leading into a quote from "Page 3 of Award 35616". They then follow up the quote by saying, "The Dissent does not address these facts". The Carrier Members are correct in that the Dissent did not address these "facts" and there is a good reason why it didn't.

The Carrier Members' so-called "facts" are actually not the "facts". The quote they attribute to "Page 3 of Award 35616" is not from page 3 (or any other page) of that Award, nor is it from Award 35617 or Award 35618. Therefore, since the quote is not factual, neither are the associated statements by the Carrier Members.

Clearly the Carrier Members' Response does not address the facts, but rather attempts to make up some new ones. The Carrier Members' fiction in no way affects the validity of the Dissent.

The Awards continue to hold no value as precedent.

David W. Volz
Labor Member