Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35703
Docket No. CL-36169
01-3-00-3-340

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12618) that:

1. Carrier violated the Working Agreement when it 'forced' clerical employee V. Klausner to work overtime service on Position 6215 and did not call Clerk J. Castleman for the vacancy on April 27, 1998.

2. Carrier must now compensate J. Castleman, located at the Field Support Center, Ft. Worth, Texas eight hours pay at the Wage Grade 13 overtime rate for April 27, 1998."

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.

Rule 37.C provides as follows:

"When it becomes necessary to fill short vacancies by working overtime, such overtime will be worked by available incumbent or incumbents of the classification where the vacancy exists by calling the senior available employee from that shift who is off duty that day. If unable to fill the vacancy from this source, calls will then be made in seniority order of available qualified employees from the other shifts in that classification who can be doubled or are off duty that day. If unable to fill by this method, available qualified senior employees from other classifications in the same immediate office will be called."

Rule 37.C was in effect when calls were made from various field offices to fill vacancies requiring overtime at each of these locations. Rule 37.C remains in effect. When the Carrier established a centralized Field Support Center at Fort Worth, Texas, calls were made thereafter from the new facility.

The parties recognized that certain accommodations as to calling procedures would be required. They formulated successive Agreements to this effect, leading to Letter of Understanding No. 69 on March 10, 1998 ("LOU No. 69"). This was in effect on the date giving rise to the dispute here under review. LOU No. 69 provides in pertinent part as follows:

"It was mutually understood and agreed that the procedures for filling overtime in the FSC will be as follows:

1. When Carrier determines it is necessary to fill a short vacancy within a region [six such regions having been recognized] by working overtime, such overtime will be worked by the senior available incumbent or incumbents of the classification in the region where the vacancy exists by calling the senior available employee from that shift who is off duty that day.

2. If unable to fill the vacancy from this source, calls will be made in seniority order of available qualified employees from other shifts in that classification, in

the same region, who can be doubled or are off duty that day.

3. If unable to fill the vacancy from available employees in the classification in the region, available senior qualified employees from other classifications in the region will be called. (Including GREB employees assigned to the region).

4. If unable to fill the vacancy under items 1, 2 and 3 above, available senior qualified employees from other regions will be called. (Including PE's and other GREB and Extra List employees)."

On April 27, 1998, there was a need to fill 22 second-shift vacancies, including Position No. 6215 during the two-hour calling period. To fill these positions, Callers followed LOU No. 69 steps 1 and 2, with the result that Position No. 6215 remained unfilled. At this point, the Carrier concedes that it required ("forced") the least senior qualified employee covered under Step 2 to "double" and accept the assignment. No attempts were made to fill Position No. 6215 under Steps 3 and 4.

According to the Organization, the Claimant was the next employee who would have been called under Step 3, had the Carrier proceeded with the call. It is the Organization's view that, by the Carrier's failing to follow the LOU No. 69 procedure, the Claimant was improperly denied this overtime opportunity.

The Carrier argues that it acted in conformance with LOU No. 69. The Carrier contends it exercised its appropriate right to "force" an employee, after its calls found no employee willing to accept the assignment under Steps 1 and 2.

Before examining the particular occurrence, the Board notes the following:

1. The Carrier reasonably explains the difficulty of filling the perhaps unusually large number of remaining vacancies within the two-hour time constraint, if it were to follow all four steps specified in LOU No. 69. This, however, cannot sanction a violation of the procedure (if, in fact, the Board determines that a violation occurred).

2. The Carrier offers statistics to show the high level of overtime refusals, and it suggests in particular that the Claimant may well have refused an offer to work Position No. 6215. This, too, does not provide an adequate basis for Rule violation (again, if such violation is found to have occurred).

3. The Organization does not argue that forcing an employee to accept an overtime assignment is prohibited. Its position is that other commitments must first be met prior to such forcing.

The parties presented the Board with extensive evidence as to practice prior and subsequent to establishment of the Field Support Center, as well as with information concerning the intermediate Agreements reached prior to adoption of LOU No. 69. These accounts do not provide the Board with clear guidance in the resolution of this dispute. The central issue here is the meaning to be given to this phrase in Step 2 of LOU No. 69:

> "... available qualified employees from other shifts in that classification, in the same region, who can be doubled or are off duty that day."

The Carrier asserts that the phrase, "can be doubled," means that an employee can be required to "double" at the point that other requirements in Steps 1 and 2 have been met. Thus, in this circumstance, Position No. 6215 remained vacant after completion of the canvass of employees under Steps 1 and 2. It follows, contends the Carrier, that it properly forced the least senior-qualified employee from another shift in the same classification and region.

The Organization strongly disavows this line of reasoning. The Organization's position is that acceptance of overtime assignment is and has been voluntary in all instances. The Carrier's authority to "force" an employee, according to the Organization, is limited to occasions when there is no qualified employee available after the entire sequence of the calling preference procedure has been exhausted. Thus, in the instance here under review, the Organization points out that the employee selected to fill in the vacancy (and who would thus be required to "double") initially declined the overtime opportunity. The Organization argues that this employee was improperly "forced," because the Carrier failed to proceed to Step 3, where the name of the Claimant would have been reached. (It is obvious that if the employee selected for the

assignment had voluntarily accepted, even if it meant doubling, there would be no basis for a claim; in fact, she initially declined and was then forced to accept.)

The Organization's Submission is replete with quoted Carrier assertions, both as argument and in informational Memoranda, that acceptance of overtime is voluntary - with the exception of forcing a junior qualified employee in the absence of acceptance by any other employee through the calling procedure. The Board finds these citations convincing as to the Carrier's understanding - at least for the period prior to establishment of the Field Support Center and, eventually, LOU No. 69.

Here it must be noted that LOU No. 69 became effective on March 10, 1998. The instance here under review occurred on April 27, 1998, little more than a month later. This, the Carrier maintains, created new problems (particularly, the capacity of a single calling center and an allegedly high level of overtime opportunity refusals. This brings the Board back to the determinative issue as stated, above. Put another way, may the Carrier "double" the least senior qualified employee under Step 2 of LOU No. 69, without proceeding to Steps 3 and 4?

The Carrier's answer to this is in the affirmative. The Board does not agree. This conclusion comes after a full review of Rule 37.C and LOU No. 69 as written, and without reliance on various undocumented assertions made by the Carrier. This conclusion is based on the following:

1. The record shows the Carrier's acceptance of the principle of voluntary acceptance or rejection of an overtime offer; "forcing" previously was an acceptable solution only as an ultimate means to fill a position.

2. The Rule 37.C procedure, in effect prior to the Field Support Center, was limited in nature. The call sequence was:

"Incumbents of the classification on same shift off duty on the date.

Incumbents of 'that classification' assigned to other shifts.

Qualified employees from other classifications 'in the same immediate office.'"

It can be reasonably assumed that if no employee accepted in these three categories, forcing would then, and only then, be in order.

LOU No. 69 modifies and expands the sequence as follows:

"Incumbents of the classification 'in the region' on same shift off duty on the date.

Incumbents of the classification 'in the same region' on same shift off duty on the date.

Qualified employees from other classifications 'in the region.'

Qualified employees from other regions."

Again, if this sequence produces no acceptance, forcing is presumably the only alternative.

The Board finds nothing in LOU No. 69 which states that the Carrier may (because of time constraints or any other reason) terminate the overtime offers short of completing the accepted sequence.

3. What is the meaning of "can be doubled?" First of all, the language in LOU No. 69 as to doubling is identical to and carried over from Rule 37.C. There is no basis to believe the parties intended to give the phrase a different meaning in LOU No. 69 from that intended for Rule 37.C.

Does this mean that the phrase "can be doubled" permits the Carrier to halt the selection procedure and force an employee at this point to accept the overtime assignment? Is this a right preserved by the Carrier, even if never or rarely utilized under local rather than centralized calling? The Board believes these questions must be logically answered in the negative. A more reasonable interpretation, which appears to have been acceptable previously by both parties, is as follows: If it is necessary to call an employee in the same classification on a different shift, and the employee accepts, the placement is agreeable to both parties even if it means that the employee is doubling or had not been scheduled for work that day. It is also reasonable to conclude that the parties included this language to give employees the right to be called for overtime (and

accept), and at the same time anticipate and reject any claim by another employee as to why the selected employee was permitted to double or to be eligible for work on a rest day.

This, as the Board sees it, is what the parties agreed to, when several previous briefly effective Agreements were succeeded by LOU No. 69. The Carrier's presentation in its Submission raises some thorny questions as to whether the terms of LOU No. 69 can be made to work effectively in certain circumstances. The solution, of course, is not through arbitral direction but by further review and possible revision undertaken by the parties bilaterally.

The Award will thus sustain Paragraph 1 of the Statement of Claim. As to compensation sought in Paragraph 2, the Board finds no basis for a monetary remedy. If the Carrier had not forced an employee to accept the position after Steps 1 and 2 were completed, and if the Carrier had followed through on the mandatory procedure under Steps 3 and 4, what may have occurred thereafter is speculative. The Claimant's name may or may not have been reached, he may or may not have received the call, and he may or may not have accepted the assignment.

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 19th day of September, 2001.