

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35824
Docket No. TD-36322
01-3-00-3-561

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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’), Article 2(e) and 7(a) of the Memorandum of Agreement dated March 5, 1974, Item 2 in particular, when on November 13 and 14, 1999 the Carrier allowed and/or required train dispatcher S. L. McKinney to protect a position other than her assigned position and failed to provide the proper compensation for this use of Ms. McKinney on an assignment other than the one chosen in the exercise of seniority.

The Carrier must now compensate Ms. McKinney for wages lost as the result of this violation, wages based on the difference between the pro rata rate and the overtime rate of pay for train dispatcher for eight (8) hours for both of the aforementioned dates, wages computed to be \$221.80.”

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.

On October 25, 1999, the Claimant was awarded Illinois Relief Position No. 3, which was bulletined to begin on October 28, 1999. That position carried the following schedule:

"Thursday & Friday	3 p.m. - 11 p.m.	Ottumwa District
Saturday & Sunday	3 p.m. - 11 p.m.	Mainline
Monday	3 p.m. - 11 p.m.	C & I"

Article 2(e) reads in pertinent part as follows:

"An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority . . . shall be compensated therefor at the overtime rate of the position worked."

Side Letter No. 5 of Memorandum of Agreement dated February 26, 1997, as amended by letter dated October 12, 1999, provides penalty pay when an employee, having been awarded a regular position, is not released to the new position within 21 days. This memorializes the Carrier's limited right to delay an employee's release to a new position, subject to this penalty.

The Carrier makes reference to the Claimant's prior position on the Guaranteed Assigned Train Dispatcher Board, basically providing work or pay for five days a week, assuming the employee is available. The Organization states this is "new" information not properly before the Board. On the contrary, the parties well knew the Claimant's prior status, and reference thereto in opposition to the Organization's contention is obviously in order.

The simple fact is that, as a GATDB employee, the Claimant could be called for assignments for which she was qualified. It follows that she could be called for daily assignments which might or might not be identical to a daily assignment of the bulletined position which she was awarded.

The Organization points out, accurately, that the Claimant was assigned the Ottumwa position on Thursday and Friday, November 11 and 12, an identical assignment to that in her bulletined position. From this alone, the Organization argues that she assumed her new regular position on November 11. Thus, when she was also assigned to the Ottumwa position on November 13 and 14 (instead of the Main Line position of her bulletined position), the Organization contends the Claimant was entitled to the pay provided in Article 2(e).

The Carrier argues that the Claimant was held on her GATDB position until November 18 (just within the 21 days prior to application of penalty pay under Side Letter No. 5). The Carrier further offers a note allegedly sent to the Claimant on November 18, 1999, stating as follows:

“You are assigned to Job ILR203 [the bulletined position] today Thursday, Nov. 18 per Dispatchers Bulletin No. 470 Award Monday, Oct. 25, 1999.”

The Carrier states this note was made known during the claim-handling procedure on the property, while the Organization views it as “new argument” not properly before the Board.

The Board need not resolve these irreconcilable views. The essence of this claim is that the burden of proof of a contractual violation rests with the Organization. The sole evidence provided by the Organization is that on November 11 and 12, the Claimant worked a position encompassed on her new bulletined assignment (but which also would have been a routine GATDB assignment even in the absence of any bulletined vacancy). The coincidence of such two-day assignment is insufficient to establish that these necessarily were the start dates for the bulletined assignment. Further supporting the Carrier’s contention that the new assignment commenced on November 18 is the Organization’s on-property Statement of Position in reference to the Claimant’s assignment thereafter, as follows:

“[The Claimant] protected the position 2d Trick Ottumwa [instead of C & I] on November 22, at the overtime rate for being used off assignment.”

In sum, the Organization has shown that on November 11 and 12, 1999 the Claimant’s assignment was identical to that of her bulletined position. The

Organization, however, has not provided probative evidence that this fact alone formally assigned the Claimant to her bulletined position on November 11, 1999.

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 14th day of November, 2001.