

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36276
Docket No. CL-36462
02-3-00-3-694

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Consolidated Rail Corporation (Shared Assets Area)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12675) that:

In behalf of Crew Dispatcher W. Hardy for June 16-20, 23-28, 30, July 1-4, 11, 14-18, 1999 for three hours penalty pay each day in accordance with Rule 5(d) that Claimant was held on former assignment and not released to new position as extra clerk, Sterling Yard.”

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 Surface Transportation Board (STB) approved the applications of Norfolk Southern Railway Company and CSX Transportation, Inc., to acquire the Consolidated Rail Corporation in Finance Docket No. 33388. As a result of the acquisition, some of the former Consolidated Rail property became the Shared Assets Area. As a condition of the acquisition, the STB imposed the employee protective conditions set forth in New

York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on all of involved railroads.

The Organization and the acquiring railroads reached an Implementing Agreement dated November 2, 1998. The Implementing Agreement expressly announces that the parties negotiated the Implementing Agreement in compliance with Article I, Section 4 of the New York Dock Conditions.

Chapter I, Article III of the November 2, 1998 Implementing Agreement sets forth a specific procedure, called a rundown process, for employees to change positions when the Shared Assets Area came into existence. Sections 1, 6 and 7 of Article III read:

"Section 1

The rundown assignment procedures called for in the Chapter I will take place on date(s) designated by the Carriers in the notices. On that day, employees who are in active service on the involved seniority district will, in seniority order, select a position, a Severance Slot (if Severance Slot(s) are applicable under Article IV below and if the employee is eligible under Article IV below) or, at PAL locations only, a Continuing Position (if Continuing Positions are established.)

* * *

Section 6

This Section 6 is applicable to positions other than those at the Philadelphia and Bethlehem PAL locations.

The results of the rundown will be posted and simultaneously communicated to the General Chairmen. Although the involved employees will choose their position during the "rundown," the Carriers may elect to stagger the effective date for placing them on their new positions. Employees may be held to train newly assigned employees and

will be released to occupy their new assignment when sufficient qualified employees are available.

* * *

Section 7

Positions not filled pursuant to this Article III will be advertised and awarded under the applicable agreement at the locations where the positions are to be located."

Prior to June 1, 1999, the Claimant occupied a Crew Dispatcher position at Dearborn, Michigan. Pursuant to Chapter I, Article III, the Claimant selected, in proper seniority order, an Extra Board position in Sterling, Michigan, on the soon to become Shared Assets Area. The Claimant was slated to transfer from his Crew Dispatcher position to the Extra Board position on June 1, 1999. Instead of placing the Claimant on the Extra Board position on June 1, 1999, the Carrier kept the Claimant on his Crew Dispatcher position through July 18, 1999. Then, the Carrier transferred the Claimant.

The Claimant now seeks three hours of pay for each workday in the period from June 16 through July 18, 1999, predicated on Rule 5(d) of the applicable property Agreement which provides:

"BULLETING AND AWARDING OF POSITIONS

- (d) **Any employee, in service, awarded a bulletined position shall be transferred to such assignment within fourteen (14) calendar days after the effective date of the award. If the employee is not transferred within the specified time limits, he shall receive pay for an additional three (3) hours at the straight time rate of the position awarded for each work day that he is withheld from such assignment. (If withheld from an extra list assignment, he shall be paid at the extra list rate of pay.)"**

The Carrier declared that it staggered the transfer dates for the Claimant, as well as other employees, pursuant to Chapter I, Article III, Section 6 of the

Implementing Agreement. The Organization does not challenge the Carrier's prerogative to delay placing the Claimant on the Extra Board position, but it claims that the Carrier must pay the three-hour payment per work day to the Claimant as specified in Rule 5(d) because the Carrier held the Claimant over at Dearborn for more than 14 days. The Carrier responds that the Implementing Agreement supersedes Rule 5(d) and even if Rule 5(d) remained applicable, the Claimant was not awarded a bulletined position within the meaning of Rule 5(d) because he selected the position pursuant to a special rundown procedure established by the Implementing Agreement. The Carrier also raises a threshold issue of whether the Board has jurisdiction to interpret and apply the November 2, 1998 Implementing Agreement. The Organization asserts that the claim is premised solely on Rule 5(d) of the applicable Agreement and so, the claim is completely independent of the November 2, 1998 Implementing Agreement.

Although the claim clearly rests on Rule 5(d), the claim arose out of the transfer and assignment of employees to new positions on a newly created entity which is governed by the November 2, 1998 Implementing Agreement. For several reasons, the claim herein is inextricably tied to the provisions of the Implementing Agreement. First, one issue is whether the parties to the Implementing Agreement intended for Rule 5(d) to continue to apply to the selection of positions set forth in the Implementing Agreement. Second, a related issue is whether the Implementing Agreement supersedes inconsistent provisions in the applicable Agreement. Third, another issue is whether the rundown procedure described in Chapter I, Article III of the Implementing Agreement is equivalent to the awarding of bulletined positions as that terminology is used in Rule 5(d).

These issues all involve interpreting provisions of the November 2, 1998 Implementing Agreement. Because the Implementing Agreement was negotiated under the auspices of Article I, Section 4 of the New York Dock Conditions, the parties must utilize the dispute resolution mechanism in Article I, Section 11 of the New York Dock Conditions to resolve this dispute. See Third Division Awards 29317 and 29660. Because the Board lacks jurisdiction to adjudicate the issues raised by the instant claim, we must dismiss the claim.

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AWARD

Claim dismissed.

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 28th day of October 2002.