

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36519
Docket No. TD-36638
03-3-01-3-160**

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

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

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 3(b), 7(a), 12(a), the Letter of Agreement dated May 31, 1973 and the Memorandum of Agreement dated March 5, 1974, Item 2 in particular, when on July 3, 2000, the Carrier allowed and/or required a junior train dispatcher to protect the position of 3d Trick Oregon Branch and provided compensation at the overtime rate of pay, rather than allowing train dispatcher R. J. Kurszewski, the senior qualified train dispatcher available under the Hours of Service Law, to protect the aforementioned position at the overtime rate of pay.”

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 July 3, 2000, at the Carrier's Train Dispatching office at Ft. Worth, Texas, the incumbent Train Dispatcher assigned to the third trick Oregon Branch position became ill four hours into her eight-hour shift, and so, she went home. At the time, the incumbent was training another Train Dispatcher on the Oregon Branch position. After the incumbent went home sick, the Carrier moved the third trick Pasco West Train Dispatcher to the Oregon Branch position. For the rest of the third shift, the Carrier compensated the Pasco West Train Dispatcher at the overtime rate of pay. The Carrier next moved the Train Dispatcher who was being trained on the Oregon Branch position to fill the vacancy on the Pasco West position, a job for which the Train Dispatcher was qualified, for the remainder of the third shift. In essence, the Carrier covered the initial vacancy created by the ill Train Dispatcher and the resulting vacancy by using Train Dispatchers that were already on duty.

The Organization charges that the Carrier was required to call the Claimant, the senior available Train Dispatcher on his rest day, pursuant to Item 2 of the May 31, 1973 Letter of Understanding. The pertinent portions of the 1973 Letter of Understanding provide:

"At the conclusion of the discussion, it was agreed that when there is no extra train dispatcher available who has not performed five days' dispatching service within seven consecutive days, dispatchers will be called for service in the following order:

1. The regular incumbent of the position.
2. The senior regular qualified train dispatcher available under the 'Hours of Service Law.'
3. The senior qualified extra train dispatcher available under the 'Hours of Service Law.'

The above understanding serves to dispose of the proposals to change the existing agreement as set forth in your letter of October 26, 1972, and except as specifically provided herein, this understanding does not modify or in any manner affect schedule rules of agreements."

On the other hand, the Carrier justified its decision to rearrange on duty Train Dispatchers by citing Article 2(e) of the applicable Agreement which reads:

“An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority, except an assigned train dispatcher who is used on the position of chief dispatcher, or assistant chief dispatcher, shall be compensated therefor at the overtime rate of the position worked; however, except as provided in Article 18, no additional payment shall be made to such train dispatcher due to not having worked his regular assignment.

Assistant chief dispatcher, required by the management to work a shift as trick dispatcher, will be compensated at the rate of his assigned position.

Assistant chief dispatcher, required by the management to work as a chief dispatcher, will be compensated at the rate of chief dispatcher.”

On July 3, 2000, there were no extra Train Dispatchers available. Therefore, the issue becomes whether the Carrier was required to invoke the Order of Call set forth in the May 31, 1973 Letter of Understanding or whether it could move the on-duty Train Dispatchers from position to position so long as it complied with the Article 2(e) premium compensation requirement. Stated differently, the specific question is whether or not the vacancy arising on the third trick Oregon Branch position triggered the provisions of the May 31, 1973 Letter of Understanding.

The May 31, 1973 Letter of Understanding, containing the Order of Call, is a mandatory provision. The Carrier must strictly comply with the enumerated items in the Letter of Understanding. However, a prior decision between these same parties (Third Division Award 34144) interpreted the same Rules and held that the mere occurrence of a vacancy does not presumptively trigger the mandatory terms of the May 31, 1973 Letter of Understanding. In Award 34144, the Board aptly observed:

“The Board sees no conflict between Article 2(e) and the 1973 Letter of Understanding. Article 2(e) is a pay provision. It provides penalty pay to an ‘assigned train dispatcher’ who is ‘required’ to work a position other than the one selected by the dispatcher through seniority exercise. This can only be read as a deterrent to the Carrier from removing a dispatcher

from a regularly assigned position. It follows that, as a pay Rule, it is silent as to any order of selection for such 'required' move.

The May 31, 1973 Letter of Understanding, as the Organization asserts, is mandatory in its terms. The Board, however, notes that it is applicable 'to filling temporary vacancies and to define who is entitled to a sixth or seventh day.' There is no indication that these two conditions are considered separately. Put another way, the Letter of Understanding is reasonably read to cover situations in which dispatchers are called in to work.

Does the Letter of Understanding apply to the reassignment of a dispatcher during the dispatcher's regular duty hours, as here? There is no basis to draw this conclusion, especially in view of the provisions of Article 2(e). As noted above, the inference to be drawn from Article 2(e) is that a dispatcher may be 'required' (thus, involuntarily) to move to another assignment temporarily, with the condition that the dispatcher receives premium pay for so doing. Here, the move was to another assignment on the same track, and no extra hours of work were involved. The Board finds no barrier to the Carrier's selection of such a move as may be most efficient and without regard to seniority. There is no way, in fact, to determine whether the senior of two qualified employees, if preference could be made, would elect not to move to another assignment to fill a one-track vacancy or would wish to transfer for the sake of the additional pay."

The holding in Award 34144 applies to the facts in this case inasmuch as the Carrier did not call Dispatchers into work. Pursuant to the ruling in Award 34144, the May 31, 1973 Letter of Understanding does not apply to the reassignment of a Train Dispatcher during the Dispatcher's regular tour of duty.

For the reasons more fully set forth in Award 34144, we must deny this claim.

AWARD

Claim denied.

Form 1
Page 5

Award No. 36519
Docket No. TD-36638
03-3-01-3-160

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 23rd day of April 2003.