Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36737
Docket No. CL-36793
03-3-01-3-366

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-12750) that:

1. Carrier violated the Working Agreement when it failed to call clerical employee H. England, CSC, Ft. Worth, Texas for overtime service on Position 6360 on July 25, 1998.

2. Carrier must now compensate clerical employee H. England eight (8) hours pay at the Wage Grade 13 overtime rate for July 25, 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.

The Claimant is a regularly assigned clerical employee at the Carrier's Field Support Center in Ft. Worth. On July 25, 1998, the Claimant was observing his rest day for his regularly assigned position 6360.

On July 25, 1998 at 4:52 A.M., the Claimant was called for first shift overtime vacancies on Positions 6641 and 6254 with start times of 7:00 A.M. The Claimant declined those overtime opportunities.

On July 25, 1998, the clerical employee assigned as relief to Position 6360 (the Claimant's position) laid off thereby creating a vacancy. Because the Claimant earlier declined the overtime opportunities for Positions 6641 and 6254, the Carrier did not call the Claimant to fill the vacancy on Position 6360 and another employee was called. This claim followed.

Rule 37(A) of the Agreement provides that "[w]hen overtime work is required by the Company, the incumbent of the position to which such overtime work is necessary shall be given preference in its performance. . . ." Letter of Understanding No. 69 dated March 10, 1998 provides that "[w]hen Carrier determines it is necessary to fill a short vacancy within a region 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."

On July 25, 1998, the Claimant was the incumbent on Position 6360 observing his rest day. When the relief employee for that position laid off on that day, Rule 37(A) gave the Claimant preference to the overtime created by the vacancy in that position. Further, under the clear language of Letter of Understanding No. 69, the Carrier had an obligation to offer the Claimant the opportunity to fill the vacancy in that position because ". . . such overtime will be worked . . . by calling the senior available employee from that shift who is off duty that day."

Putting the remedy question aside for the moment, the fact that the Claimant earlier declined the opportunity to work two other overtime positions on the first shift does not change the result that, by clear language, the Carrier was obligated to offer the Claimant the opportunity to work the vacancy on Position 6360. Again, the clear language of Rule 37(A) and Letter of Understanding No. 69 requires a conclusion that the Carrier was obligated to call the Claimant for the vacancy on Position 6360 ("[w]hen overtime work is required by the Company, the incumbent

of the position to which such overtime work is necessary shall be given preference in its performance. . . ." and "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") [Emphasis added]. Stated differently, under the specific language of the relevant Rules, without a clearer manifestation by the Claimant that he was not interested in working any overtime on July 25, 1998, the fact that the Claimant turned down other overtime opportunities on that day is insufficient to show that the Claimant was not "available" to fill an overtime vacancy on his incumbent position. The Rules clearly required the Carrier to call the Claimant and the Carrier did not do so. Violation of that language has been shown. See e.g., Third Division Award 33833 ("The fact that Claimant may have refused a call for another position does not relieve the Carrier from its obligation to call the Claimant for the vacant position in dispute"); Special Board of Adjustment 951, Award 284 ("The Carrier's justification that the Claimant previously had rejected overtime work, while apparently factually correct, is irrelevant under [the rule] . . . which requires that specified employees be 'offered' overtime").

Awards cited by the Carrier (Third Division Awards 18644, 14208; Second Division Awards 12244, 13533; and Special Board of Adjustment No. 1011, Award 212) do not address the specific facts in this case concerning an incumbent's preference to the overtime opportunity or the language found in Rule 37(A) and Letter of Understanding No. 69 mandating a call to the senior available employee before moving on to call other employees.

The harder question in this case is the remedy.

If all that existed in this case was the fact that the Claimant was not called when the relevant language obligated the Carrier to make a call to the Claimant, then the Claimant would be entitled to be made whole and compensated for the lost overtime opportunity. However, in this case, there is more.

Notwithstanding the clear language of Rule 37(A) and Letter of Understanding No. 69 which obligated the Carrier to call the Claimant even though he turned down overtime opportunities on other positions on the day in dispute, the Carrier has offered evidence that employees have been able to fill out call preference lists for positions for which they would accept overtime and for those positions or situations where they did not want to work overtime. Further,

according to the Carrier, since at least 1994, it has operated under the procedure that employees who refused overtime calls were considered not available for subsequent calls for positions on the same shift. The Carrier recognizes that such procedures are outside the terms of the Agreement and do not conform to the strict application of the negotiated language. The Carrier further claims a hardship that will exist for timely filling vacancies if it is obligated to call employees who have already turned down overtime opportunities. The Organization does not agree with the Carrier's assertions, but points out in argument that the Claimant had not signed such a preference that would have precluded at least a call for the vacancy in dispute.

It is a basic rule of contract construction that past practice cannot be used to vary or explain the meaning of clear language. See Third Division Award 22214 ("Relative to the contention of the Carrier concerning past practice, we must note that Rule 6 is clear and unambiguous and even if past practice had been established, it does not nullify the clear requirements of Rule 6"). We believe that Rule 37(A) and Letter of Understanding No. 69 are clear with respect to this dispute - "[w]hen overtime work is required by the Company, the incumbent of the position to which such overtime work is necessary shall be given preference in its performance. . . ." and "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." Mandatory phrases like "shall be given preference" and "will be worked . . . by calling the senior available employee. . . ." are clear, leave nothing to discretion and do not allow for ambiguous interpretations. Because of the clear language found in Rule 37(A) and in the Letter of Understanding No. 69, in terms of assessing whether a Rule violation occurred, the practice relied upon by the Carrier is not determinative.

However, because the Board has broad discretion in the formulation of remedies, how the parties have operated in the past can be considered by us in structuring a remedy in this case. Given that discretion and because the Carrier has demonstrated that for years it has operated under a procedure of allowing employees to indicate their preferences for overtime opportunities and not calling employees again who have turned down an overtime opportunity on the same shift, in our opinion it would be manifestly unfair to now require the Carrier to compensate the Claimant in this case for the lost overtime opportunity on July 25, 1998. However, notwithstanding the Carrier's prior treatment of these calling situations, given the clear language of Rule 37(A) and the Letter of Understanding

No. 69, from this point forward, that is, from the date of the Award failure to make a similar call where the employee has not manifested a clear intent that he or she is not available for other overtime calls on a shift - i.e., one that is more than merely turning down a call for a particular vacancy on that shift - will require make whole compensation by the Carrier for the lost work opportunity.

We are mindful of the Carrier's concern that a requirement to call employees for other overtime opportunities when they have previously turned down calls on a particular shift will cause more calls to be made and may impact operations. But another Rule of contract construction is that clear language must be enforced even if to do so works a hardship on one of the parties. See Third Division Award 30156 (". . . the result may appear harsh to those employees who were recently furloughed . . . [h]owever, the result in this case is dictated by the clear language of the relevant rule. . . ."). These parties are sophisticated negotiators and they have been able to come up with or have allowed procedures outside the relevant language which specify orders of call and give employees opportunities to indicate the circumstances when calls need not be made by the Carrier. Nothing prevents the parties from specifically addressing the situation where an employee turns down a call on a shift. Further, because the real question in these cases is whether the employee is "available" for further overtime calls, nothing prevents the caller from simply asking the employee who is called and turns down an overtime opportunity whether that employee desires to receive calls for other opportunities on that shift.

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 22nd day of October 2003.