

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36986
Docket No. TD-36959
04-3-01-3-592

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

(American Train Dispatchers Department
(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(The Burlington Northern and 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’), 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 December 26, 2000, the Carrier allowed and/or required a junior train dispatcher other than the incumbent to protect the position of 3d Trick Dickinson, and provided compensation at the overtime rate of pay, rather than allowing train dispatcher B. R. Adams, the incumbent to the contested position, 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 December 26, 2000, a vacancy arose on 3rd Trick Dickinson from 10:30 P.M. to 6:30 A.M. when the Dispatcher holding that assignment for that day did not report as scheduled. The Claimant was the incumbent to the position and was observing a rest day. The Carrier asserted that it called the Claimant in an effort to get her to protect the vacancy. The Carrier stated that "[t]here was no answer to the call made to the Claimant's residence and thus, she was not available." The Carrier argued that it was faced with an emergency situation and, as a result, Dakota Chief Dispatcher W. Fohl ". . . was only able to place one call to the Claimant's residence." In support of that assertion, Fohl provided a statement that "[o]n Dec 26 had no show 3rd trick at 2230 - [d]id not have time to call BR Adams more than once." According to the Carrier, after the call was made by Fohl to the Claimant and the Claimant did not respond, it filled the position with Dispatcher S. J. Frank.

The Organization argues that no call was made to the Claimant. In support of that assertion, according to the Claimant's statement:

"I was home all that night. If tape is researched it will show that if they did call, they did not let it ring more than 3 rings because my recorder comes on right after 3rd ring and it is turned up to highest volume. It can be heard anywhere in my house. No message was left. Nor did they call twice like stated. They also did not call my cell phone."

There appears to be no dispute that the Claimant should have been called prior to Dispatcher Frank to protect the vacancy. However, as to whether that call to the Claimant was actually made, we are faced with a dispute of fact. The Carrier asserts that the Claimant was called to protect the vacancy. The Organization asserts that she was not. Both positions are supported by statements from the individuals involved (the Chief Dispatcher and the Claimant). Based on what is before us, the facts concerning whether the Carrier called the Claimant are simply

irreconcilable. But the burden is on the Organization to demonstrate with sufficient evidence that the Claimant was not called. Inferences the Organization argues we should make to credit the Claimant's version over Fohl's version are not persuasive. The facts are simply in dispute. Given the irreconcilable facts, the Organization has not met its burden of proof.

For the sake of discussion, we will assume that the circumstances did not rise to the level of an "emergency." But, aside from the order of call specified in the May 31, 1973 Letter of Understanding and the general concepts of seniority, the Organization has not cited us to an agreed upon procedure regarding the methods and mechanics for making such calls in similar circumstances which were not followed. But, under the circumstances, although perhaps not an emergency, nevertheless, the Carrier had to move quickly. A Dispatcher's position was vacant because of a no show. This was not a situation where the Carrier knew in advance that there would be a vacancy and could take more time in an effort to make calls, which the Organization could then more forcibly argue would dictate a requirement to make more than just one attempt to call the Claimant to see if she was willing to fill the vacancy.

The Awards cited by the Organization do not change the result. Third Division Award 16473 involved a single call to a Section Laborer (which, as here, was disputed as to whether the call was made) to perform overtime work which the Board concluded "[w]e do not think that this constitutes a reasonable effort on [the foreman's] part to satisfy the requirements of the cited rule." Third Division Award 23561 involved a Relief Agent, Telegrapher, Clerk who was first told she would not work her third trick assignment on Christmas Day, which was changed when the carrier called her at 9:00 P.M. to work that assignment, which caused the Board to conclude "[o]ne call in such a situation falls short of any reasonable definition of a sufficient effort." Third Division Award 31704 involved a single call (again, disputed as to whether made) to a Maintenance of Way employee, wherein the Board stated that "[t]his Division has, on many occasions, held that a reasonable attempt to reach an employee requires more than a single call." Third Division Award 31973 (with this Referee participating) involved attempted calls to a Customer Service Center employee at his work location after the employee's shift was over and to the employee's home before he could have arrived home at times that were outside the designated calling times for filling a vacancy, which caused the

Board to conclude that the carrier's efforts were not bona fide. Those cases are clearly distinguishable. Here, although perhaps not an emergency, the Carrier still had to act quickly to fill a vacant Dispatcher's position that occurred when the 3rd Trick Dickinson Dispatcher was a no show. Those circumstances were not present in the Awards cited by the Organization. Under the particular circumstances of this case, one call to the Claimant before moving on would have to be considered a reasonable effort.

But again, the dispute turns on whether the Claimant was called. Due to the irreconcilable facts in this record and because the burden of proof is on the Organization to demonstrate the necessary facts to support its claim, the claim is denied.

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 12th day of May 2004.