Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37259
Docket No. TD-36870
04-3-01-3-485

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

PARTIES TO DISPUTE: (American Train Dispatchers Department
(Brotherhood of Locomotive Engineers
(
(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 June 24, 2000 (not "June 26, 2000", as the Carrier's declination states), the Carrier allowed and/or required a junior train dispatcher to protect the position of 2d Trick Brush and provided compensation at the overtime rate of pay, rather than allowing train dispatcher K. E. Hand, 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 June 24, 2000, a vacancy arose on the second trick Brush Dispatcher position at the Carrier's dispatching office in Ft. Worth. The Carrier could not fill the position with a qualified employee from the extra board. Rather than calling the Claimant who was observing a rest day, the Carrier assigned K. D. McCully (who was junior to the Claimant and assigned to work another second shift Dispatcher position in the same office) to work the second trick Brush Dispatcher position and compensated McCully at the overtime rate. In this claim, the Organization contends that the Claimant should have been called for the second trick Brush Dispatcher position rather than assigning the work to junior Dispatcher McCully.

Article 2(e) provides:

> "(e) SERVICE ON POSITIONS OTHER THAN SENIORITY CHOICE
>
> 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."

* * *

The May 31, 1973 Letter of Understanding provides:

> "This refers to our exchange of correspondence ending with my letter dated April 27, 1973, and discussion in conference on May 23,

1973 at which I was represented by Mr. K. A. Voelk, in connection with your proposal of October 26, 1972, to amend the existing agreement applicable to filling temporary vacancies and to define who is entitled to a sixth or seventh day in the absence of an extra train dispatcher who has not performed five days' service within seven consecutive days.

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 '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 or agreements."

The Organization argues that under language in the May 31, 1973 Letter of Understanding (". . . 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 . . . [t]he senior regular qualified train dispatcher available under 'Hours of Service Law'" [Emphasis added]), the Claimant was entitled to work the second trick Brush position instead of junior Dispatcher McCully. On the basis of prior precedent, we disagree.

The Board previously addressed similar disputes between the parties. In Third Division Award 34144, rather than using the senior claimant therein who was working the first trick, the Carrier moved a junior Dispatcher assigned to the first

trick to fill a vacancy in another position on the first trick and compensated that employee at the overtime rate and utilized an extra board employee to work the resulting vacancy. The Board denied the Organization's claim that the senior claimant should have been transferred under the provisions of the 1973 Letter of Understanding finding that ". . . the Letter of Understanding is reasonably read to cover situations in which dispatchers are called in to work":

> "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 trick, 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-trick vacancy or would wish to transfer for the sake of the additional pay."

In Third Division Award 36519, again between the parties, rather than using the claimant therein who was senior and on a rest day, the Carrier covered a vacancy that occurred during a shift by using on duty Dispatchers. The Board denied the claim, relying upon Third Division Award 34144:

"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. . . .

* * *

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."

Third Division Awards 34144 and 36519 previously decided between the parties are not palpably in error and control this matter. The reassignment here occurred during the second shift and involved Dispatchers on that shift. No Dispatchers were called in. As found in Third Division Award 36519 "[p]ursuant 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." On the basis of those Awards, this claim shall be denied.

Other Awards between the parties cited to us do not change the result and are distinguishable. In some cases, the results support the Carrier's position and our conclusion in this particular case. For example, in Third Division Award 35987, the

facts showed that the claimant was called for a different vacancy than the one in dispute and declined the offer, which then exhausted the list of qualified Dispatchers under the Hours of Service Act. Other Dispatchers were then called to fill vacancies. After reporting, one of the Dispatchers did not feel "comfortable" working the vacancy and was permitted to work his regular assignment. The Carrier then directed the Dispatcher on duty who was junior to the claimant to fill the vacancy. The Board denied the claim on the grounds that ". . . no explanation is offered as to how the Claimant could have been 'available' to fill a vacancy on a trick that had already commenced." But the point is that the Carrier utilized a junior Dispatcher from the trick and made the assignment. That is consistent with the result in this case. Third Division Award 36224 - also a denial Award - involved a dispute over whether the Carrier was required ". . . to offer an overtime assignment in another position when such assignment would prohibit the employee, under the Hours of Service Law, from meeting the obligations of his regular assignment." That is not this case. Third Division Award 34003 involved a situation where there was a one shift vacancy on the first trick and rather than calling in the claimant who was a second trick Dispatcher and available, the Carrier held over a third trick Dispatcher for five hours and called in a second trick Dispatcher three hours earlier to fill the vacancy. Clearly, under the May 31, 1973 Letter of Understanding the claimant who was senior and available should have been called - and the Board so found. But again, those are not the facts in this case. The vacancy in this case occurred on the same shift and the Carrier simply moved personnel on that shift and "did not call Dispatchers into work." Third Division Award 36519, supra.

Third Division Award 36985 with this Referee participating is also distinguishable. There, the claimant was called on two occasions to fill vacancies and declined the offers. Another vacancy occurred and the Carrier bypassed calling the claimant because of the prior refusals of offers. There, we sustained the claim noting the obligation to call under the May 31, 1973 Letter of Understanding and concluded "[t]he Claimant in this matter did not indicate her "'non-availability on the date in question,' she just turned down specific offers for specific jobs." Once again, that is not this case. Finally, as we have in this case, Public Law Board No. 6519, Award 12 relied upon Third Division Award 34144 and found that Award ". . . finds that the Carrier is not required to use the senior train dispatcher when it requires a train dispatcher to move to another assignment on the same shift."

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 5th day of November 2004.

Labor Member's Dissent
To Third Division Award Nos. 37259 & 37260
Docket Nos. TD-36870 & TD-36917
(Referee Edwin H. Benn)

These claims involved the filling of vacancies that occurred when there were no extra train dispatchers available. Instead of using dispatchers on their rest days the carrier moved dispatchers, who were already scheduled to work, off their regular assignment and then used other dispatchers to fill the resultant vacancies. The May 31, 1973 Letter of Understanding ('73 LOU) established a defined order of call and is quoted in its entirety in Award 37259.

In denying these claims, the Majority incorrectly deemed Third Division Awards 34144 and 36519 as controlling precedent. This is the only reason for the Majority's justification for denying these claims.

The Organization cited Third Division Awards 35987, 36224, 34003, 36985 and Public Law Board 6519, Award 12 because of the consistent interpretations of the '73 LOU. The Majority suggests that these Awards have no bearing because the facts involved in those cases are distinguishable from the facts in the instant claims. But, what about the facts involved in Awards 34144 and 36519 as compared to the facts involved in the claims at bar? Were they the same? Or, were they distinguishable?

In Third Division Award 34144, the Board described the facts involved as being:

> "On January 1, 1997, a vacancy occurred in a first trick dispatcher position. There were no qualified extra board dispatchers available to fill the vacancy at the *straight time rate, and there were no regularly assigned qualified dispatchers* available under the Hours of Service Law to fill the positions. The Carrier elected to move an employee already assigned to the first trick to fill the vacancy and utilized a qualified extra board employee to work the resulting vacancy. The Claimant, also assigned to and working the first trick, was senior to the transferred employee and was qualified to fill the initial vacancy. The Organization argues that the Claimant, rather than the other employee, should have been transferred to the vacancy on the same shift, thus being enabled to earn premium pay, as provided in Article 2(e). For the alleged requirement to transfer the senior qualified employee, the Organization relies on the May 31, 1973 Letter of Understanding.... The Organization argues that this Letter of Understanding requires filling the vacancy under the second numbered order; that is, the Claimant as 'senior' employee."[1]

[1] As can be seen from this excerpt, the Carrier exhausted the '73 LOU before it moved a dispatcher off assignment to fill the vacancy. The dispute centered on whether the '73 LOU required the Carrier to use the senior qualified dispatcher off assignment under Article 2(e). It found that the '73 LOU did not apply to moving dispatchers off their regular assignment. In a subsequent decision involving the identical facts of Award 34144, PLB 6519, Award 12 (cited by the Organization as support for its position that Award 34144's findings were only applicable to moving *dispatchers off their regular assignment) found, "Third Division Award No. 34144 is applicable and we do not find* it palpably erroneous. It is directly on point to the instant facts. It finds that the Carrier is not required to use the senior train dispatcher when it requires a train dispatcher to move to another assignment on the same shift...."

Labor Member's Dissent
To Third Division Award Nos. 37259 & 37260
Docket Nos. TD-36870 & TD-36917
(Referee Edwin H. Benn)

In Third Division Award 36519 the Board described the facts involved as being:

> "On July 3, 2000, at the Carrier's Train Dispatcher office in 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."[2]

However, in the instant claims a vacancy occurred and there were no extra train dispatchers available to fill the vacancies. The vacancies were known ahead of time and did not occur with short notice. The Carrier had ample time to fill the vacancies using the '73 LOU order of call but opted instead to fill the vacancies by moving dispatchers off assignment and paying them in accordance with Article 2(e).

Instead of adhering to the clear and unambiguous language of the '73 LOU, the Majority opted to deny the claims on the basis of what it referred to as "prior precedent", Awards 34144 and 36159. Even though the facts involved in the so-called precedent Awards 34144 and 36519 are not only distinguishable from the facts involved in the claims at bar, but also starkly different.

As previously noted, the Awards cited by the Organization[3] were referenced because of what the Board said in each of those Awards about the interpretation of the '73 LOU. An analysis of these Awards, as well as those relied on by the Majority[4] interprets the '73 LOU as follows:

Third Divison Award 34144:

> "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."

Third Division Award 36519:

> "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."

Third Divison Award 35987:

> "The May 31, 1973 Letter of Understanding provides that a vacancy is initially filled with an available extra Train Dispatcher with less than five days' dispatching service within seven consecutive days; if no such extra Train Dispatcher is available, then the position is offered to the regular incumbent. Absent the incumbent's availability, the Letter of Understanding calls for offering the position to 'the senior qualified train dispatcher available under the Hours of

[2] As can be seen from this excerpt, this involved a vacancy that occurred during the shift.
[3] Third Division Awards 35987, 36224, 34003, 36985 and PLB 6519, Award 12.
[4] Third Division Awards 34144 and 36159.

> Service Law.'... In the absence of other circumstances the Organization would be on firm ground in arguing that the Carrier violated the Letter of Understanding and that remedy is due to the Claimant. The difficulty with the Organization's position, however, is that there were factors in the situation here under review that clearly left the Carrier with no alternative and warranted the action taken.... While the Organization's reading of the Letter of Understanding is accurate, no explanation is offered as to how the Claimant could have been 'available' to fill a vacancy on a trick that had already commenced."

Third Divison Award 36224:

> "The Carrier and the Organization agree that the document covering the filling of such temporary vacancies is the mutually signed Letter of Understanding dated May 31, 1973...."

Third Division Award 34003:

> "The Organization states without contradiction there was no Extra Train Dispatcher available on straight time, and the regular incumbent was not available. Thus, the Organization argues that the Claimant should have been called, noting the use of the mandatory 'will be called.'... In sum, there is no showing that the 1973 LOU has been superseded as to the filling of short, non-bulletined vacancies by qualified employees."

The Board has consistently held that the '73 LOU is "mandatory"; that "it is applicable to filling temporary vacancies and to define who is entitled to a sixth or seventh day"; that the parties "agree that the document covering the filling of such temporary vacancies is the mutually signed" '73 LOU and that "there is no showing that the 1973 LOU has been superseded as to the filling of short, non-bulletined vacancies." All of which the Majority disregarded in deciding the instant claims.

Finally, in the most recent decision involving the '73 LOU between these parties, Third Division Award 36985 interpreted the '73 LOU as follows:

> "The May 31, 1973 Letter of Understanding is clear – '...dispatchers will be called for service in the following order....' (Emphasis added) Given the phrase 'will be called,' there is no discretion on the Carrier's part.... The Carrier was therefore obligated to follow the clear terms of the May 31, 1973 Letter of Understanding for each call – '...dispatchers will be called for service in the following order....' The Claimant was not called. The claim therefore has merit. To rule otherwise would cause us to change the mandatory language of the May 31, 1973 Letter of Understanding concerning the order of call. We do not have that authority."

Labor Member's Dissent
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As can be seen from the above, Award 36985 interpreted the '73 LOU as leaving "no discretion on the Carrier's part" and that the "Carrier was obligated to follow the **clear** terms" and that it contained "mandatory language." (Emphasis added.) This is the interpretation of the '73 LOU based upon its clear terms. However, the Majority exercised authority it didn't have in the instant claims and did exactly what the Board refused to do in Award 36985; it changed "the mandatory language of the May 31, 1973 Letter of Understanding concerning the order of call."

The Majority's decision is contrary to the clear terms of the '73 LOU and Board precedent concerning the interpretation of the '73 LOU. Therefore, these Awards are palpably erroneous.

I dissent.

David W. Volz
Labor Member