

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37450
Docket No. TD-37603
05-3-02-3-727

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: ((American Train Dispatchers Association
(Peoria and Pekin Union Railway

STATEMENT OF CLAIM:

"The P&PU Railway Co. (the Carrier) violated the current agreement between the Carrier and the Organization, including Article I in particular, when it abolished the position of Chief Train Dispatcher and permitted and/or required an employee not covered by the scope of said agreement to assume the duties and responsibilities previously held by the Chief Train Dispatcher.

Because of said violation, the Carrier shall now compensate the senior Train Dispatcher on rest day (1) day's pay at the overtime rate applicable to the Chief Train Dispatcher beginning on January 9, 2002 and continuing on each subsequent date thereafter until the work is returned to the train dispatchers.

The identities of individual claimants entitled to the compensation requested in above paragraph are ascertainable from the carrier's records and shall be determined by a joint check thereof."

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 disposition of this claim is governed by well-settled Board precedent. In the on-property record, unrefuted assertions of material fact become established fact. Such unrefuted assertions are, for purposes of our analysis, facts admitted or conceded. Therefore, they are sufficient, by themselves, to prove the requisite elements of a claim; no separate evidence is required. See, for examples, Third Division Awards 35771 and 35923.

On the property, the Carrier did not refute any of the assertions of material fact made by the Organization in its claim. It must be deemed, therefore, to have agreed with the assertions. For example, the Carrier did not respond to the assertion that the Trainmaster who abolished the Chief Train Dispatcher position in question said "... he ... would assume responsibility for the supervision of Train Dispatchers including scheduling vacations, personal days and scheduling Extra Train Dispatcher(s). (Those duties have always been performed by the Chief Train Dispatcher.)"

Article I of the Agreement clearly provides that a Chief Train Dispatcher position must be designated whenever the duties of a Chief Train Dispatcher exist.

In its ex-parte Submission to the Board, the Carrier included new evidence and argument that was not provided as part of the record of handling on the property. It is also well settled that parties cannot wait to make their defenses in their Submissions to the Board. We simply are not permitted to consider information and argument that was not part of the record developed on the property.

Given the state of the record, we are constrained to recognize that the Organization successfully proved the essential elements necessary to establish a violation of the Agreement. For remedy purposes, however, the record does not sufficiently establish either the frequency or duration of the need for the performance of Chief Train Dispatcher duties. To the extent those duties are required to be performed, we cannot determine whether it is only for brief periods

from time to time or continuously every day. If only briefly from time to time, we cannot determine whether the Agreement requires a full-time position or only something like an occasional temporary upgrade. Accordingly, the remedy question is remanded to the parties for research to answer these aspects of the remedy issue and to compensate the senior available Train Dispatcher(s) as appropriate.

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 March, 2005.