

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37569
Docket No. TD-37709
05-3-03-3-64**

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

**(American Train Dispatchers Association
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“The Burlington Northern Santa Fe Railroad (“the Carrier”) violated the current effective agreement between the Carrier and the American Train Dispatchers Department, Brotherhood of Locomotive Engineers (“the Organization”), Articles 2(e), 3(a), 3(b), 3(d) and Article 18, in particular, when on November 4, 2001, it required train dispatcher Debbie DeHaas to absent herself from her assigned position and instead report the following day, her rest day, for service.”

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.

At the relevant time, Dispatcher D. A. DeHaas held a third shift Montana Relief Assistant Chief Dispatcher position, 11:00 P.M. – 7:00 A.M., with Monday and Tuesday as rest days.

According to the Organization, on Sunday, November 4, 2001, DeHaas was instructed by Montana Chief Dispatcher J. Gannon to absent herself from her regular assignment and report for service at 7:00 A.M. on Monday, November 5, 2001 - DeHaas' rest day - in order to qualify on crew management functions. Also, according to the Organization, DeHaas worked until 3:00 P.M. on November 5, 2001 and received no compensation for being held off her regular assignment and was further compensated at only the straight time rate for service on her rest day. This claim followed.

The Carrier's view of the facts is different. The Carrier asserts that Chief Dispatcher Gannon had planned to have an Extra Board Dispatcher train DeHaas on crew management functions while she was working her regular third shift assignment, but DeHaas asked Gannon for permission to absent herself from her third shift position on two dates - October 28 and November 4, 2001 - so that she could come in on the first shift on her following rest days to train on those functions. A statement from Gannon dated December 14, 2001 confirms that "I talked to Montana ACD D. A. Dehaas about her training and she asked if it would be permissible for her to be relieved on Sunday 3rd Trick and train on Mondays 1st Trick." Further, according to the Carrier, because DeHaas made the request, Gannon granted DeHaas' request with the understanding that she would get paid at the straight time rate and would not be compensated for the third shift on the previous day.

Thus, the crucial factual difference between the parties is that, according to the Organization, Chief Dispatcher Gannon instructed and required DeHaas not to work on her regularly assigned shift and to come in on her rest day for training, while the Carrier asserts that DeHaas requested permission and an accommodation to do so.

The Carrier asserts in its September 12, 2002 letter that "[t]raining is not 'work' or 'service'" for which the Rules governing additional compensation for being held off her regular assignment and working rest days apply and cites Third

Division Awards 20707, 30047, 32204, 33146 and 35192. The Organization seeks to distinguish those Awards by pointing out that those Awards specifically dealt with training classes, and this case is different because DeHaas was performing on-the-job training on her rest day and therefore was performing "work." The Organization further argues that Chief Dispatcher Gannon engaged in individual negotiations with DeHaas in derogation of the Organization's exclusive representative status and changed the terms of the Agreement which would have provided extra compensation to DeHaas for working on her rest day.

We do not have to determine if there is a valid distinction between training classes and on-the-job training as argued by the Organization. Nor do we have to determine if Chief Dispatcher Gannon improperly negotiated with DeHaas on an individual basis with the result that the terms of the Agreement were waived by DeHaas or changed. In our opinion, the crucial fact is that the record establishes that DeHaas requested permission from Chief Dispatcher Gannon that he accommodate her and allow DeHaas to come in on her rest day and Gannon granted DeHaas' request. Gannon verified that fact in his December 14, 2001 statement ("... she [DeHaas] asked if it would be permissible for her to be relieved on Sunday 3rd Trick and train on Mondays 1st Trick."). Indeed, throughout the handling of the dispute on the property, the Carrier challenged the Organization to speak with DeHaas to verify that she requested the accommodation and that Gannon did not require or instruct her to perform the training on her rest day. There is nothing from DeHaas or the Organization to refute the factual assertions made by Gannon.

The Organization is correct that it is the entity which polices compliance with the Agreement and that DeHaas' wishes do not permit the Carrier to change the terms of the Agreement. But what we have here is a case with facts showing that the employee made the request to be accommodated and the Carrier complied with that request. In such a case - where there was no direction or instruction by the Carrier for the employee to work on her rest day - even if we found a violation of the Agreement, we would not fashion any remedy to compensate the employee at other than the straight time rate. Because DeHaas initiated the request - and did so without apparent suggestion or inducement from the Carrier - the Organization is estopped from obtaining additional relief beyond the straight time rate. While the Organization is correct that the Carrier cannot individually negotiate with employees to change or waive the terms of the Agreement, in this case, because

DeHaas made the request on her own to train on her rest day, basic principles of estoppel - indeed, simple fundamental fairness - bar this claim. Under these unique circumstances, because no relief can be granted, no violation can be found. This result should not be construed as a broad endorsement of individuals initiating requests for special treatment in return for diminished benefits or pay.

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 24th day of August 2005.