

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 38215  
Docket No. TD-39103  
07-3-05-3-564

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**PARTIES TO DISPUTE:** (American Train Dispatchers Association  
(Soo Line Railroad Company)

**STATEMENT OF CLAIM:**

“(A) The Soo Line Railroad Company (the Carrier) violated the current schedule agreement between the Carrier and the Organization, including rules 9 and 19 thereof in particular, when on Monday August 30, 2004 and Tuesday August 31, 2004 the Carrier improperly filled a vacancy existing on the D&H South 2<sup>nd</sup> shift desk and failed to use the claimant as stipulated in the current agreement.

(B) Because of the lost work opportunity caused by said violation the Carrier shall now compensate claimant J. K. Adam \$222.22 which represents lost earnings for August 30 and 31, 2004.”

**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 Monday, August 30 and Tuesday, August 31, 2004, respectively, a temporary vacancy existed on the 2nd D & H South dispatching desk. This position had a starting time of 1:00 P.M. The Carrier assigned Dispatcher S. M. Krockner to fill the temporary position on those two days when no one responded to fill the vacancy under the Order of Call. Dispatcher Krockner was regularly assigned the position of Swing 8, working 1st shift on Friday and Saturday, from 7:00 A.M. to 3:10 P.M.; 2nd shift on Sunday and Monday, from 3:00 P.M. to 11:00 P.M.; and 3rd shift on Tuesday, from 11:00 P.M. to 7:10 A.M.

The Organization maintains that Dispatcher Krockner was not rested for the normal start time of 1:00 P.M. on the D & H South dispatching desk vacancy. The Organization contends that the Carrier improperly circumvented this obstacle by setting back the start time of the position to 2:10 P.M. in order to accommodate Dispatcher Krockner. Under Rule 9 (c) the Carrier must give "not less than seventy-two hours' advance notice" to change the starting time of a regular assignment. The Carrier did not comply with this Rule, the Organization maintains.

It is the Organization's position that the Claimant, who is senior to Dispatcher Krockner, should have been assigned to work the vacancy. The Claimant holds a Monday through Friday 3rd shift assignment on the Wisconsin desk. The Organization asserts that the Claimant worked the first shift on Sunday, August 29, 2004, and was rested and available to assume the D & H South vacancy at its regular start time. The Claimant's seniority rights under Rule 19 should have prevailed in this instance, the Organization asserts.

The Carrier denied the claim, contending that the Claimant could not work the 1:00 P.M. vacancy on either Monday or Tuesday and still perform his third shift on those days due to Hours of Service Act restrictions. Under Rule 16 - Order of Call, the NOTE to Item No. 4 recognizes that a Train Dispatcher is ineligible for overtime if it would result in "his/her unavailability to work his/her own assignment on account of Hours of Service Law restrictions."

The Carrier further argues that it retained the discretion and flexibility to assign Dispatchers when the Order of Call has been exhausted. In the instant case, the Carrier contends that it properly exercised its discretion by assigning Dispatcher Krockner to fill the temporary vacancy. Rule 9 (c) is inapplicable, in the Carrier's view, because the starting time of the regular position was not changed. Because the Organization failed to cite any Rule or agreement provision that would

require the utilization of the Claimant in preference to Dispatcher Krockner, this claim must be denied.

In examining the respective positions of the parties, the Board notes at the outset that our findings herein are predicated upon the record that was developed on the property before the record was closed. In accordance with well-established precedent, we have not considered arguments or evidence proffered by the parties after the Organization filed its Notice of Intent with the Board. See, Third Division Awards 33998, 32786, and 26381.

The crux of this case centers on a matter of some importance. What is the procedure by which vacancies are to be filled after the Order of Call set forth in Rule 16 has been exhausted? Unlike the cases cited by the Carrier, where the parties have entered into a Letter of Understanding to address these matters, the record here discloses that no similar agreement has been reached by the parties on this property. Compare, Third Division Awards 36224 and 37541 with Third Division Award 38214.

In the absence of such an agreement, the Carrier is correct when it argues that it retains the discretion to assign overtime in a manner that is consistent with its managerial prerogatives. However, its discretion is not unfettered. The Carrier cannot act in a manner inconsistent with, or contrary to, a provision of the Agreement, nor can it exercise its discretion in a way that is arbitrary or unreasonable.

Under Rule 19, Train Dispatcher seniority governs when filling positions. The Carrier's discretion is limited by this provision of the Agreement. Even if the Carrier could successfully argue that it did not change the start time of a regular assignment in violation of Rule 9 (c) when it altered the starting time for the temporary vacancy, the Carrier never addressed the Rule 19 seniority requirement for filling positions.

Although the Carrier emphasized in its on-property correspondence that the Claimant was ineligible for the overtime at issue, the fact remains that Krockner was not eligible for the overtime either. The Claimant would have had an Hours of Service Act violation under the NOTE to Item No. 4 of Rule 16. Krockner was not the "senior qualified, rested and available train dispatcher" under Item No. 4 of Rule 16 to fill the 1:00 P.M. vacancy. Moreover, on Tuesday, August 31, both the

Claimant and Krockner had regular third shift assignments. No reason was forthcoming from the Carrier as to why Krockner would have been given preference to the Claimant, the senior employee in that circumstance.

Based on these facts, we find that the Carrier's discretion did not extend to assigning the vacancy in the manner it did. After exhausting the Order of Call, the Carrier failed to explain why the seniority requirement under Rule 19 was not taken into consideration. We must conclude that, because the Claimant was senior to Krockner, he should have been assigned the temporary vacancy.

**AWARD**

Claim sustained.

**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 25th day of June 2007.