

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30418
Docket No. TD-30896
94-3-92-3-766

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Please accept this claim submitted in behalf of J. D. Bianco for eight (8) hours pay at the punitive rate for November 20, 1990, four (4) hours at the punitive rate for November 22 1990, eight (8) hours at the punitive rate for November 23, 1990 and eight (8) hours at the punitive rate for November 24, 1990.

On each of the claim dates listed above the Carrier blanked the second trick Assistant Chief Dispatcher position-Youngstown Line without using every possible means to fill the position."

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 waived right of appearance at hearing thereon.

Rule 11 permits combining of positions to avoid use of relief or extra employees on rest days subject to approval by the General Chairman, and further proceedings if agreement is not reached.

On the claim dates, Carrier blanked the second shift Assistant Chief Train Dispatcher position-Youngstown (a three shift, seven days per week position) and the Conway Assistant Chief was instructed to perform the work. At the time, the Claimant was on vacation, but it is alleged that he should have been called to fill the vacancies.

Carrier advised, on the property, that it has called in employees to work during vacation periods only then the employees advised that they would be available, and such was not the case here. Further, there was, according to Carrier, an unusual amount of vacancies due to heavy sick leave mark-offs and "All reasonable efforts were made to fill vacancies occurring during this period...."

The Organization denies that employees are called in from vacation only if they have advised of availability, and it cited a 1979 understanding concerning pay under those circumstances. A May 20, 1991 Statement from the Claimant advises that "In the past, no request has ever been required, written or oral." The statement does not advise if the Claimant had ever been called in from vacation in the past. In response thereto, Carrier advised of a past practice not to disturb employees who are on vacation, and only called vacationers in if they had requested to be considered. In response to the Carrier's alleged practice, the Organization submitted five statements allegedly to the contrary, but only one stated that the employee had not made a request to be considered available.

The Carrier argued that the Claimant had combined certain "Personal Days" with vacation days so that he was off from duty during the pertinent period. During the week in question, due to "...inordinate number of vacancies...no qualified dispatchers were available to cover [Claimant's] position" and it was blanked at certain times and it cites Awards to suggest that an employee is not considered available during his/her vacation period.

Rule 5 discusses the case where no extra employees are available at the straight time rate and it is necessary to assign an employee at the overtime rate. In those cases, the incumbent is used on his rest days, followed by the senior available relief incumbent and then the senior available qualified Train Dispatcher on his rest day. To rule for the Claimant here would, according to the Carrier, rewrite the Agreement.

The December 1991 Third Division Award 29071 considered a dispute between this Carrier and the Brotherhood of Railroad Signalmen which raised the question of whether Carrier was obligated to inquire of an employee who was on vacation whether he wished to perform work. In that regard the Board noted an alleged practice in that regard. The Award concluded:

"Since the Organization as the moving party has the burden of proving all aspects of its claim, including here, its contention of a past practice and since the on-situs record is devoid of tangible proof that such a practice existed, the Board must find for Carrier on this question."

We have not ignored the Awards which have ruled that employees on vacation are not generally considered to be available, but here, we are confronted with an asserted practice on this property dealing with a history of calling employees to work from that status. In fact, Award 29071 recognizes that a practice may control this type of a dispute.

But, the Board is also concerned with another aspect of this case. The January 14, 1991 claim as submitted asserted that on all occasions during the week of November 20, 1990, the Carrier blanked Claimant's position and the Conway Assistant Train Dispatcher was instructed to perform the work of this vacant position. We find no denial of that assertion even though Rule 11 was cited on the property.

We have no desire to expand this Award beyond the issues presented by the parties, but Rule 11 provides certain machinery which was not employed by the Carrier. It is possible that the issues in this dispute could have been clarified in such a manner.

We feel that the Organization supported its burden concerning the vacation days. On the property the Carrier described November 20 to be a personal day. We may not merely conclude that personal days are the same as vacation days for these purposes. Therefore, no compensation will be allowed for November 20, however, the claim is sustained concerning November 22, 23, and 24, 1990.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 8th day of August 1994.