

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31178
Docket No. TD-31325
95-3-93-3-323

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
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"The following claim or grievance is hereby submitted for your consideration and decision, as provided for under the ATDA Rule Agreement:

Date of Occurrence: May 15, 1991
Rule(s) violated: Rule (5) Section (2) Para (e)
Location of Violation: Indianapolis

Description of Violations: 2nd trick CPC vacant on Wed 5/15 account C. F. Geirhart marked off sick. I was the senior qualified employee on a rest day. STO J. L. Stein called me to fill the vacancy and left a message on my answering machine. I returned at 125PM to accept the vacancy and was told that G. C. Andrews had been called to fill the vacancy ... Number of hours and rate of pay claimed: 8 hours straight time CPC rate. ..."

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.

There is no factual dispute. At 1:20 p.m., incumbent Geirhart marked off sick for his 3:00 p.m. assignment. The Agreement required that Claimant be offered the overtime assignment.

Carrier's representative called Claimant immediately but only reached his answering machine and left a message that he had tried to reach him. Since the vacancy was only 1 hour and 40 minutes from beginning, Carrier called junior employee Andrews who accepted the assignment. Within minutes, at 1:25 p.m., Claimant called in to accept the opportunity. When he was informed that it had been filled, Claimant requested that Carrier call Andrews and cancel the assignment to him. Carrier was unwilling to do this.

The Organization contends it was not reasonable to place only one call to Claimant before contacting another employee. It cites several Awards of this Division in support of its contention that at least two calls should have been made. Moreover, in refusing to cancel the assignment made to the junior employee, the Organization says Carrier violated the spirit, meaning and intent of the seniority order assignment rule.

Carrier contends time was short and it needed to fill the vacancy. It says it complied with the Agreement. In addition, it maintains that nothing in the Agreement requires it to cancel an assignment that was properly made to make it available to Claimant. Carrier also cited Awards in support of its position that it made a reasonable attempt to call Claimant.

The Awards cited by the Organization have been reviewed in detail. To the extent the factual circumstances are sufficiently described, it is clear they each involved significantly different situations. For example, two (13474 and 16334) involved single call situations where a busy signal was received. Three others (22422, 23561 and 17182) involved single calls where no answer was received. The rationale expressed in them is that a second call would be reasonable to ensure that the call actually went through to the correct number. Collectively, in our view, they stand for the proposition that what is a reasonable effort is a question of fact to be determined upon consideration of all of the relevant circumstances.

In this case, time was of the essence in filling the vacancy. Moreover, by successfully reaching Claimant's answering machine, Carrier knew the call properly went through and that Claimant was not available. Significantly, the Organization does not contend that the answering machine message informed Carrier that Claimant would be returning by a certain time or even shortly. In view of these considerations and given the short time Carrier had to fill the position, we do not find that Carrier acted unreasonably in moving on to the junior employee when it learned, for certain, that Claimant was not home and it had no reliable information about his expected return time.

Concerning the Organization's other contention, it is essentially an equitable argument, something we lack authority to

entertain. We must agree with Carrier, therefore, that no Agreement provision has been identified by the Organization requiring Carrier to cancel the assignment after it was properly made and reassign it to Claimant. Under the circumstances, Carrier's unwillingness to do so is not found to be violative of the Agreement.

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 26th day of September 1995.

Labor Member's Dissent
Third Division Award No. 31178
Referee Wallin

I dissent to this Award as I find that the decision of the majority ignores the spirit, meaning and intent of Rule 5, Section 2(e), the Claimant's rights thereunder as well as the reason and purpose of seniority provisions. Considering the importance of Claimant's demand right to the work in question, his quick action in returning the call indicates his understanding that the Carrier needed to fill the position promptly. In the handling of this claim on the property, the Carrier expressed no reasonable purpose in refusing to call the junior employee back to at least attempt to cancel the assignment. As the Employees state in their submission (page 6);

"Carrier's callous refusal to immediately remedy the situation herein by at least attempting to call the junior employee back, is tantamount to a total disregard for [the employee's] rights in the first place."

Plainly, Carrier failed to make any reasonable effort to afford the Claimant his contractual rights under the agreement.

It may be true, as the majority points out, that the Awards cited by the Organization are not directly on point with the factual circumstances in this case. However, they collectively demonstrate that at a minimum there must be a reasonable effort made to afford employees their contractual rights. In this case, all that was needed was for the Carrier to make a simple phone call to the junior employee to cancel his assignment. Had that call been made, even if the Carrier was unable to cancel the junior employee's assignment, this matter would not have been presented to this Board.


L. A. Parmelee, Labor Member