

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31397
Docket No. TD-31572
96-3-93-3-574

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
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Accept this claim on behalf of Mr. Baker, Selkirk Train Dispatcher, for a days pay at W. Edwards rate for Thursday 12-12-91 [Friday 12-13-91]. Mr. Edward's position was vacant on this day and was covered by John Schuler - non agreement employee, and should have been filled in accordance with Rule 1 and the 6/16/89 Letter of Agreement. Mr. Baker was available and not called."

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.

This dispute consists of two pay claims. They appear to be identical except for the dates of the alleged violations. Each contends Carrier failed to fill temporary vacancies with Agreement-covered train dispatchers when the incumbent Supervisor Train Operations-Chief Train Dispatcher (STO-CTD) was absent from his position while undergoing training.

The Scope Rule of the effective Agreement reads, in pertinent part, as follows:

"A qualified train dispatcher from the seniority roster involved will be used to relieve the Chief Dispatcher during vacation periods and other temporary vacancies and such train dispatcher will be compensated at the straight time rate applicable to the position worked."

An associated June 16, 1989 Letter of Agreement provided that dispatching offices would establish at least one and, if needed, a second STO-CTD position. The STO-CTD positions are subject to the Chief Dispatcher provisions of the Scope Rule.

It is not disputed in the Submissions that there was a temporary vacancy on the STO-CTD position in question on the claim dates. Both dates were scheduled work days for the incumbent. Rather, the dispute centers around the qualifications of the Claimant to cover the vacancies. The Organization says Claimant was qualified because he had served as Assistant Chief Dispatcher in the office. Carrier, on the other hand, maintains that Claimant was not qualified and, therefore, could not fill the position. In the Carrier's view, it was free to blank the position on the two claim dates because of the lack of qualified relief employees.

Both parties cited prior Awards in support of their positions. Two Third Division Awards are particularly noteworthy. Awards 29996 and 30419 involve claims in March and May of 1991, between these same parties. Although the Awards do not provide complete details of the operative factual circumstances, it is clear both are very similar to the instant claim. The claim in Third Division Award 29996 arose in the same Selkirk, New York, Dispatch office on the Albany Division. Third Division Award 30419 involved a claim from the Dearborn, Michigan, office on the Dearborn Division.

The record in this matter suggests there are circumstances unique to this kind of claim that require some elaboration. Indeed, it appears that the application of the Letter of Agreement, in conjunction with the Scope Rule, has been a continuing source of friction between the parties. It is clear Carrier obligated itself to fill temporary STO-CTD vacancies with dispatchers who hold seniority on the applicable division roster. Both prior Awards recognize this obligation. The record suggests, however, that Carrier's efforts to recruit and train employees to relieve the STO-CTD position have been thwarted by lack of interest among the eligible employees. Third Division Award 30419 involved a Claimant who had passed up the opportunity to receive qualification training. The Board found that circumstance to be a sufficient basis for denying the claim. Third Division Award 29996 sustained its claim, but it is not entirely clear what role the qualification issue played in that decision.

The terms of the Scope Rule and the Letter of Agreement provide both parties with the opportunity to abuse the relationship. On the one hand, the eligible employees can, as a practical matter, prevent the Carrier from having sufficient qualified relief employees simply by refusing to undergo STO-CTD training. On the other hand, Carrier can create an insufficiency of qualified relief employees by failing to periodically recruit and provide training.

The Scope Rule and the 1989 Letter of Agreement are silent about the methods by which qualified relief employees are to be provided. In the absence of such explicit guidance, it is well settled that both parties must act reasonably in light of the relevant circumstances.

We expressly agree with the rationale in Third Division Award 30419. A Claimant who has affirmatively rejected the reasonable opportunity(ies) to become qualified should not benefit from the Carrier's inability to provide sufficient relief.

That said, however, it must also be recognized that Carrier's position in this dispute is an affirmative defense. As a result, it has the burden of proof to establish that it has provided eligible employees with the reasonable opportunity(ies) to become qualified. This burden must be satisfied before Carrier can successfully claim it could not cover a vacancy with a qualified employee. What constitutes reasonable opportunity(ies) must, of course, be evaluated on a case-by-case basis.

Our decision in this dispute is confined, as it must be, to the record developed by the parties in their handling on the property. Review of that record fails to reveal any evidence that Claimant rejected an opportunity to become qualified. Indeed, such an allegation is not made anywhere in Carrier's correspondence on the property. Moreover, the record is devoid of any evidence that Carrier attempted to recruit and train eligible employees in the Selkirk office. While a copy of Bulletin 90-17, dated August 2, 1990, is included with Carrier's Submission to this Board, it refers to the Dearborn Division and not the Albany Division. More importantly, however, the record does not reflect that the Bulletin was exchanged on the property. Under these circumstances, we must conclude that Carrier has not satisfied its burden to establish the validity of its qualification defense.

AWARD

Claims 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 29th day of February 1996.