

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31706
Docket No. TD-32121
96-3-94-3-526**

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: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"I am submitting this time slip for 8 hrs. pay for 1st trick Sunday May 30 on Desk 6.5. I was available and not called.

I was senior dispatcher available for 1st trick and not called. Instead a dispatcher trainee T. Popivchak was used to cover this vacancy. This is against the agreement between American Train dispatchers union and consolidated Rail Corp.

/s/ F. A. Romito"

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 May 30, 1993, the Carrier used T. Popivchak, designated by the Carrier as a dispatcher trainee (who was unassigned and was on furlough from his seniority position in the Signal Department), to fill a dispatcher's position on Desk 6.5 in the Carrier's Pittsburgh office on the first shift at the straight time rate. The Carrier assigned Popivchak rather than Claimant who was the incumbent dispatcher on Desk 7 and who was observing a regularly scheduled rest day. On that date, no extra dispatchers were available to cover the Desk 6.5 vacancy at the straight time rate.

Rule 5, Section 2 states, in pertinent part:

"RULE 5 - RELIEF AND EXTRA WORK

* * *

Section 2 - Extra Work

(a) Extra work shall consist of the following:

1. Relief requirements of less than five (5) days' work per week except as provided in Section 1, paragraph (b) of this rule.
2. Vacancies and positions not filled in accordance with Rule 4.

(b) The assignment of such work to extra train dispatchers will be in accordance with qualifications, availability and seniority....

* * *

(e) Where, in the performance of extra work, no extra employees are available who can be used at the straight time rate of pay and it therefore becomes necessary to assign an employee who must be paid at the overtime rate, assignment will be made in accordance with the following order:

1. Available incumbent on his rest days.

2. Senior available relief incumbent on his rest days.
3. Senior available qualified train dispatcher on his rest days."

The Organization asserts that because no extra Dispatchers were available for the assignment at the straight time rate, under Rule 5, Section 2(e) the Carrier was obligated to call Claimant as the senior regularly assigned Dispatcher. Relying upon the language in Rule 5, Section 2(e) that when "it therefore becomes necessary to assign an employee who must be paid at the overtime rate", the Carrier argues that it has the right to assign any straight time employee within the confines of the Agreement, prior to being required to call a Dispatcher on his rest day at overtime. According to the Carrier, nothing in Rule 5 restricts the Carrier in filling vacancies at the straight time rate. Trainee Popivchak, according to the Carrier, was available at the straight time rate. The Carrier also relies upon Rule 2.

The problem with the Carrier's Rule 5 argument is that Rule 5, Section 2(e) specifically states that "Where, in the performance of extra work, no extra employees are available who can be used at the straight time rate of pay ... assignment will be made in accordance with the following order ... 3. Senior available qualified train dispatcher on his rest days" [emphasis added.] This was "extra work" as defined in Rule 5, Section 2(a). The vacancy on Desk 6.5 was a relief requirement of less than five days. No extra dispatchers were available for assignment at the straight time rate. The rule governing the assignment of this "extra work" specifically and clearly provides that if no extra employees are available at the straight time rate, then "Senior available qualified train dispatcher on his rest days" (Claimant) "will" be assigned. The rule says nothing about "trainees". Rather, the rule speaks to resting qualified Dispatchers and mandates that when an extra employee cannot fill the position at the straight time rate, employees such as a Claimant "will" be assigned. Given that mandate ("will"), this Board does not have authority to change that rule and allow for the assignment of "trainees" such as Popivchak over Claimant.

The language in Rule 5, Section 2(e) relied upon by the Carrier ("and it therefore becomes necessary to assign an employee who must be paid at the overtime rate") does not change the result. This language does not clearly give the Carrier the right to assign any straight time employee within the confines of the Agreement, prior to being required to call a Dispatcher on his rest day at overtime. On the contrary, under a plain reading of the rule, if the Carrier cannot get an extra employee to fill the vacancy at the straight

time rate, "it therefore becomes necessary to assign an employee who must be paid at the overtime rate" and, "assignment will be made in accordance with the following order" through available incumbent or qualified dispatchers on rest days.

The Carrier's reliance upon Rule 2 also does not change the result. Rule 2 states. in pertinent part:

"RULE 2 - SENIORITY

Section 1. - Seniority Date

* * *

(b) An employee performing dispatching service who has not established a seniority date or an employee entering dispatching service subsequent to the effective date thereof, if not notified prior to completion of the thirtieth day on which he performs dispatching service (not including posting time) that he has failed to qualify, shall be given a seniority date as of the first date on which he performed dispatching (not including posting time) service. When given a seniority date, he may then displace any train dispatcher his junior occupying a position he is qualified to fill, but shall have no claim to service performed by a junior train dispatcher prior to date of such displacement."

Rule 2 governs the determination of seniority. Rule 5 governs assignments. This is an assignment dispute. Rule 5 mandates that Claimant should have been assigned the extra work.

The Carrier argues that in light of the Organization's position it will be difficult to add new employees to the ATDA roster. However, any such perceived difficulty flows from the clear language of the negotiated rule. Again, we do not have authority to change that rule.

In light of the outcome, we need not address the Organization's argument that the Carrier is bound in this case by Public Law Board No. 3477, Award 6.

As a remedy, because Claimant was denied a work opportunity at the overtime rate, Claimant shall be made whole at that rate.

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 September 1996.