

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31978
Docket No. TD-32384
97-3-95-3-236

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim No. 1 - Claim of H. E. Hartley

Claim of 8 hrs. overtime rate for Monday July 26, 1993 account L. Blake worked vacancy of R. G. Stallsmith MDIA 7AM to 3PM and I was available for work.

Claim No. 2 - Claim of E. A. Martone

Please allow 8 hrs. pay for Sunday 7/25/93 acc't junior employee R. Redmond was used on 1st trick ACTD. He was not the incumbent for 1st trick as per Rule 11, Paragraph B.

Claim No. 3 - Claim of E. A. Martone

Please allow 8 hrs. pay for Sunday 8/29/93 acc't junior employee R. Redmond was used on 1st trick ACTD. He was not the incumbent for 1st trick as per Rule 11, Paragraph B.

Claim No. 4 - Claim of E. A. Martone

Please allow 8 hrs. pay for Sunday 9/12/93 acc't junior employee R. Redmond was used on 1st trick ACTD. He was not the incumbent for 1st trick as per Rule 11, Paragraph B."

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.

Claimant Martone is a Relief Assistant Chief Train Dispatcher with Wednesday and Thursday rest days. R. D. Redmond is a Guaranteed Assigned Dispatcher ("GAD") with various rest days. Claimant Martone is senior to Redmond. On Sunday, July 25, August 29 and September 12, 1993, the Carrier used Redmond to fill 7:00 A.M. to 3:00 P.M. vacancies instead of using Claimant Martone. The Organization asserts that Redmond worked 3:00 P.M. to 11:00 P.M. assignments on the days prior to filling the vacancies. Claimant Martone worked 3:00 P.M. to 11:00 P.M. assignments on the claim dates.

Claimant Hartley is a Relief Assistant Chief Train Dispatcher with Thursday and Friday rest days. L. Blake is an Assistant Chief Train Dispatcher holding a regular 3:00 P.M. to 11:00 P.M. assignment with Monday and Tuesday rest days. Hartley is senior to Blake. On Monday, July 26, 1993, the Carrier used Blake to fill a 7:00 A.M. to 3:00 P.M. vacancy instead of Claimant Hartley. Claimant Hartley worked a 3:00 P.M. to 11:00 P.M. assignment on that date.

The pertinent parts of Rules 5 and 11 provide as follows:

"RULE 5 - RELIEF AND EXTRA WORK"

Section 2 - Extra Work

★ ★ ★

(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.

Note: An employee will not be considered available for the purposes of this rule, if by performing extra work, he would not be able to work his regular assignment without violating the Hours of Service Law.

RULE 11 - REST DAYS

* * *

(b) The term 'rest days' as used in this rule means that for a regular assigned train dispatcher seventy-two (72) hours, and for a relief train dispatcher (who performs five (5) consecutive days' service as train dispatcher) fifty-six hours, shall elapse between the time required to report on the day preceding the 'rest days' and the time required to report on the day following the 'rest days', except that when non-consecutive rest days are assigned in accordance with paragraph (a) of this rule, the number of hours specified herein shall be reduced by twenty-four (24). Neither these definitions of the term 'rest days' nor the provisions of paragraph (a) of this rule will apply in case of transfers due to train dispatchers exercising seniority."

For the sake of discussion, and contrary to the Carrier's position that the argument is not properly before us, we shall assume that Redmond and Blake were technically not on their rest days as defined in Rule 11(b) when the overtime assignments were made to them over Claimants. The problem from the Organization's perspective

is that Claimants were also not on their rest days when those overtime assignments were made. It is undisputed that for the claim concerning the Sunday assignments to the junior employee Redmond that Claimant Martone had Wednesday and Thursday rest days. Similarly, with respect to claim concerning the Monday assignment to the junior employee Blake, Claimant Hartley had Thursday and Friday rest days. Further, the Organization has not identified employees who were on rest days and who were senior to Redmond and Blake and who were passed over in favor of Redmond and Blake.

In Rule 5(e), the parties set forth a specific procedure for assigning extra work at the overtime rate. Because the negotiated provisions in Rule 5(e) key only upon "rest days" and because Claimants were not on their rest days and further because the Organization has not identified more senior employees to Redmond and Blake who were on their rest days and who were passed over, none of the three conditions set forth in Rule 5(e) are applicable. The burden in a contract case is on the Organization to demonstrate a violation of a specific provision of the Agreement. Here, because none of the provisions of Rule 5(e) are applicable to Claimants or other identified employees, we find that the Organization has not carried its burden.

This Board has considered Third Division Award 31177. This Board is also very mindful of our obligation for stability purposes to follow Awards on the property unless those awards are palpably in error. However, for us to apply the rationale of Award 31177 to the facts in this case and to hold that seniority governs so as to require an overtime assignment to employees not on their rest days where the parties specifically limited Rule 5(e) to apply only to employees who are on their rest days would be tantamount to this Board writing a new provision into the Agreement where the parties have not, through the negotiation process, agreed to do so. We simply do not have that authority. That is for the parties to do.

The Organization has not sustained its burden to demonstrate a violation of a specific provision of the Agreement. The claim will therefore be denied.

AWARD

Claim denied.

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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 6th day of May 1997.

Labor Member's Dissent
Third Division Award No. 31978, Docket TD-32384
Referee Benn

The majority decision in the case, ignores the precedent established by the Board on this property, between the same parties, on the very same issue. This Board should function to add stability to labor relations, not to "stir the pot". While the majority decision concedes that the Board is obligated "for stability purposes to follow awards on the property", it fails to do so in this case with apparent indifference.

Third Division Award 31177 carefully analyzed **all** the agreement rules cited by the parties. In summarizing the opinion, the majority in 31177 states:

"...we find the better approach to resolution of the matter is represented by the precedent cited by the Organization. **We believe this approach more closely gives effect to the intentions of the parties to the extent they expressed their intention in the Agreement.**" (Emphasis added)

It is apparent by a reading of Award No. 31978, that the majority focused only on Rule 5(e). But, that was not the only rule cited by the Organization as supportive of its position in this matter. Rather, it was merely a small part of the bigger picture.

Each of these claimants possessed superior seniority to the employee selected by the Carrier for overtime assignments. Seniority is a valuable property right. See for example, Third Division Award 9193. Evidence of the parties' intent to observe seniority is replete throughout the Agreement. The Organization argued in this case that the seniority system within the agreement conveys to the employees covered thereunder a demand right to select assignments in accordance with their seniority. This is particularly so when it involves an overtime assignment. The Organization cited many rules in support of its position.

Rule 2- establishes the seniority of train dispatchers, provides the relative roster standing of employees, sets forth the circumstances under which more senior employees are afforded displacement rights over junior employees.

Rule 4 - arranges for the selection of employees for assignment to positions based on their seniority.

Rule 5 - sets forth a seniority based "order of call" for overtime assignments.

These rules all work in concert with each other and set forth the clear understanding between the parties that positions are filled seniority basis.

In Award 31978, the focus of the Board is solely on application of Rule 5. It is true that Rule 5 does not specifically address the circumstances in this case. However, in light of the parties clearly expressed intent to observe seniority in the assignment of overtime, the precedent established, and prior awards of this Division, this Board should have sustained the claims.

Organization's position in this matter is not new nor is it novel. Many Awards of this Division on this same issue have withstood the test of time.

Third Division Award 14161, Referee Schmertz

"The Union takes the position that although there is no specific rule in the Agreement explicitly requiring the following of seniority in such cases, the awards of this Board have consistently upheld the application of seniority in determining work assignments of overtime."

Third Division Award 19758, Referee Rubenstein

"Seniority provisions are included in labor relations agreements for the benefits of the senior employees. They seek to protect and give preference in jobs, promotions and other opportunities to employees with greater seniority. In this respect, they are a limitation of the employer's right to operate and manage its business. As such, they must be interpreted in favor of their beneficiaries, and applied wherever the issue arises, unless there are definite limitations of the Rule in the contract. Exceptions to the seniority provisions, if any, should be listed in the Agreement. Otherwise the term is widely applied..."

Third Division Award 21421, Referee Wallace

"The Awards of this Division are persuasive to the effect overtime of a given class must be assigned on the basis of seniority even where there are no specific rules in the Agreement covering the situation. See Third Division Awards 5346, 14161, 4531 and 5029..."

Third Division Award 24526, Referee Roukis

"While the Carrier argues that it has the right to fill the position in any manner it saw fit, after exhausting the straight time call procedures, we cannot conclude that Carrier was de facto excused from filling the position without observing seniority. The issue is not whether Claimant possessed super seniority rights, but whether seniority was applicable to this overtime assignment. We find it was so applicable. Such assignment would have been consistent with the intended purpose of Rule 27 and the implicit spirit of the collective bargaining Agreement. Moreover, it would have comported with our generic holding in Third Division Award No. 4393, wherein we held in pertinent part:

'Seniority applies to all positions, whether it be a regular bulletined position, temporary position or one that is required to be performed only with overtime work.'

In the absence of preclusive Agreement language to the contrary, we find no justifiable reason to deviate from this standard." (Emphasis added)

Third Division Award 27593, Referee Marx

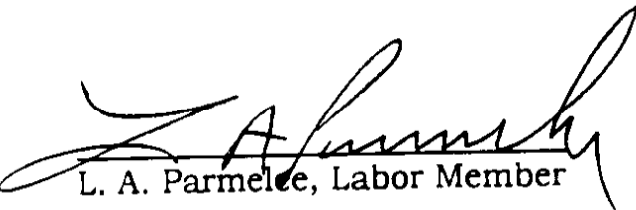
"Absent other considerations, there is no doubt as to Claimants' entitlement to be called for the work in question. This is true despite the absence of a rule specifying that employees should be called in seniority order for overtime work. The Organization cites numerous Awards to this effect..."

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LM Dissent - Award No.

See also, Third Division Awards 24331 [Referee Caples], 29375 [Referee Eischen) in this regard.

The decision of the majority is wrong. It ignores the very backbone of the Agreement which is the seniority of the employees. This award is mere fodder for future disputes.

I dissent.



L. A. Parmelee, Labor Member

**CARRIER MEMBERS' RESPONSE
TO ORGANIZATION'S DISSENT TO
AWARD 31978 (Docket TD-32384)
(Referee Benn)**

The Organization's Dissent in this matter is the equivalent of the Organization being told that their argument doesn't make sense and then the Organization contending that it is not being understood.

Award 31978 involved claims for rest day overtime. According to the Organization, Claimants' standing "...was identical to that of the junior employees except for their superior seniority..." (Organization Submission p.9).

Award 31978 found that "...the parties set forth a specific procedure for assigning extra work at the overtime rate [and that since these conditions, listed at p.3 of the Award, were not met] Rule 5 Section 2(e) was not applicable.

To this the Organization bewails that there were many rules cited in support of its position and that Rule 5 "...was merely a small part of the bigger picture." However, other than their assertion that Claimants, who were working at the time, had "superior seniority", the Dissent points to no specific contract provision that sustains their claim.

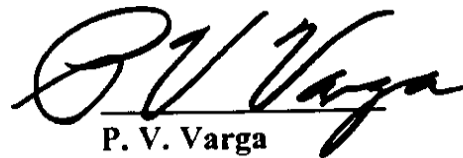
Award 31177 was a similar matter but it certainly was not an all inclusive review of the subject. However, it did conclude that the provision of Rule 5 Section 2(e) had not resulted in filling the position and that the "Agreement does not...cover the unique situation..." It then applied a general conclusion. In the Carrier Members' Dissent, we pointed out:

"This is a case involving diversion of an employee when there are no employees available to fill a vacancy pursuant to the overtime rule. It is with good reason that the Agreement remains silent with respect to seniority when it becomes necessary to divert an employee: if the Carrier were required to divert the senior qualified employee, there would be no way to ensure that the resulting vacancy could be filled; in the end, the Carrier's ability to protect train operations easily could be placed in jeopardy. The freedom to select which employee to divert permits the Carrier to ensure that the resulting vacancy will be the least disruptive to its operation. As evidenced by the absence of a fourth step in Rule 5, the parties understood that...."

Two other items need to be noted. First, Award 31177, on which the Organization cites precedent, considered what to do when the provisions of Rule 5 were exhausted yet the Organization in their Dissent lament that Rule 5 was "merely a small part...of its argument" (?). Second, the Majority did not point out the several new arguments made in the

Organization's Submission to this Board. It is absolutely basic in arbitration that contractual arguments and evidence be made and presented on the property prior to submission to the Board.

Finally, should somebody desire to begin to get the big picture, a review of Awards 29550, 31177, 31178, 31510, 31765, 31766, 31767 between these same parties issued over the last four years might be instructive.


P. V. Varga


M. W. Fingerhut


M. C. Lesnik