Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32380
Docket No. TD-32501
97-3-95-3-363

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"(A) CSX Transportation, Inc. ('Carrier' or 'CSXT') violated Article 5 of its train dispatchers' basic scheduled agreement applicable in the Jacksonville Centralized Train Dispatching Center (JCTDC) on Sunday July 17, 1994, when it failed to call regular assigned train dispatcher S. M. Henricks for overtime on his rest day on 3rd shift BL desk.

(B) Because of said violation, the Carrier shall now compensate claimant Henricks for eight hours at time and one-half rate of compensation for lost work opportunities at the rate applicable to the JCTDC rate of compensation for Sunday July 17, 1994."

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.

The Organization contends that its Agreement was violated when Carrier allowed R. L. Ferman, an employee junior to Claimant S. M. Henricks, to work Position No. 302 (the BL Desk) at the overtime rate on Sunday, July 17, 1994. It maintains that under the language of Article 5(i) of the Agreement, since Claimant was entitled to perform the work at the overtime rate in preference to the employee used at the overtime rate, Claimant should now be paid a day's pay at the time and one-half rate to remedy the violation.

Carrier acknowledges that Ferman, an employee junior to Claimant was used to work the BL desk (Position No. 302) on Sunday, July 17, 1994, and that he was paid at the overtime rate. It maintains, though, that payment at the overtime rate was in error. Carrier asserts that Ferman should only have been paid at the straight time rate for working Position No. 302 that day. Position No. 301 was bulletined as a vacancy while Ferman was on vacation. It was awarded to a junior employee. Upon return from vacation, Ferman exercised displacement rights to Position No. 301, as provided in Article 8(2)1. Under Article 6(a)4, Carrier has the right to hold successful applicants on their old jobs for up to six days. Ferman was held on his old job, Position No. 302, and worked on July 16, 17 and 18, 1994. He submitted a penalty time slip for overtime pay for these days, under the provisions of Article 2(f), based on the contention that he was required to fill an assignment other than the one obtained through the exercise of seniority. Although payment was allowed at the time and one-half rate, Carrier said it was a mistake and was not required by the Agreement.

The Organization asserts that because Ferman was paid at the overtime rate its claim that the more senior employee (Henricks) should have been used is valid. With this the Board cannot agree. The Carrier made a convincing case that it could properly have used Ferman on Position No. 302 at the straight time rate on July 17, 1994. That Carrier paid Ferman at the overtime rate by mistake does not generate any entitlement whatsoever for Henricks to be paid at the overtime rate for not being called to work Position No. 302 on that date. There was no vacancy on Position No. 302 for which Henricks was entitled to be called. Payment of overtime to one employee by mistake does not generate entitlement for payment to a different employee because he was not called.

The claim is without merit.

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 30th day of December 1997.

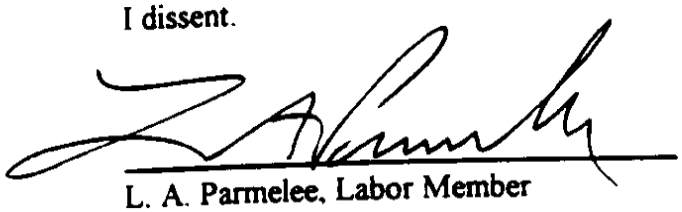
Labor Member's Dissent
Third Division Award No. 32380
Referee Fletcher

In Award 32380, the Claimant sought a day's pay at the time and one-half rate. While the factual circumstances may have been somewhat confusing, the bottom line was that the Carrier paid a junior employee the time and one-half rate. Since time and one-half was paid, the Claimant was entitled to work under Article 5(i).

In defending itself, the Carrier asserted the payment to the junior employee was an error and that the junior employee wasn't really entitled to it. But, in the end, the junior employee was still paid at the overtime rate.

Award 32380 is in error because it fails to decide the issue based strictly on the agreement between the parties and the clear precedent established in Award 29402. Instead, in this case, the Board apparently didn't think it fair to make the Carrier pay the Claimant based on his superior seniority and demand right to overtime in preference to the junior employee. Article 5(i) provides those rights to the Claimant. This Board should not have acted to diminish or eliminate those rights. As this Referee said in Award 29345 "this Board cannot look behind clear and unambiguous language in the Agreement, nor are we charged with deciding disputes on an equitable basis". Here, with total disregard for the findings of Award 29345, the majority looked behind the clear and unambiguous language of Article 5(i) and then decided the issue on an equitable basis.

I dissent.



L. A. Parmelee, Labor Member

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