

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33636
Docket No. TD-34388
99-3-98-3-10**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

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

PARTIES TO DISPUTE: (

(CSX Transportation, Inc.

STATEMENT OF CLAIM:

- “A. CSX Transportation, Inc. (Carrier) violated Article 5(I) Order of Call of its American Train Dispatchers Agreement applicable in the Jacksonville Centralized Train Dispatching Center (JCTDC), when it failed to call claimant Guaranteed Assigned Train Dispatcher (GATD) C. L. Turner for overtime on his rest day.**
- B. Because of said violation, carrier shall now compensate, GATD C. L. Turner for eight (8) hours pay for lost work opportunities applicable to the JCTDC rate for February 25, 1997.”**

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.

This claim seeks one day's pay at the overtime rate for February 25, 1997, when Carrier utilized junior employee Gunter to perform work as an AO Train Dispatcher on Position 4U0C-302 rather than calling Claimant who was a regularly assigned GATD on his rest day. There is no dispute that Gunter received the time and one-half rate of pay for such work under the penalty pay provisions of Article 6(a)(4), because he was not permitted by Carrier to be released to his newly bid position for in excess of six days from its award.

The Organization contends that Carrier violated Article 5(i), Order of Call for overtime assignments, which provides, in pertinent part:

"When a vacancy exists for train dispatching service and there are no train dispatchers available at the straight time rate of pay vacancies will be filled as follows:

First Call the regularly assigned train dispatcher who is on his rest day and who is regularly assigned to the position on which the vacancy occurs.

* * *

Third Call the senior regularly assigned train dispatcher in the office and available on his rest day and who is qualified on the position on which the vacancy occurs,"

The Organization notes that there is no dispute that Claimant was senior in order of call to Gunter, and that he was qualified on the position. It argues that there were no Train Dispatchers available at straight time, because Carrier paid Gunter overtime pay, and, under the clear language of Article 5(i), Claimant should have been called for the vacancy. It asserts that Carrier's application of Article 6(a)(4) does not give it the right to ignore the plain language of Article 5(i). The Organization relies upon two prior Awards between the same parties - Third Division Awards 29345 and 29402 - in arguing res judicata, and urges the Board to adopt the same rationale and promote stability in the absence of a showing that they are palpably erroneous, citing Third Division Awards 29521 and 29230.

Carrier contends that it fully complied with Article 6(a)(4) in making penalty compensation to Gunter for his performance of dispatching functions on February 24, 1997, and that he was not paid overtime pay as contemplated by Article 5(i). Carrier

argues that Article 5(i) is not applicable because there was no vacancy on February 25, 1997, since Gunter had been held over as the AO Train Dispatcher and it was his regularly assigned position on that date. It distinguishes Third Division Award 29402 on this basis. Carrier also avers that the Organization's position would subject it to double jeopardy every time it elected to hold an employee over in a position as is its right under Article 6(a)(4), and would render that provision meaningless, an inequitable result to be avoided in interpreting the Agreement.

A careful review of the record convinces the Board that the crux of this dispute is whether there was a vacancy on February 25, 1997. If there was, then the rationale of the Board in Third Division Awards 29345 and 29402 is determinative, and requires that the claim be sustained. If it is found that no vacancy occurred, then the provisions of Article 5(i) do not come into play, and no violation of the Agreement can be found.

The facts in the instant case reveal that Claimant was assigned to the Guaranteed Extra Board, and was instructed to observe his rest days on Monday and Tuesday, February 24 and 25, 1997. The position in issue, AO Train Dispatcher #4UOC-302, had Sunday and Monday as its assigned rest days. Junior Dispatcher Gunter was regularly assigned to Position #4UOC-302, but had bid on, and was awarded, a vacant position on the Guaranteed Extra Board more than six days prior to February 25, 1997. Due to manpower requirements, Carrier did not release Gunter to his new position within the contractual time limit, and chose to keep him in his present position with penalty pay under Article 6(a)(4). Thus, on Tuesday, February 25, 1997, Gunter remained on his regular assignment receiving time and one-half compensation.

Unlike the situation in Third Division Awards 29345 and 29402, the position was not filled by an employee from the Extra Board receiving penalty "hold over" compensation rather than the Claimant who was regularly assigned to the position in issue and on his rest day. In this case, there was no vacancy created on February 25, 1997, because it was a regularly assigned day for Position #4UOC-302, which Gunter still held. February 25, 1997 was not a rest day for the position in issue, and thus, no vacancy was created that would call into play the Order of Call in Article 5(i). The fact that Gunter was paid at his time and one-half rate, and that the cases hold no distinction between the fact that such rate derives from Article 6(a)(4) or otherwise for purposes of the application of Article 5(i), does not change the result. Because Article 5(i) is inapplicable to the specific facts of this case, the claim must be denied.

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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 16th day of November 1999.