Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34003
Docket No. TD-35280
00-3-99-3-139

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(American Train Dispatchers Department / International
(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

"The Burlington Northern Santa Fe Railway Company (hereinafter referred to as "the Carrier") violated the current effective agreement between the Carrier and the American Train Dispatchers Department, Brotherhood of Locomotive Engineers (hereinafter referred to as "the Organization"), Letter of Understanding dated May 31, 1973, in particular, when on January 8, 1998 the Carrier allowed and/or required a junior train dispatcher to protect the position of First Trick Illinois ACD for three (3) hours and provided compensation at the overtime rate of pay, rather than allowing train dispatcher C. T. Gailis, the senior qualified train dispatcher available under the Hours of Service Law, to protect the aforementioned position at the overtime rate of pay."

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.

At the outset, the Organization raises a procedural point concerning a February 25, 1999 Carrier letter which was received by the Organization after it filed a Notice of Intent to the Board on March 2, 1999. The Organization contends this letter should not be considered part of the record. The Organization also objects to the Carrier's citation of a previous claim within such letter without including the text thereof. Likewise, the Carrier objects to the Organization's March 5 and 17, 1999 letters in response to the February 25, 1999 letter, because such letters were written after the Notice of Intent. The Board reviewed these letters, finds they do not add substance to the parties' positions previously expressed on the property, and declines to comment on these objections.

The dispute concerns a one-shift vacancy on the First Trick Illinois Assistant Chief Dispatcher ("ACD") position on January 8, 1998. To fill this vacancy, the Carrier held over the Third Trick ACD for five hours (concerning which there is no dispute before the Board) and called in the Second Trick ACD three hours earlier.

The Claimant, a regularly assigned second trick Dispatcher available for work, was senior to the Second Trick ACD. The Organization argues that he should have been called for the three-hour vacancy, under the May 31, 1973 Letter of Understanding ("LOU"), which reads in pertinent part as follows:

> "When there is no extra train dispatcher available who has not performed five days' dispatching service within seven consecutive days, dispatchers will be called for service in the following order:
>
> 1. The regular incumbent of the position.
>
> 2. The senior regular qualified train dispatcher available under the 'Hours of Service Law.'
>
> 3. The senior qualified extra train dispatcher available under the 'Hours of Service Law.'"

The Organization states without contradiction there was no Extra Train Dispatcher available on straight time, and the regular incumbent was not available. Thus, the Organization argues that the Claimant should have been called, noting the use of the mandatory "will be called."

The Carrier, by contrast, argues that the 1973 LOU was superseded by the Agreement of May 3, 1993, which states in Article IX.B as follows:

> "B. In filing ACD positions in the Fort Worth consolidated office, train dispatchers desiring an ACD position shall file a written application with the designated Company officer. Carrier has the right of assignment from the list of applicants, with consideration given to fitness, ability and seniority."

The Board concludes, as argued by the Organization, that the 1973 LOU is not negated by the 1993 Agreement. While the Carrier argues that the Memorandum applies to both permanent and temporary vacancies, its context suggests strongly otherwise. The 1993 Agreement concerns positions to be filled from "written application[s]," a clear indication that this refers to consideration for new positions as part of and subsequent to the consolidation of dispatching offices. While the Carrier properly maintains its "right of assignment" in such instances, there is no evidence presented of the Claimant's lack of fitness or ability to fill the three-hour vacancy.

In the latter portion of its defense during the claim handling procedure, the Carrier appears to change its tack from its "right of assignment" under the 1993 Agreement to emphasis on selection from among those Dispatchers who have "filed written application" for positions. Indeed, the statements from Chief Dispatchers attached to the Carrier's February 10, 1999 claim response all contend that since the 1993 Agreement the Carrier has "been filing both temporary and permanent Assistant Chief Dispatcher (ACD) positions from a list of candidates that had filed written applications with the designated Carrier officer." The emphasis appears to be on the written application (with the inference that the Claimant did not file such application); the statement makes no mention of selection by fitness, ability and seniority.

This leaves considerable confusion. Does this mean written application for the ACD position when established, possibly years previously, or does it mean (hardly possible) written application for a one-shift vacancy?

The specific Awards relied upon by the Carrier offer no support. Third Division Award 32279, involving the same parties, fully supports the Carrier's "right of assignment" to an ACD position. The Award, however, states that "Job 321 . . . was awarded to the junior applicant." This appears to be the filling of a permanent vacancy,

about which there is no dispute in the matter here under review. There certainly is no indication that Award 32279 concerns a temporary assignment.

Third Division Awards 25526 and 28557 concern different parties and different agreements, with no indication that provisions similar to either Article IX.B or the 1973 LOU are included therein.

In sum, there is no showing that the 1973 LOU has been superseded as to the filling of short, non-bulletined vacancies by qualified employees. The record fails to show the Claimant was not qualified or unavailable. The Award will sustain the claim at the pro rata rate.

AWARD

Claim sustained in accordance with the Findings.

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 19th day of April, 2000.

Carrier Members' Dissent
to Award 34003 (docket TD-35280)
Referee Marx

Carrier provided coverage for a one day first trick vacancy by holding the third trick Assistant Chief Dispatcher (ACD) for 5 hours and calling in the second trick ACD 3 hours early. No claim was made concerning the use of the third trick ACD for 5 hours.

Since 1993 with the consolidation of train dispatching in the Fort Worth facility, Carrier has, pursuant to the May 3, 1993 Agreement filled both temporary and permanent positions under its "right of selection" in Article IX of the May 3, 1993 Agreement. Such was unrebutted! However the Majority at page 3 seems to indicate that such selection was limited to those who "had filed written applications." It must be noted that such was not the contention made concerning Claimant and the assertion of the application of the May 31, 1973 Letter of Understanding on the property. As the Majority noted at page 2 of the Award Claimant "was senior to the Second Trick ACD." (Emphasis added).

However, the 1993 Agreement was made to cover the operations at the Fort Worth facility. This matter occurred at that facility in 1998 and that specific Agreement should have been followed in this matter.

While we do Dissent to the substance of this decision we do note that it applied the precedent extent between these parties that compensation for work not performed is at the prorata rate.

We Dissent

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik