Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34144
Docket No. TD-35073
00-3-98-3-820

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

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

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

The Burlington Northern Santa Fe Railroad 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'), Articles 2(e) and 7(a), and the Letter of Understanding dated May 31, 1973 in particular, when on January 1, 1997, the Carrier allowed and/or required train dispatcher A. J. Schaffer to protect a position other than her assigned position and compensated her at the overtime rate of pay as required, rather than allowing senior train dispatcher S. C. Scoville to perform this service at the overtime rate of pay, as the senior regular qualified train dispatcher available under the Hours of Service Law."

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 January 1, 1997, a vacancy occurred in a first trick dispatcher position. There were no qualified extra board dispatchers available to fill the vacancy at the

straight time rate, and there were no regularly assigned qualified dispatchers available under the Hours of Service Law to fill the position.

The Carrier elected to move an employee already assigned to the first trick to fill the vacancy and utilized a qualified extra board employee to work the resulting vacancy. The Claimant, also assigned to and working the first trick, was senior to the transferred employee and was qualified to fill the initial vacancy.

The Organization argues that the Claimant, rather than the other employee, should have been transferred to the vacancy on the same shift, thus being enabled to earn premium pay, as provided in Article 2(e). For the alleged requirement to transfer the senior qualified employee, the Organization relies on the May 31, 1973 Letter of Understanding. This Letter states in pertinent part as follows:

> "This refers to [the Organization's] proposal . . . to amend the existing agreement applicable to filling temporary vacancies and to define who is entitled to a sixth or seventh day in the absence of an extra train dispatcher who has not performed five days' service within seven consecutive days.
>
> . . . [I]t was agreed that 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.'
>
> . . . [E]xcept as specifically provided herein, this understanding does not modify or in any manner affect schedule rules or agreements."

The Organization argues that this Letter of Understanding requires filling the vacancy under the second numbered order; that is, the Claimant as "senior" employee.

In support of its action, the Carrier relies on Rule 2(e), which reads in pertinent part as follows:

"An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority, . . . shall be compensated therefor at the overtime rate for the position worked; . . ."

The Board sees no conflict between Article 2(e) and the 1973 Letter of Understanding. Article 2(e) is a pay provision. It provides penalty pay to an "assigned train dispatcher" who is "required" to work a position other than the one selected by the dispatcher through seniority exercise. This can only be read as a deterrent to the Carrier from removing a dispatcher from a regularly assigned position. It follows that, as a pay Rule, it is silent as to any order of selection for such "required" move.

The May 31, 1973 Letter of Understanding, as the Organization asserts, is mandatory in its terms. The Board, however, notes that it is applicable "to filling temporary vacancies and to define who is entitled to a sixth or seventh day." There is no indication that these two conditions are considered separately. Put another way, the Letter of Understanding is reasonably read to cover situations in which dispatchers are called in to work.

Does the Letter of Understanding apply to the reassignment of a dispatcher during the dispatcher's regular duty hours, as here? There is no basis to draw this conclusion, especially in view of the provisions of Article 2(e). As noted above, the inference to be drawn from Article 2(e) is that a dispatcher may be "required" (thus, involuntarily) to move to another assignment temporarily, with the condition that the dispatcher receives premium pay for so doing. Here, the move was to another assignment on the same trick, and no extra hours of work were involved. The Board finds no barrier to the Carrier's selection of such a move as may be most efficient and without regard to seniority. There is no way, in fact, to determine whether the senior of two qualified employees, if preference could be made, would elect not to move to another assignment to fill a one-trick vacancy or would wish to transfer for the sake of the additional pay.

A statement by an Assistant Chief Dispatcher provided by the Carrier asserts that it has "always been the practice" to follow the procedure utilized in the instance here under review. To counter this, the Organization offered a number of previous on-property settlements; these, however, do not have the intended effect. First, there are a series of payments to one employee, but these include the disclaimer that the settlements are "without prejudice" and "will not be referred to as a precedent by either party." There is no evidence provided that the Organization did not concur in this limitation.

Also, included are two letters from dispatchers/Organizations' officers. Both of these discuss the required method to "fill overtime" as provided by the Letter of Understanding. The letters appear to be discussing assignment by seniority when additional hours of work are assigned to an employee. In this instance, Article 2(e) calls

for compensation "at the overtime rate," but no additional hours were worked by the employee assigned to the same-trick vacancy, nor would the Claimant have been required to work additional hours if assigned to the vacancy. There is a clear distinction between pay for work beyond regular schedule ("overtime pay" for "overtime work") and a penalty payment (the "overtime rate"), when an employee is "required" to move from an assigned position during regular working hours.

In furtherance of this, other examples submitted by the Organization concerned payment to senior employees, because junior employees were called for work involving a rest day or vacation. Again, this is unrelated to the matter at hand.

The Claimant here worked on a regularly assigned position. A junior employee was "required" to go to another assignment during regularly assigned hours and was paid the appropriate penalty. In the absence of demonstrating any overtime work beyond regular hours, the Organization has failed to demonstrate that this is an action covered by the Letter of Understanding.

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 19th day of June, 2000.