

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34151
Docket No. TD-33782
00-3-97-3-221**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

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

STATEMENT OF CLAIM:

“The Burlington Northern Railroad Company (hereinafter referred to as ‘the Carrier’) violated the current effective agreement between the Carrier and the American Train Dispatchers Department (hereinafter referred to as ‘the Organization’), Article 3(f) of the current Schedule, Article X of the Agreement dated May 3, 1993, and the Letter of Understanding dated May 31, 1973 in particular, when on August 10, 11, 18 and 19, 1995, 3rd Trick Administrative ACD, was blanked, rather than calling the incumbent, train dispatcher J. L. Swafford, to perform service 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.

On August 10, 11, 18 and 19, 1995, the Carrier blanked the 3rd Shift Administrative Assistant Chief Dispatcher (ACD) position. The Organization argues that the Carrier thereby violated Article 3(f), Article X of the May 3, 1993 Agreement and the Letter of Understanding dated May 31, 1973, when the Claimant's position was not filled as required. The Organization maintains that the cited Agreements do not permit the Carrier's actions. As stated in pertinent part:

"Article 3

(f) Combining Territory, Duties or Responsibilities for Relief.

The combining of territory, duties or responsibilities, or the blanking of position to avoid using relief or extra train dispatchers to provide relief on rest days for established positions, will not be permitted except by agreement between the Superintendent and Office Chairman subject to approval of the General Chairman.

Article X

(1) Positions in the Fort Worth consolidated office may be consolidated on a temporary basis, under circumstances such as track blockage due to derailments, washouts, mud slides, severe weather, short term downturn in traffic levels (. . . and others as agreed to with the ATDA)

An employee whose position is consolidated on a temporary basis will be assigned other duties by the Carrier and will be compensated at the rate of the position he would otherwise have worked.

Note: It is not Carrier's intent to consolidate positions under normal operations or solely to avoid filling vacancies on a day-to-day basis."

The Organization alleges that the Carrier does not have the Agreement right to blank the Claimant's position for the four dates of claim. As indicated supra, the Carrier is prohibited in its right "to avoid filling vacancies"; may not combine territory, duties or responsibilities to avoid using relief for established positions; and even if there were some reason under Article X, it would have to be "as agreed to with the ATDA" which was not done. The Carrier just blanked the 3rd Trick on the Claimant's ACD Position 378.

The Carrier's position in this dispute is that it is not required to fill the position when there is no work to be performed. In response to the Organization, the Carrier stated that Article 3(f) was inapplicable, "as it only applies to situations wherein the Carrier blanks positions to avoid using relief or extra train dispatchers to provide relief on rest days." In this dispute, the Carrier states that "none of the duties of the position were performed on the aggrieved dates." It also challenges the Claimant as having no standing with regard to assignment on this position. The Carrier further asserts both that this was a short term vacancy that did not need to be filled and that it had right of selection. It directs attention to Third Division Award 20567.

The Board read Third Division Award 20567 and notes that it was issued prior to Article X, which is a clear revision of Article 3(f). Nevertheless, Article X does not change the basic issue considered by that Award. The language of Article 3(f) and Article X has to do with consolidating positions. Similarly, the same is true of all other language calling for assigning other duties to employees. The Carrier would have violated the Agreement if it blanked the position and thereafter combined the duties and responsibilities of the position with another position for the purpose of avoiding the filling of the vacancy. As Third Division Award 20567, which considered the same issue put it:

"The main argument centers on the assertion that what took place was a combining of duties and responsibilities. The Organization has made no attempt to offer evidence on this point. Instead it has relied on what it considers a necessary inference.

* * *

As the record stands, Carrier's statement that no work of the ACD position was performed was uncontroverted. . . . There was no combining of territory, duties or responsibility, nor was there a blanking of positions to avoid using relief or extra train dispatchers to provide relief on rest days."

The Board carefully read the language to determine if the Agreement language prohibits the Carrier from blanking a position when there is no work to be performed. We studied the record and find the Organization repeatedly draws a necessary inference that there was work to be performed. The Carrier admitted that "the

employee assigned to ACD position No. 378 could not be released. . . .” The Organization argues that if they could have released the employee, then he would have been performing the work that must otherwise have been available. Because it was therefore available, it must have been performed. As the Organization put it on property:

“... The duties associated with position 378 . . . were indeed performed by other employees on these dates. The work did not disappear. . . . It was absorbed by other employees. Not only was the position blanked, it was clearly combined. . . .”

The Board is unable to find a factual base of proof that the Carrier blanked the position to avoid relief by shifting any of the duties of Position 378 to any other employees. The Carrier asserted that none of the duties of Position 378 were performed on any of the claim dates and there is no substantial evidence in this record to prove otherwise. We therefore find the conclusions of Third Division Award 20567 to apply (Also see Third Division Awards 32779, 32780).

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.