

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35171
Docket No. TD-35676
00-3-99-3-610**

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

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

STATEMENT OF CLAIM:

“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’), Article 24(f). They did not decline Mr. Koster's claim within the 60 days allowable. This is shown in the statement written by Mr. Koster. It is clear the Carrier made a declination once they were informed by Mr. Koster that they were in violation of the time limits.

Even if the Carrier had declined to the claim in the time limits they violated Article 12(a), 3(b) and the training agreement dated December 21, 1984, in particular, when train dispatcher Paul Koster was not used to train L. Staedent on 2nd Galveston on June 11, 1998 and June 12, 1998. Had Mr. Koster been used, as the Schedule requires he would have been paid overtime on Saturday, June 13, 1998, and June 14, 1998, for working. He lost wages in the amount of \$427.44 because the Carrier did not follow the guidelines of the Schedules Agreement. Carrier needs to make restitution to Mr. Koster of the wages.”

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's Statement of Claim is based upon the fact that an employee was trained by a non-bargaining unit employee rather than by the Claimant. The Organization contends that the trainee, L. Staedent received his training from R. Kolodziezyk. The incident occurred in Spring, Texas, where a dispatching office had been opened.

The Organization argues that both the trainee and the trainer are bargaining unit employees. The Carrier claims that both are exempt employees under the provisions of the agreement reached between the Organization and Burlington Northern Santa Fe Railroad Company on December 24, 1997 concerning representation. This, the Carrier contends, means that the Carrier can treat the employees as being outside of the contract between the parties to this proceeding and can assign duties in any manner it may deem appropriate.

The first issue to be determined is whether the employees are indeed exempt under the provisions of the December 24, 1997 Agreement. The Organization argues that the employees are union members, but produces no evidence to support this claim. The Carrier claims the employees are exempt under the terms of the Agreement and a reference to Carrier's Exhibit two reveals that these employees are indeed both listed on the schedule of former ATSF employees. It must be noted that the schedule carries the heading 'exempt' for certain employees listed in the schedule, but it is the sense of the Agreement that the named employees opted not to be covered by the terms of the BN Collective Bargaining Agreement. The burden of proof is that of the Organization, and it failed to demonstrate that these employees are covered by its Agreement.

Remaining to be determined is the question of whether an exempt employee may be trained by a non-bargaining unit person. Section 4 of Article III B of the Agreement provides:

“All SOC dispatchers that elect to retain their SOC benefit package and working conditions shall continue employment as BNSF dispatchers under all the same rates of pay, rules and working conditions/arrangements that existed in Schaumburg, and shall be fully excepted from the rules of BNSF/ATDD labor agreements except as otherwise provided in this Agreement. Thus, with respect to these employees, BSNF retains all the same freedoms and prerogatives to direct, supervise and otherwise manage its relationship with them, and to determine their compensation, work schedules, assignments, and other working conditions, which BNSF held prior to their consolidation to the Fort Worth NOC, except as otherwise provided for in this Agreement. Positions that are held by dispatchers retaining their SOC benefits and working conditions, will comprise and be administered as a separate pool of positions”

While the Organization argues that a literal reading of its contract requires a finding that the work in question is covered, an equally literal reading of the December 24, 1997 Agreement makes clear that the employees in question are not covered and that the Carrier is free to deal with such employees in its sole discretion. The Organization has not met its burden of proof in this case and the claim is denied.

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 20th day of December, 2000.

Labor Member's Dissent
To Third Division Award No. 35171
Docket No. TD-35676
(Referee Donald W. Cohen)

Regardless of the Majority's incorrect findings in this case, both employees involved are union members, represented by the Organization. The proof of this, which was apparently overlooked by the Majority, is contained in the December 24, 1997 Agreement.

Prior to the merger of the ATSF and BN Railroads, the ATSF train dispatchers (also referred to as SOC dispatchers) located in Schaumburg, Illinois were not represented by the Organization while the BN train dispatchers (also referred to as NOC dispatchers) located in Fort Worth, Texas were. Subsequent to the merger, the combined ATSF/BN Railroad (BNSF) moved the SOC dispatchers to its consolidated train dispatching office in Fort Worth, Texas. To accommodate this change in operations, the parties reached an Implementing Agreement on December 24, 1997, pursuant to Article I, Section 4 of New York Dock (NYD) conditions. This December 24, 1997 Agreement recognized and addressed the representation differences as follows:

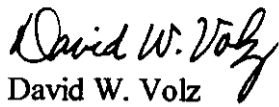
"Whereas the dispatchers in the former SOC are not union represented while those in the NOC are represented by the American Train Dispatchers Department/BLE (ATDD)....

BNSF recognizes the ATDD as the representative, for purposes of the Railway Labor Act, of the craft or class of train dispatchers on the BNSF, effective immediately."

Attached to the December 24, 1997 Agreement was an "Attachment A"¹ which was a list of all SOC train dispatchers indicating their "seniority standing" and their status² as of the date of the Agreement. Both of the SOC train dispatchers involved were active train dispatchers and were not shown as being "exempt".

Clearly, the employees involved were union members covered by the December 24, 1997 Agreement.

I dissent.


David W. Volz
Labor Member

¹ Included in the "Carrier exhibit two" referred to by the Majority.

² A notation of "exempt" meant an employee with train dispatcher standing but working in a management position. If there was no notation, the employee was working as an active train dispatcher.