

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35617
Docket No. TD-35214
01-3-99-3-31

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 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 18 in particular, when on December 23 1997 train dispatcher J. N. Snider, following the instructions of the Carrier, was not allowed to protect his assigned position because of the Hours of Service Law, due to his previous assignment, and received no compensation for complying with the Carrier’s instructions on December 23 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.

The essential facts of this case are not in dispute. At the time the dispute arose, the Claimant was assigned to the Guaranteed Assigned Train Dispatcher Board (GATDB) at the Carrier's centralized train dispatching office in Fort Worth, Texas. He was the successful bidder on a temporary vacancy on a first shift position that was to begin on December 23, 1997. The Claimant remained on his third shift position through December 22, 1997, and first worked the temporary vacancy on December 24, 1997. There was, therefore, a delay of one day in the Claimant being placed on the temporary vacancy.

On December 23, 1997, the Claimant filed a claim for eight hours overtime, account he was "not rested to cover the first shift position on December 23, 1997, because he was held on his former position through the third shift on December 22, 1997. His claim was denied on January 31, 1998. In its denial, the Carrier asserted that the Claimant had been moved to the temporary position as soon as possible, and, therefore, there was no violation of the Agreement. The Organization appealed that declination by letter of February 12, 1998. In that appeal, the Organization asserted that the Carrier intentionally failed to allow the Claimant to rest on December 22, 1997, in order to deprive him of the right to work (in view of the Hours of Service Act) on December 23, 1997. It requested that the Carrier reimburse the Claimant eight hours' pay at the penalty rate.

In its response, the Carrier noted that bids were received on the disputed position until 9:00 A.M. on December 22, 1997, and the position was not awarded to the Claimant until about noon that day. It further pointed out that there are no time limits specified in the Agreement regarding placement of successful bidders into temporary positions. The Organization appealed that denial by letter of April 8, 1998, and restated its position regarding the Carrier's obligation to place employees into their temporary positions as soon as they are awarded. In its final declination, the Carrier contended that the applicable language in this case was found in Articles 12 (i), which contains no time limits or penalties, and Article 12 (h), which provides that "Every reasonable effort shall be made to promptly place dispatchers on positions awarded to them under bulletin and assignment rules." The Carrier also noted that the language of Article 12 (h) applies to permanent positions, and that the Agreement contains no such parallel language for transfers to permanent positions.

This case is similar but not identical to Third Division Award 35616. With respect to assignment of employees into temporary positions, the Board's findings are

the same as in that matter; to wit, the Carrier does not violate the Agreement when it briefly delays assignment of employees into temporary positions for which they were the successful bidder. In the instant case, however, there is an additional consideration. In the present case, the Claimant would not have been eligible, having completed his third trick shift, to cover a first trick position beginning at 7:00 A.M. The Organization quarrels with the Carrier's decision to hold the Claimant on his third trick position for its final day, and then allow the following day to be his rest day, prior to starting his temporary position. The Organization pleads a distinction without a difference. In either case, whether beginning his temporary assignment on December 23 or 24, under the Hours of Service Act, the Claimant would have to have had a rest day between his last third shift and beginning his new position on the first shift. The Carrier's decision was neither arbitrary nor capricious, nor did the Claimant suffer any loss because of the Carrier's decision to retain him on his former position on December 22 and to have him begin the temporary vacancy on December 24, 1997.

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 24th day of July, 2001.

Labor Member's Dissent
To Third Division Award Nos. 35616, 35617, 35618
Docket Nos. TD-35240, TD-35214, TD-35215
(Referee Elizabeth C. Wesman)

In reaching its decision, the Majority not only ignored common sense, it ignored the basic principles of contract construction. In doing so it has changed the Agreement between the parties. Something it doesn't have the authority to do. Therefore, the decision is not worth the paper it is printed on.

The dispute was really rather simple. The Carrier posted a notice of a temporary position. The Claimant bid on the position. The Carrier awarded the temporary position to the Claimant. Then, the Carrier refused to allow the Claimant to move to the temporary vacancy in accordance with the clear provisions of the Agreement.

Article 12 (i), captioned "FILLING TEMPORARY POSITIONS", of the Agreement provides:

"Prompt notice of each temporary position shall be posted on bulletin boards in the office where the position exists; assigned train dispatchers in such office may transfer thereto subject to seniority." (Emphasis added.)

Article 12 (j), captioned "ADVICE OF AVAILABLE POSITIONS", of the Agreement provides:

"Advice of regular and temporary positions shall, whenever possible, be posted sufficiently in advance to enable the successful bidders or applicants for such positions to transfer thereto on their effective date." (Emphasis added.)

The parties' intent is clear. Temporary positions would be posted and awarded to the successful bidder so that he/she could "transfer thereto on [the] effective date" of the temporary position.

The Majority, however, chose to apply another provision of the Agreement, which had nothing whatsoever to do with temporary positions, to justify its decision. That provision being Article 12 (h), captioned "FILLING REGULAR POSITIONS", which reads:

"Each new position that is authorized to continue for more than ninety (90) days, or a vacancy of more than ninety (90) days occurring on an existing regular position, shall be promptly bulletined and posted in the dispatching office where such new position or vacancy occurs.

The senior train dispatcher holding a regular assignment in such office, who, within three (3) days after bulletin is posted, files written application with the Superintendent, shall be assigned thereto.

Each resulting vacancy shall be bulletined and posted until there are no applications from regularly assigned train dispatchers in that office.

The position finally left unfilled shall then be promptly bulletined to all offices (including office where vacancy exists) on the seniority district for a period of six

Labor Member's Dissent
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(6) days. The senior bidder shall be assigned thereto within three (3) days from close of bulletin. Every reasonable effort shall be made to promptly place dispatchers on positions awarded to them under bulletin and assignment rules."

It was this provision of the Agreement, dealing only with the filling of regular positions, that the Majority clutches to when it says, "the Board finds that the Organization has failed to show that the Carrier delayed transfer of the Claimant for an unreasonable amount of time". This rationale is even contrary to the Carrier's position as indicated on page 5 of its Submission to the Board, which reads:

"While Article 12 (h), dealing with permanent positions, contains language providing that 'Every reasonable effort shall be made to promptly place dispatchers on positions awarded to them under bulletin and assignment rules', there is no such provision for assigning temporary positions." (Emphasis added.)

The Carrier's foremost argument was that Article 12 (i) (Filling Temporary Positions) contained no time limit provision for placing a train dispatcher to a temporary position; therefore it was free to place the Claimant on the Temporary Position at its leisure. However, given the obvious meaning and clear language of Article 12 (h), (i) and (j), an exception, such as the one included in Article 12 (h), is necessary to override the requirement of a transfer to the temporary position on its effective date.

Article 12 (i) requires that successful bidders for regular and temporary positions "transfer thereto on their effective date." Article 12 (h) provides an exception for transfer to permanent positions. There is no such exception contained in Article 12 (i) concerning temporary positions, therefore none can be taken, contrary to the Majority's opinion.

Another flaw to the Majority's decision is concerning Article 2 (e) and its application. The Majority found that "the language of 2 (e) can only come into effect once a regular position has been awarded and worked". With regard to the application of Article 2 (e) for "regular" or "permanent" positions, given the exception contained in Article 12 (h) dealing with permanent positions, that is correct concerning permanent positions. However, for the Majority to say that Article 2 (e) has no application with regard to temporary positions is contrary to the clear language of Article 2 (e), which reads in part:

"An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority..."

There is no mention at all in Article 2 (e) that says it only applies to being required to work a position other than a "regular" or permanent position. It very clearly pertains to working any position "other than the one...obtained in the exercise of his seniority."

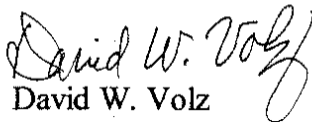
Labor Member's Dissent
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The only way a train dispatcher can "obtain" a temporary position is by exercising his/her seniority. This is clear by the provisions of Article 12 (i) and (j). Once a train dispatcher bids on and is awarded a temporary position, that temporary position has been obtained and transfer thereto has to be on the effective date. If the Carrier does not allow the transfer on the effective date of the temporary position, then Article 2 (e) applies and the train dispatcher is entitled to compensation at the overtime rate for being "required to work a position other than the one he obtained in the exercise of his seniority".

The Majority's decision, if accepted as precedent, renders the provisions of the Agreement concerning temporary positions meaningless. For the Majority to say that the Agreement provides for the Carrier to post notice of a temporary position, award the temporary position to the senior bidder and then not allow the successful applicant to transfer to the temporary position, is nonsensical. The parties would not have gone to all the trouble of making these Agreement provisions for nothing. And, given the fact that when these provisions were agreed to a temporary position was one that would be vacant for as little as five days, makes the Majority's decision that the Carrier has not violated the Agreement when it prevents someone from transferring to a temporary position for five days even less plausible.

The Majority's decision is palpably erroneous and holds no value as precedent.

I dissent.


David W. Volz
Labor Member

Carrier Members' Response
to Organization's Dissent to Awards
35616, 35617, 35618
(Dockets TD-35240, 35214, 35215)
(Referee Wesman)

It is difficult to understand the Organization's Dissent to Third Division Awards 35616, 35617 and 35618 although we do agree that the "disputes" were "really rather simple". Each of the Claimants had been assigned/awarded a position but were held to protect necessary work. Organization's claims were that Article 12 (i) required the immediate movement to these positions on the effective date.

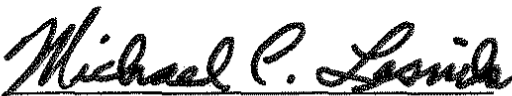
Article 12 (i) does not provide any time frame. However, the Board held that movement must be in reasonable time and this corresponds to the "reasonable" requirement of Article 12 (h). As the Dissenter notes at page 2, Article 12 (h) provides that "reasonable effort" would be made to place dispatchers on positions. That caveat, such as it is, does not exist for temporary positions. Therefore, there was no contractual bar to the Claimants' being held on their former positions. It was unrefuted on the property that:

"...there has been a long standing practice of transferring such employees within a reasonable time, i.e., as soon as practicable. In addition... there is no language in the Agreement establishing a penalty payment for delaying the transfer of employees to temporary positions." (Page 3 of Award 35616)

The Dissent does not address these facts. These decisions do not make the handling of temporary positions "meaningless". What they do substantiate is there is no contractual penalty when dispatchers are not immediately moved to a temporary position.


Paul V. Varga


Martin W. Fingerhut


Michael C. Lesnik

**Labor Member's Response
To Carrier Members' Response
To Labor Member's Dissent
To Third Division Award Nos. 35616, 35617, 35618
Docket Nos. TD-35240, TD-35214, TD-35215
(Referee Elizabeth C. Wesman)**

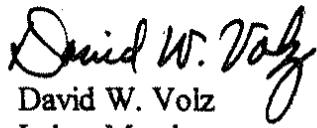
It is not difficult to understand why the Carrier Members found it difficult to understand the Dissent to these Awards, given their Response.

In their Response, the Carrier Members say that "It was unrefuted on the property that:" leading into a quote from "Page 3 of Award 35616". They then follow up the quote by saying, "The Dissent does not address these facts". The Carrier Members are correct in that the Dissent did not address these "facts" and there is a good reason why it didn't.

The Carrier Members' so-called "facts" are actually not the "facts". The quote they attribute to "Page 3 of Award 35616" is not from page 3 (or any other page) of that Award, nor is it from Award 35617 or Award 35618. Therefore, since the quote is not factual, neither are the associated statements by the Carrier Members.

Clearly the Carrier Members' Response does not address the facts, but rather attempts to make up some new ones. The Carrier Members' fiction in no way affects the validity of the Dissent.

The Awards continue to hold no value as precedent.


David W. Volz
Labor Member