Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36224
Docket No. TD-35805
01-3-99-3-792

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 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'), Letter of Agreement dated May 31, 1973 in particular, when on August 9, 1998 the Carrier allowed and/or required a junior train dispatcher to protect the position of 2d Trick Beardstown and provided compensation at the overtime rate of pay, rather than allowing train dispatcher J. A. Banks, 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.

The Claimant, a Train Dispatcher, was regularly assigned to First Trick Oregon Trunk Position No. 102, hours of 7:00 A.M. to 3:00 P.M., with Saturday and Sunday

as rest days. On Sunday, August 9, 1999 (the Claimant's second rest day), there was a vacancy on Second Trick Beardstown Position No. 275, hours of 3:00 P.M. to 11:00 P.M. There were no qualified Extra Board Dispatchers available at the straight time rate. The Carrier filled the position with a Train Dispatcher junior to the Claimant.

It is recognized that, if the Claimant had been called to fill the vacant position commencing 3:00 P.M. on Sunday, the Hours of Service Law provisions would have barred him from working his regular assignment commencing 7:00 A.M., Monday.

The Organization argues that the Claimant was improperly bypassed, because no Hours of Service Law provision would have prevented him from accepting and working the Sunday assignment commencing at 3:00 P.M.

The Carrier and the Organization agree that the document covering the filling of such temporary vacancies is the mutually signed Letter of Understanding dated May 31, 1973 ("1973 LOU") which reads in pertinent part as follows:

> ". . . [W]hen 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 single point at issue here is the meaning and intent of the phrase, "Hours of Service Law" in the 1973 LOU. The Organization argues that it refers to whether or not a Train Dispatcher is sufficiently rested to permit service to fill the vacancy. The Organization accurately notes that no Hours of Service limitation would have prohibited the Claimant from filling the second trick vacancy, because he was on his second rest day and thus sufficiently rested. The Carrier argues that the purpose of reference to the Hours of Service Law is to insure that working the vacancy will not prohibit an employee from maintaining his full regular schedule. In this instance, the

Carrier points out, if the Claimant had been assigned commencing at 3:00 P.M. on Sunday, he would not have been able to resume his regularly assigned schedule at 7:00 A.M. on Monday.

The genesis of the 1973 LOU is an October 26, 1972 letter from the General Chairman to the Vice President - Labor Relations. As a proposed change, the General Chairman suggested the following sequence for overtime assignments:

> "1. The regular incumbent of the position if he desires the work.
>
> 2. The senior regular train dispatcher available under the Hours of Service Act desiring the work.
>
> 3. The senior qualified extra train dispatcher available under the Hours of Service Act.
>
> It is understood that 'available under the Hours of Service Act' is meant as available for service on a regular position."

The Vice President - Labor Relations then circulated for comment from Carrier officers the General Chairman's proposal exactly as quoted above. There followed the signing of the 1973 LOU, which varied in two respects. One was to omit the phrase, used twice, "desiring the work"; this is of no significance in the matter here under review. The second is the omission in the 1973 LOU of the sentence commencing, "It is understood. . . ."

Does the fact that the 1973 LOU excludes what was "understood" by the proposer of the new language change the intent of reference to "Hours of Service Law?" Put another way, can the Organization convincingly demonstrate that the omission made the leap from availability for a "regular position" to availability for the vacancy? The Board does not believe so.

There is no logical basis for the argument that the "Hours of Service Law" reference concerns only whether or not a Train Dispatcher is "available" to fill a vacancy. In <u>any</u> proposed assignment, it is understood that such cannot be undertaken when the employee is "out of hours"; some other reason for reference to the Hours of Service Law must be inferred. Note in particular the first order of calling, which is

"the regular incumbent of the position." This does not include reference to the Hours of Service Law, because the "incumbent," presumably on a non-scheduled day, would not be "out of hours" to fill such regular assignment.

Further, it follows that the Carrier would have good reason to concur in what the General Chairman "understood" when he proposed language for the 1973 LOU. It is clearly in the Carrier's interest to preserve a Train Dispatcher's availability for a "regular position." The fact that the 1973 LOU does not include what was "understood" by the proposer of the new language does not obliterate such understanding.

The Organization failed to prove that the 1973 LOU requires the Carrier to offer an overtime assignment in another position when such assignment would prohibit the employee, under the Hours of Service Law, from meeting the obligations of his regular assignment.

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 September 2002.

Labor Member's Dissent
To Third Division Award No. 36224
Docket No. TD-35805
(Referee Herbert L. Marx, Jr.)

The Board's mandate is to interpret Agreements, not impose new ones on the parties. Third Division Award No. 7577 put it this way:

> "We are limited to interpreting the applicable Agreement provisions as they stand..."

And, Third Division Award No. 16835:

> "It is well established that the Board must accept the rules as it finds them. We have no power to alter, amend or add to the terms the parties agreed upon..."

The Majority in this case ignored that mandate and opted to add to the terms the parties agreed on. In doing so, the Majority has exceeded its authority and its conclusions are, therefore, illogical, unreasonable and erroneous.

The Majority suggests that the parties reached the "1973 LOU" (Letter of Understanding) without including all of their "understanding". Why would the parties do that? Why would the parties go to the trouble of reaching a "Letter of Understanding" only to exclude part of that "understanding"? That makes no sense whatsoever.

The record before the Board included the bargaining history between the parties leading up to the "1973 LOU". It showed that in October 1972, the Organization's General Chairman proposed language suggesting a three-step order of call for overtime assignments. Included in the second and third steps of the proposed language was the term "available under the Hours of Service Act". Immediately following the third step in the order of call was the following proposed "understanding":

> "It is understood that 'available under the Hours of Service Act' is meant as available for service on a regular position."

The Carrier initially rejected the General Chairman's entire proposal. However, after further discussions and exchanges of correspondence over several months, the parties reached the May "1973 LOU". Instead of adopting the above "understanding", the parties chose to exclude it from the "1973 LOU" and actually replaced it with the following:

> "The above understanding serves to dispose of the proposals to change the existing agreement as set forth in your letter of October 26, 1972, and except as specifically provided herein, this understanding does not modify or in any manner affect schedule rules or agreements."

Since the parties chose to exclude the proposed understanding from the "1973 LOU", doesn't it make sense that they didn't want it to apply? Or, does it make more sense that the

parties did want it to apply but decided to exclude it from their "1973 LOU" as the Majority suggests? Clearly the parties' actions to exclude this understanding from the "1973 LOU" indicated their decision to discard it.

And, how did the Majority overcome the last paragraph of the "1973 LOU", which is conspicuously absent from its quote of that LOU, that very clearly states "**except as specifically provided herein, this understanding does not modify or in any manner affect schedule rules or agreements**"? Wouldn't that be a further indication that the parties intended that the only modifications to the Agreement were those contained in the "1973 LOU"? Of course it is!

The Majority finds, "There is no logical basis for the argument that the 'Hours of Service Law' reference concerns only whether or not a Train Dispatcher is 'available' to fill a vacancy". The Majority may have had a valid point if it ignored the impact of the bargaining history leading up to the "1973 LOU", which it apparently did.

The parties considered restricting the availability of Train Dispatchers under the Hours of Service Law to only those who would be rested to protect their regular assignment. The parties rejected that restriction. Therefore, that restriction cannot apply and the "logical basis for the argument that the 'Hours of Service Law' reference concerns only whether or not a Train Dispatcher is 'available' to fill a vacancy" is in the rejection of that restriction by the parties.

The Majority finds, "the Carrier would have good reason to concur in what the General Chairman 'understood' when he proposed language for the 1973 LOU. It is clearly in the Carrier's interest to preserve Train Dispatchers' availability for 'regular position'. Then, why didn't the Carrier protect that interest by including the proposed "understanding"?

In reaching the "1973 LOU", the parties excluded the proposed "understanding" and included a limitation that the only modifications of the Agreement were those contained in the "1973 LOU". In reaching its decision, the Majority included the proposed "understanding" and excluded the limitation that the only modifications of the Agreement were those contained in the "1973 LOU".

If the Majority's logic were accepted, it would mean that any understanding that the Organization proposes that does not find its way into a written agreement or "LOU" would be binding on the parties. While that does have a certain amount of appeal, it is nonsense. This Award is palpably erroneous and holds no value whatsoever as precedent.

I dissent,

David W. Volz

David W. Volz
Labor Member

Carrier Members' Response to
Labor Member's Dissent
to Award 36224 (Docket TD-35805)
Referee Marx

Dissenter goes to great effort to state that certain language was not included in the May 31, 1973 Letter of Understanding (1973 LOU). Dissenter then concludes that such excluded language was improperly relied upon in this matter, i.e., the Majority has modified the specific language agreed upon by the parties.

However, what the Dissenter has ignored is that, on the property, the Carrier pointed out without refutation, that the actual practice of the application of the 1973 Letter of Understanding had been applied, since 1973, consistent with the deleted proposed language. Thus, it was not disputed in this record, that in the more than 25 years of actual practice in the application of this "Understanding," it was applied consistent with the conclusion stated in Award 36224. Dissenter ignores this undisputed history. Rather than changing the substances of the contract between the parties, Award 36224 upholds the consistent application that was made prior to the 1998 claim in this case.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik