

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36311
Docket No. TD-36135
02-3-00-3-312**

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

**(American Train Dispatchers Department
(Brotherhood of Locomotive Engineers**

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim one days pay at the penalty rate of pay for train dispatchers for Wednesday June 2, 1999 account not called to cover a vacancy on 2nd Trick River Desk. The Carrier assigned dispatcher Patrick L Mooney on his rest day at time and one-half to cover the vacancy on the River Desk. Mr. Minnich is senior to Mr. Mooney and was also on his rest day and available to cover the position but was not called to do so.”

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 June 1, 1999, a Relief Train Dispatcher, who was scheduled to work a third trick position at the Carrier's Main Dispatching Office in Minneapolis, Minnesota, took a leave of absence pursuant to the Family and Medical Leave Act. The Relief Train

Dispatcher laid off work at 7:00 P.M. on June 1, 1999, which was four hours prior to the starting time of the position.

The parties concur that there were not any guaranteed assigned Train Dispatchers or Extra Train Dispatchers available to fill the vacancy at the straight-time rate of pay, and so, the Carrier invoked the Order of Call set forth in Rule 15 which provides:

"The call order for EXTRA TRAIN DISPATCHER WORK when there are no guaranteed assigned or extra train dispatchers available to perform the work at the straight time rate will be as follows:

- 1. Incumbent of the position to be relieved if the vacancy occurs on his/her rest day.**
- 2. Incumbent of the relief assignment relieving the rest days on the position to be relieved will be used on his/her rest day. If the position is relieved by the two relief assignments, the senior of the two incumbents of such relief assignments will be used if both are on their rest days.**
- 3. Senior of either rested and available dispatchers on assigned rest day or rested and available guaranteed assigned or extra dispatchers who would work at overtime for the 6th or 7th day.**

NOTE: It is understood that no train dispatcher in the above categories will be eligible for the overtime work involved if the performance of such work would result in his/her unavailability to work his/her own assignment on account of Hours of Service Law restrictions.

- 4. A relief train dispatcher due to perform "other service" in the same shift as the vacant position.**
- 5. If a guaranteed assigned or extra dispatcher is available but not qualified on the position to be filled, the senior qualified dispatcher**

working the same shift may be used off assignment and the guaranteed assigned or extra dispatcher fill his/her vacancy.

6. If unable to fill the vacancy under 1, 2, 3, 4 or 5, the senior qualified dispatcher rested and available will be called ahead of shift and his/her vacancy filled by a guaranteed assigned or extra dispatcher, if available at straight time rate, if not available at straight time that vacancy will be filled under the provisions of the call order.

NOTE: It is understood that a train dispatcher called for overtime under items 1, 2, 3, 4, 5 or 6, turns down the call he/she will not be subject to call for the vacancy or subsequent resultant vacancies until all means provided by items 1 through 6 have been exhausted.

7. If no regular dispatchers desire to fill the vacancy, dispatcher will be required to perform the extra work at the overtime rate of pay. If there are extra dispatchers available to perform the work at the straight time rate, they will be first utilized.
8. In applying the emergency provisions of the Hours of Service Law should a double be required, the following will apply:
 - (a) The dispatcher to be relieved may work an additional four (4) hours for a total of twelve (12) hours on duty, and
 - (b) The dispatcher scheduled to relieve the position being doubled may be called in four (4) hours early."

The Carrier was unable to fill the vacancy with a Dispatcher satisfying the criteria contained in Items 1 and 2. Indeed, the Relief Train Dispatcher who had already laid off fell within the second category. The Claimant was the Senior Train Dispatcher on his rest day and thus, fit the parameters of Item 3.

The Carrier telephoned the Claimant's home at 7:26 P.M. on June 1, 1999 to ascertain if he wanted to fill the 11:00 P.M. vacancy. The Carrier left a message on the Claimant's telephone answering machine. The Claimant represented that he was not at home and he did not listen to the telephone message until sometime after 11:00 P.M. The Claimant did not call or otherwise contact the Carrier. The Claimant intimated that it was too late to contact the Carrier because it was past the starting time of the vacancy. The Claimant emphasized that he was home during the morning of June 2, 1999, and available to receive calls to perform overtime service.

Because it did not receive a response from the Claimant, the Carrier proceeded sequentially down the items listed in Rule 15. Ultimately, the Carrier forced a Train Dispatcher to cover the third trick vacancy which, in turn, created a vacancy on the second trick River Desk position on June 2, 1999. The Carrier did not call the Claimant to work the second trick River Desk vacancy on June 2, 1999 even though he, again, fit the parameters of Item 3. Instead, the Carrier utilized a Train Dispatcher junior to the Claimant off the guaranteed assigned Train Dispatcher's extra list.

The Organization argues that the Carrier was required to call the Claimant to the June 2, second trick River Desk vacancy per Rule 15, Item 3, because the Claimant was on his rest day and available.

Citing the Note following Item 6 of Rule 15, the Carrier justified its decision not to call the Claimant to the June 2 vacancy by contending that the Claimant had turned down the call to work the June 1 third trick vacancy which caused the June 2 vacancy.

The issue in this case is what is the meaning of the phrase, "turns down the call" which appears in the Note following Item 6 of Rule 15. The Carrier submits that, because it never received a response from the Claimant to the message that it left on the Claimant's telephone answering machine on June 1, that the Claimant, for all practical purposes, turned down the June 1 call rendering him ineligible to fill the resulting June 2 vacancy. The Organization submits that not only did the Claimant not turn down the call because he did not receive the message until after the 11:00 P.M. start of the third trick vacancy, but he was also at home, ready and willing to take calls the next morning.

Rule 15 does not directly address the instant factual situation which poses the dilemma of whether a failure to contact the Carrier after being called is tantamount to turning down the call. Certainly, the Carrier must have been experiencing a shortage

of Train Dispatchers on June 1 and 2, 1999 and the Claimant was available on June 2 for the call which would have helped alleviate the short supply of Train Dispatchers. However, the dilemma was created by the Claimant's failure to respond to the call which, if not construed as turning down the call, could lead to some illogical results. For example, if a failure to respond to the call is not tantamount to turning down the call, a Train Dispatcher could simply ignore a telephone message (the call) and then, claim that he was available for a resulting vacancy even though, due to the deliberate lack of response, the Carrier logically concluded that the Dispatcher did not want to work the vacancy and the Dispatcher's preference not to work created another vacancy. The Board emphasizes that such a sharp shooting practice did not occur in this instance. The Claimant was not home at the time of the call. He did not receive the message until it was too late to accept the call. However, rules like the Note following Item 6, must be interpreted in a reasonable and logical fashion. The rule of reason dictates that the Claimant was under an implied duty to, at the very least, notify the Carrier, even if it was past the starting time of the June 1 third trick vacancy, that he had not received the message in time. Such a contact would not constitute turning down a call within the meaning of the Note following Item 6. Also, our decision promotes the purpose of the Rule. The Note following Item 6 is designed to encourage Dispatchers to accept calls so they will not be rendered ineligible for vacancies created by their rejections.

In conclusion, the Organization did not meet its burden of proving that the phrase, "turns down the call" does not cover the situation where the Train Dispatcher receives a call but fails to respond to the call. Indeed, because of a failure to respond, the Carrier would not know if, like in this case, the Claimant received the message too late or if the Dispatcher had intentionally decided that he did not want to accept the call. The Organization did not prove how the Carrier could discern between these two scenarios.

Therefore, a failure to respond to the call constitutes "turning down the call" within the meaning of the Note to Item 6 of Rule 15 under the peculiar facts of this case.

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 13th day of November 2002.