Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36985
Docket No. TD-36958
04-3-01-3-591

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department
(Brotherhood of Locomotive Engineers
(
(The Burlington Northern and 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'), Articles 3(b), 7(a), 12(a), the Letter of Agreement dated May 31, 1973 and the Memorandum of Agreement dated March 5, 1974, Item 2 in particular, when on January 6, 2001, the Carrier allowed and/or required a junior train dispatcher to protect the position of 2d Trick Alliance North and provided compensation at the overtime rate of pay, rather than allowing train dispatcher E. A. Lane, 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 was the incumbent Dispatcher on 2nd Trick Orin, with Friday and Saturday rest days. On Saturday, January 6, 2001, while on her rest day, the Carrier contacted the Claimant and offered her the opportunity to work overtime on a vacancy on 2nd Trick Orin, which the Claimant refused. On the same date, another offer for overtime was made to the Claimant to work on a vacancy on 2nd Trick Sheridan, which the Claimant also refused. Later that day another vacancy arose, this time on 2nd Trick Alliance North. The Carrier did not offer the third vacancy to the Claimant because it considered the Claimant unavailable because she turned down the other two overtime offers. This claim followed.

The May 31, 1973 Letter of Understanding sets forth the order of call to be used when the Carrier calls in Dispatchers to fill vacancies:

> "This refers to our exchange of correspondence ending with my letter dated April 27, 1973, and discussion in conference on May 23, 1973 at which I was represented by Mr. K. A. Voelk, in connection with your proposal of October 26, 1972, to amend the existing agreement applicable to filling temporary vacancies and to define who is entitled to a sixth or seventh day in the absence of an extra train dispatcher who has not performed five days' service within seven consecutive days.
>
> At the conclusion of the discussion, it was agreed that when 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 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."

The May 31, 1973 Letter of Understanding is clear - ". . . dispatchers will be called for service in the following order. . . ." (Emphasis added) Given the phrase "will be called," there is no discretion on the Carrier's part. However, as the Carrier points out, on the disputed date the Claimant turned down two prior offers to work overtime on other vacancies. But given the lack of discretion from the phrase "will be called," "[t]he fact that Claimant may have refused a call for another position does not relieve the Carrier from its obligation to call Claimant for the vacant position in dispute." Third Division Award 33833.

The Claimant may not have wanted to work those two other positions and she exercised her right to refuse to accept those positions. There is no evidence that the Carrier asked whether the Claimant did not desire to work any overtime on that day. Nor is there evidence that the Claimant indicated to the Carrier that she would refuse all overtime work opportunities on that day. The Carrier was therefore obligated to follow the clear terms of the May 31, 1973 Letter of Understanding for each call - ". . . dispatchers will be called for service in the following order. . . ." The Claimant was not called. The claim therefore has merit. To rule otherwise would cause us to change the mandatory language of the May 31, 1973 Letter of Understanding concerning the order of call. We do not have that authority.

The Awards cited by the Carrier do not change the result. In Third Division Award 18644, the employee "refused work for Sunday, August 6, 1997," which caused the Board to conclude that "Claimant herein had no right, contractually or otherwise, to dictate his personal policy of assignment to a position after having indicated his non-availability on the date in question." The Claimant in this matter did not indicate her "non-availability on the date in question," she just turned down specific offers for specific jobs. Had the Claimant indicated that she was not available for that date as opposed to specific overtime opportunities, the logic of Third Division Award 18644 would apply. Special Board of Adjustment No. 1011,

Award 212 did hold, consistent with the Carrier's argument in this case, that "[t]he Board can find no provision of Rule 24, or any other cited Rule of the Agreement, which requires the Carrier to call an employee a second time who may have refused an overtime assignment a first time on the same shift." But from a reading of the cited Rule in that case (Rule 24) we do not find the kind of language existing in the May 31, 1973 Letter of Understanding which states, in no uncertain terms, that ". . . dispatchers will be called for service in the following order. . . ." Similarly, Second Division Award 12244 states that ". . . the Claimant had been requested to work overtime and had declined . . . [h]e thus was clearly 'unavailable' for overtime work on the second shift," but also does not indicate language similar to the mandatory "will be called" provisions of the May 31, 1973 Letter of Understanding.

Finally, we note that the issue of an employee's unavailability for overtime after having declined to work an overtime opportunity was raised in Third Division Award 35987 between the parties. However, the claim was denied in that case on the basis that ". . . no explanation is offered as to how the Claimant could have been 'available' to fill a vacancy on a trick that had already commenced." With respect to the assertion that the employee in that case was unavailable after the employee had previously declined another overtime opportunity, the Board commented that ". . . there is a lack of agreement as to whether the Claimant declined any overtime work on November 20 or whether he was specifically declining the call to work Position SE194 . . . [and] the Carrier argues that it had no obligation to offer the Claimant a different first trick vacancy after the Claimant had declined an initial first trick position." With respect to those issues the Board further stated that "[t]he Board concludes that neither of these aspects is determinative in resolving the dispute and therefore draws no conclusion in reference to them." In this case, however, we have addressed the issue of the Carrier's obligation to again offer another overtime opportunity to an employee who previously refused one, and we find that the clear language of the May 31, 1973 Letter of Understanding requires that the Carrier do so.

The Carrier's options in these situations are simple. If the Carrier desires to avoid having to again call a Dispatcher who previously refused an overtime opportunity, it should simply ask the employee if the employee wants to be considered for any subsequent overtime opportunities for that date. That was not done here. The May 31, 1973 Letter of Understanding therefore required that the Claimant be called for the overtime opportunities as they arose following the order of call - indeed, all of them.

The claim will be sustained. The Claimant shall be made whole consistent with the parties' practice of compensating employees for lost overtime work opportunities.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 12th day of May 2004.