Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37260
Docket No. TD-36917
04-3-01-3-574

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 June 27, 2000, the Carrier allowed and/or required a junior train dispatcher to protect the position of 1st Trick Front Range and provided compensation at the overtime rate of pay, rather than allowing train dispatcher D. A. Bauman, 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.

On June 27, 2000, a vacancy arose on the first trick Front Range Dispatcher position at the dispatching office in Ft. Worth. The Carrier could not fill the position with a qualified employee from the extra board. Rather than calling the Claimant who was observing a rest day, the Carrier assigned R. G. Redell (who was junior to the Claimant and assigned to work another first shift Dispatcher position in the same office) to work the first trick Front Range position and compensated Redell at the overtime rate. In this claim, the Organization contends that under the provisions of the May 31, 1973 Letter of Understanding, the Claimant should have been called for the first trick Front Range position rather than assigning the work to junior Dispatcher Redell.

This case is similar to the dispute decided by this Board in Third Division Award 37259. In that Award we found:

> "Third Division Awards 34144 and 36519 previously decided between the parties are not palpably in error and control this matter. The reassignment here occurred during the second shift and involved Dispatchers on that shift. No Dispatchers were called in. As found in Third Division Award 36519 '[p]ursuant to the ruling in Award 34144, the May 31, 1973 Letter of Understanding does not apply to the reassignment of a Train Dispatcher during the Dispatcher's regular tour of duty.' On the basis of those Awards, this claim shall be denied."

No Dispatchers were called in here. The reassignment in dispute occurred on the same shift. For the reasons expressed in the above Awards, this claim must be 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 5th day of November 2004.

Labor Member's Dissent
To Third Division Award Nos. 37259 & 37260
Docket Nos. TD-36870 & TD-36917
(Referee Edwin H. Benn)

These claims involved the filling of vacancies that occurred when there were no extra train dispatchers available. Instead of using dispatchers on their rest days the carrier moved dispatchers, who were already scheduled to work, off their regular assignment and then used other dispatchers to fill the resultant vacancies. The May 31, 1973 Letter of Understanding ('73 LOU) established a defined order of call and is quoted in its entirety in Award 37259.

In denying these claims, the Majority incorrectly deemed Third Division Awards 34144 and 36519 as controlling precedent. This is the only reason for the Majority's justification for denying these claims.

The Organization cited Third Division Awards 35987, 36224, 34003, 36985 and Public Law Board 6519, Award 12 because of the consistent interpretations of the '73 LOU. The Majority suggests that these Awards have no bearing because the facts involved in those cases are distinguishable from the facts in the instant claims. But, what about the facts involved in Awards 34144 and 36519 as compared to the facts involved in the claims at bar? Were they the same? Or, were they distinguishable?

In Third Division Award 34144, the Board described the facts involved as being:

> "On January 1, 1997, a vacancy occurred in a first trick dispatcher position. There were no qualified extra board dispatchers available to fill the vacancy at the straight time rate, and there were no regularly assigned qualified dispatchers available under the Hours of Service Law to fill the positions. The Carrier elected to move an employee already assigned to the first trick to fill the vacancy and utilized a qualified extra board employee to work the resulting vacancy. The Claimant, also assigned to and working the first trick, was senior to the transferred employee and was qualified to fill the initial vacancy. The Organization argues that the Claimant, rather than the other employee, should have been transferred to the vacancy on the same shift, thus being enabled to earn premium pay, as provided in Article 2(e). For the alleged requirement to transfer the senior qualified employee, the Organization relies on the May 31, 1973 Letter of Understanding.... The Organization argues that this Letter of Understanding requires filling the vacancy under the second numbered order; that is, the Claimant as 'senior' employee."[1]

[1] As can be seen from this excerpt, the Carrier exhausted the '73 LOU before it moved a dispatcher off assignment to fill the vacancy. The dispute centered on whether the '73 LOU required the Carrier to use the senior qualified dispatcher off assignment under Article 2(e). It found that the '73 LOU did not apply to moving dispatchers off their regular assignment. In a subsequent decision involving the identical facts of Award 34144, PLB 6519, Award 12 (cited by the Organization as support for its position that Award 34144's findings were only applicable to moving dispatchers off their regular assignment) found, "Third Division Award No. 34144 is applicable and we do not find it palpably erroneous. It is directly on point to the instant facts. It finds that the Carrier is not required to use the senior train dispatcher when it requires a train dispatcher to move to another assignment on the same shift...."

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In Third Division Award 36519 the Board described the facts involved as being:

> "On July 3, 2000, at the Carrier's Train Dispatcher office in Ft. Worth, Texas, the incumbent Train Dispatcher assigned to the third trick Oregon Branch position became ill four hours into her eight-hour shift, and so, she went home."[2]

However, in the instant claims a vacancy occurred and there were no extra train dispatchers available to fill the vacancies. The vacancies were known ahead of time and did not occur with short notice. The Carrier had ample time to fill the vacancies using the '73 LOU order of call but opted instead to fill the vacancies by moving dispatchers off assignment and paying them in accordance with Article 2(e).

Instead of adhering to the clear and unambiguous language of the '73 LOU, the Majority opted to deny the claims on the basis of what it referred to as "prior precedent", Awards 34144 and 36159. Even though the facts involved in the so-called precedent Awards 34144 and 36519 are not only distinguishable from the facts involved in the claims at bar, but also starkly different.

As previously noted, the Awards cited by the Organization[3] were referenced because of what the Board said in each of those Awards about the interpretation of the '73 LOU. An analysis of these Awards, as well as those relied on by the Majority[4] interprets the '73 LOU as follows:

Third Divison Award 34144:

> "The May 31, 1973 Letter of Understanding, as the Organization asserts, is mandatory in its terms. The Board, however, notes that it is applicable 'to filling temporary vacancies and to define who is entitled to a sixth or seventh day.' There is no indication that these two conditions are considered separately."

Third Division Award 36519:

> "The May 31, 1973 Letter of Understanding, containing the Order of Call, is a mandatory provision. The Carrier must strictly comply with the enumerated items in the Letter of Understanding."

Third Divison Award 35987:

> "The May 31, 1973 Letter of Understanding provides that a vacancy is initially filled with an available extra Train Dispatcher with less than five days' dispatching service within seven consecutive days; if no such extra Train Dispatcher is available, then the position is offered to the regular incumbent. Absent the incumbent's availability, the Letter of Understanding calls for offering the position to 'the senior qualified train dispatcher available under the Hours of

[2] As can be seen from this excerpt, this involved a vacancy that occurred during the shift.
[3] Third Division Awards 35987, 36224, 34003, 36985 and PLB 6519, Award 12.
[4] Third Division Awards 34144 and 36159.

> Service Law.'... In the absence of other circumstances the Organization would be on firm ground in arguing that the Carrier violated the Letter of Understanding and that remedy is due to the Claimant. The difficulty with the Organization's position, however, is that there were factors in the situation here under review that clearly left the Carrier with no alternative and warranted the action taken.... While the Organization's reading of the Letter of Understanding is accurate, no explanation is offered as to how the Claimant could have been 'available' to fill a vacancy on a trick that had already commenced."

Third Divison Award 36224:

> "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...."

Third Division Award 34003:

> "The Organization states without contradiction there was no Extra Train Dispatcher available on straight time, and the regular incumbent was not available. Thus, the Organization argues that the Claimant should have been called, noting the use of the mandatory 'will be called.'... In sum, there is no showing that the 1973 LOU has been superseded as to the filling of short, non-bulletined vacancies by qualified employees."

The Board has consistently held that the '73 LOU is "mandatory"; that "it is applicable to filling temporary vacancies and to define who is entitled to a sixth or seventh day"; that the parties "agree that the document covering the filling of such temporary vacancies is the mutually signed" '73 LOU and that "there is no showing that the 1973 LOU has been superseded as to the filling of short, non-bulletined vacancies." All of which the Majority disregarded in deciding the instant claims.

Finally, in the most recent decision involving the '73 LOU between these parties, Third Division Award 36985 interpreted the '73 LOU as follows:

> "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.... 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."

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As can be seen from the above, Award 36985 interpreted the '73 LOU as leaving "no discretion on the Carrier's part" and that the "Carrier was obligated to follow the **clear** terms" and that it contained "mandatory language." (Emphasis added.) This is the interpretation of the '73 LOU based upon its clear terms. However, the Majority exercised authority it didn't have in the instant claims and did exactly what the Board refused to do in Award 36985; it changed "the mandatory language of the May 31, 1973 Letter of Understanding concerning the order of call."

The Majority's decision is contrary to the clear terms of the '73 LOU and Board precedent concerning the interpretation of the '73 LOU. Therefore, these Awards are palpably erroneous.

I dissent.

David W. Volz
Labor Member