Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37715
Docket No. TD-37883
05-3-03-3-264

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 Association
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"The Burlington Northern Santa Fe 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 12(a), Article 12(I), XVI-Amendment to Article 12(I), Article 3(b), Article 2(e), and Article 18 in particular, when the Carrier failed to advertise temporary position 3rd Amarillo as the Schedule dictates and train dispatcher T. L. Hudson was not allowed her right to place a bid on this position. Mrs. Hudson was made to remain on her permanent position and not compensated the correct wage for working this position. Therefore the Carrier needs to make restitution to Mrs. Hudson."

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 Amendment to Article 12(i) of the Agreement reads, in pertinent part:

"Prompt notice of temporary position of ten (10) working days or longer shall be posted in the zone where the temporary vacancy exists. Such vacancy shall be filled as follows:

(a) awarded to senior qualified bidder in that zone, and
(b) successful bidder must remain on said temporary vacancy through its last day. . . ."

At the time the dispute arose, the Claimant was a Dispatcher at Fort Worth assigned to the Guaranteed Assigned Train Dispatchers Board ("GATDB") on the Colorado Zone. The Claimant filed a claim dated August 24, 2001 seeking eight hours of straight time on four days and eight hours of overtime on 30 days during the period July 9 through August 15, 2001 due to an alleged violation of the Agreement because the Carrier "failed to post 3rd Amarillo, as required, on a temporary vacancy, which started on 6-30-01 and ended 8-15-01. I could have bid on this vacancy." The temporary vacancy in dispute was in the Southern Zone.

The record shows that the employees and the Organization advised the Carrier of the need to post the temporary vacancy for bidding, but the Carrier did not do so. Although the Carrier asserted in its letter of December 18, 2001, that its failure to post the vacancy was "simply an oversight," in its letter of March 25, 2002, the Carrier conceded that it ". . . acknowledges that the temporary assignment was not advertised in accordance with the time stipulations provided in the Agreement . . . ." Therefore, because the Amendment to Article 12(i) mandates that ". . . notice of temporary position of ten (10) working days or longer shall be posted in the zone where the temporary vacancy exists . . ." and the Carrier admittedly did not do so, the Organization has demonstrated a violation of the Agreement. [Emphasis added]

For purposes of this particular case, the fact that the temporary vacancy was in the Southern Zone and the Claimant was assigned to the GATDB in the Colorado Zone does not change the result that a violation has been shown. The Carrier clearly did not post a temporary vacancy that was greater than ten working days as required - and that is the demonstrated violation.

With respect to the Claimant being assigned to a zone different from the one in which the vacancy existed, the pertinent language requires that "[s]uch vacancy shall be . . . awarded to senior qualified bidder in that zone. . . ." [Emphasis added] The record shows that although assigned to the Colorado Zone, the Claimant also worked in the Southern Zone where the vacancy existed. Further, in its January 6, 2003 letter, the Carrier concedes that ". . . there are occasions, such as herein involved, when a GATDB employee assigned to one zone is required to work a vacancy in another zone. . . ." However, although the Carrier concedes that GATDB employees work across zone lines, the Carrier argues that the quoted language clearly barred the Claimant from bidding on a vacancy in another zone from which she was assigned.

But the phrase "in that zone" is not completely clear. Does it mean "assigned to that zone" (as the Carrier argues) or "working in that zone" (as the Organization argues)? Both interpretations are plausible. From the parties' respective viewpoints, the words "assigned" or "working" would have clarified the language. However, absent that type of clarifying language, because both interpretations are plausible, the language is therefore ambiguous.

A past practice can explain ambiguous language. Here the Carrier asserts through statements from its Manager and Director, Dispatching Scheduling that such a practice exists favorable to its position that "[i]t has been the position of the Carrier that a GATDB employee is not entitled to be awarded a Temporary position on a Zone other than the one he/she was assigned to." This past practice argument is an affirmative defense raised by the Carrier. As the Organization correctly points out in its December 27, 2002 letter, to meet its burden for this affirmative defense, the Carrier must show more than what its "position" has been. As the Organization argues, "[m]inimally, in support of its past practice argument, the Carrier should now be able to provide specific evidence that clearly demonstrates ... that otherwise qualified GATDB employees were denied being awarded particular temporary vacancies solely the result of being assigned to a different zone." We agree. The Carrier has articulated its position but has not provided evidence that its position has been implemented as the accepted practice between the parties. In its January 8, 2002 letter, the Organization offered evidence to the contrary that "zone designations or assignments do not necessarily figure into the awarding of temporary vacancies" and the Carrier subsequently disputed that assertion. What this all means is that the past practice contentions are therefore in dispute. However, because the Carrier raised past practice as an affirmative defense, the

Carrier has the burden to show the existence of that practice. We find the Carrier has not adequately done so in this record.

The next question is what remedy, if any, should be applied? The function of a remedy is to make the aggrieved employee whole for losses suffered as a result of a demonstrated violation. Further, the Board has discretion with respect to the formulation of such remedies. In the exercise of that discretion, and taking into account the clearly demonstrated violation of the Agreement, we find that the Claimant must be made whole in accord with the provisions of the Agreement.

The record shows that as a result of the Carrier's failure to post the vacancy as mandated by the Agreement, the Claimant was required by the Carrier to work a position other than one she could have been awarded. It will therefore be necessary for the parties to examine the schedule of the vacant position, the days actually worked by the Claimant as well as compensation earned by the Claimant to determine whether the Claimant is entitled to compensation at the appropriate contractual rate beyond that which she received during the period covered by the claim. This computation and the Claimant's monetary entitlement will also require the parties to take into account the penalty provisions of the Agreement such as Articles 3(b) ("[a] regularly assigned train dispatcher required to perform services on the rest day assigned to his position will be paid at rate of time and one-half for service performed on either or both of such rest days"); 2(e) ("[a]n assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority . . . shall be compensated therefore at the overtime rate of the position worked . . ."); and any other provisions of the Agreement.

The Carrier's assertion that the Claimant was improper and would not have been awarded the position also does not change the result. The Organization has the right to identify the Claimant as it did in this case. As part of our discretion in the formulation of remedies, we find that the Carrier cannot object to the Claimant as the beneficiary of the remedy. To agree with such an argument would allow the Carrier to benefit from its demonstrated violation of the Agreement.

The other arguments raised by the parties also do not change the result.

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 23rd day of February 2006.

CARRIER MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 37715, DOCKET TD 37883
(Referee Benn)

The Carrier overlooked bulletining a temporary vacancy in the Southern zone for a dispatcher. The Organization filed a claim in behalf of a regular dispatcher assigned to another zone, the Colorado zone, "for restitution" to the claimant because Claimant was allegedly not compensated "the correct wage." The Carrier's response was that the failure to bulletin the vacancy did not adversely affect the Claimant because, had the Carrier bulletined the vacancy after it existed the required ten days, the Claimant could not submit a valid bid because Claimant was regularly assigned to a position in a different zone. Thus the claim centered on whether the Claimant was a proper claimant.

In the last paragraph of the Arbitrator's opinion, the Board states that it does not make any difference whether the Organization named a proper claimant. It holds, "The Organization has the right to identify the Claimant as it did in this case. As part of our discretion in the formulation of remedies, we find that the Carrier cannot object to the Claimant as the beneficiary of the remedy. To agree with such an argument would allow the Carrier to benefit from its demonstrated violation of the Agreement." There is no evidence the Carrier benefited or that failure to bulletin was deliberate. We reject this notion. "Arbitrators generally require a party to prove its claim for damage, and, where no grievant suffers any monetary loss as a result of the employer's violation, no damages will be awarded." [***Elkouri & Elkouri*** Sixth Edition p. 1229] Moreover, the Arbitrator raised this idea, a minority and extreme view among arbitrators, for the first time in the proposed award. Neither party argues that the Organization has the right to name a claimant who has no standing. We think an arbitrator must observe the same principle as the parties and not help one side or the other by raising new argument in the opinion.

What the parties did ask the Arbitrator to determine is whether the Claimant is a proper claimant. The arbitrator did answer the question, holding that the Claimant was proper. The reasoning is based on two factual mistakes. First, contrary to the Arbitrator's finding that the Carrier failed to submit evidence of past practice, the Carrier submitted detailed analysis of past bulletins showing that the Carrier never awarded temporary vacancies to a qualified dispatcher permanently assigned to a different zone. Second, the record shows that Claimant was not working in the Southern zone at the time the Carrier should have bulletined the temporary vacancy. (June 30 – July 9) She worked in the Southern Zone June 22 and not again until after a bulletin would have expired. Even under the Board's erroneous interpretation, the Claimant had no standing.

For these reasons, we dissent.

John P. Lange

John P. Lange

Martin W. Fingerhut

Martin W. Fingerhut

Bjarne R. Henderson

Bjarne R. Henderson

Michael C. Lesnik

Michael C. Lesnik

Labor Member's Response
To Carrier Member's Dissent
To Third Division Award No. 37715, Docket No. TD-37883
(Referee Edwin H. Benn)

The Dissent begins by stating that the "Carrier overlooked bulletining a temporary vacancy." Then in the second paragraph it states, "There is no evidence... that failure to bulletin was deliberate." The record clearly showed otherwise and the Award so noted.

> "The record shows that the employees and the Organization advised the Carrier of the need to post the temporary vacancy for bidding, but the Carrier did not do so."

The carrier made an overt decision to violate the Agreement and the Referee correctly held it accountable for doing so.

The claim did NOT center "on whether the Claimant was a proper Claimant." Rather, that was just one of the nonsensical arguments raised by the Carrier. Nor, is the statement true, "What the parties did ask the Arbitrator to determine is whether the Claimant is a proper claimant." Again, that was the carrier's argument. As far as the Organization was concerned there was never any doubt concerning whether the Claimant was the proper Claimant.

Regardless of what the Dissenters say, this claim centered on the carrier's violation of the Agreement when it failed to post a temporary vacancy. As noted in the Award, the carrier conceded, "that the temporary assignment was not advertised in accordance with the time stipulations provided in the Agreement." The carrier tried to deflect attention from the proven violation by arguing that the Claimant could not submit a valid bid because she was regularly assigned to a position in another zone. However, the record clearly showed that she had worked in the zone where the temporary vacancy had occurred on numerous occasions leading up to and after the time frame involved in the temporary vacancy, even working the first shift of the position involved in the temporary vacancy.

I do agree with one thing the Dissenters write; an arbitrator should not help one side or the other by raising new argument in the opinion, but that's not what happened here. The Referee weighed the arguments of the parties against the record and subsequently rejected the carrier's, and correctly so.

The carrier also unsuccessfully argued that there was a past practice that supported its position that the Claimant was not eligible to bid on the temporary vacancy, as she was not assigned to a position in the zone where the temporary vacancy existed. This argument was correctly rejected, as the carrier did not offer evidence that its position had been implemented as the accepted practice between the parties, because no such evidence exists.

The Award correctly found a violation of the Agreement and properly sustained the claim.

David W. Volz

David W. Volz
Labor Member