

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37928
Docket No. TD-38235
06-3-04-3-155

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(BNSF 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'), Article 18 and the Memorandum of Agreement dated March 5, 1974, Item 2 in particular, when on October 12, 2002, the Carrier allowed and/or required train dispatcher S. J. Merrill to protect a position other than her assigned position, reporting for service subsequent to her assigned hours, and failed to provide the proper compensation for changing positions at the direction of proper authority."

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 regularly assigned to a relief Assistant Chief Dispatcher (ACD) position in the centralized dispatching center in Fort Worth, Texas. On Friday, October 11, 2002 the Claimant worked the last four hours on the 2nd trick South ACD position and then worked on the 3rd trick South ACD position for eight hours getting off at about 6:30 A.M. On the claim date, Saturday, October 12, 2002, her regular assignment was a 1st trick ACD position with a starting time of 5:30 A.M. However, she was held off her 1st trick assignment and used to work a 3rd trick ACD position that same day, for which she was paid eight hours at the overtime rate, in accordance with Article 2(e) which states:

"ARTICLE 2 - (e) SERVICE ON POSITIONS OTHER THAN SENIORITY CHOICE

An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority, except an assigned train dispatcher who is used on the position of chief dispatcher, or assistant chief dispatcher, shall be compensated therefore at the overtime rate of the position worked; however, except as provided in Article 18, no additional payment shall be made to such train dispatcher due to not having worked his regular assignment."

The Organization filed the instant claim, contending that the Claimant sustained a "loss of time" when held off her first shift assignment and should have been additionally compensated pursuant to Article 18, which provides as follows:

"ARTICLE 18 - LOSS OF TIME IN CHANGING POSITIONS

Loss of time on account of Hours of Service Law, or in changing positions by direction of proper authority, shall be paid for at the straight time rate of the position on which service was performed immediately prior to such change. Loss of time in exercising seniority will not be paid for."

The Carrier's denial of the claim is based upon its contention that the Claimant suffered no loss of time on the claim date. Because the Claimant worked at the overtime rate of pay on October 12, 2002, it is the Carrier's position that Article 18 does not apply and the Claimant is not entitled to any additional compensation.

The interpretation and application of Article 18 have been addressed before on this property and others. The Organization's position is exemplified in Third Division Award 7403, where the Board held:

"As to the merits of the instant claim, this Board has repeatedly held that where an employee has regularly assigned hours and is directed to work a different trick, thus losing his regular assignment because of the limitations of the Hours of Service Law, he is entitled to pay for the hours lost on his regular assignment. . . . Even though Claimant has lost nothing in the way of compensation, or in number of hours worked, he has suffered 'loss of time on account of the hours of service law . . . in changing positions . . . by the direction of proper authority. . . .' As this language has been previously interpreted and applied by the Board, such claims have been sustained. . . ."

Other Awards have supported the Carrier's position, as seen in Public Law Board No. 300, Award 8:

"This dispute involves a claim involving the Federal Hours of Service Law where tricks on the same day are involved. Award 8984 has determined this issue and held that it was not a violation of the Agreement. We concur with the findings in that Award and adopt the position taken therein. On the other hand, Third Division Awards 2742 and 7403 have established the principle that similar claims for different work days are valid. Since in this dispute the claim is for the same work day, it will be denied."

Careful examination of the Awards cited reveals that the distinction expressed in the foregoing decision has been maintained by the weight of authority on this property. The situation where an employee is held off his regular assignment to work another shift on the same work day is distinguished from the situation where an employee is held off to work a shift on a different day. The latter has been held to be a violation of Article 18; the former is not a violation. See, Third Division Award 18456 as well as Public Law Board No. 300, Awards 5, 6, 8, 9, 10, 11, 21 and Public Law Board No. 588, Awards 5 and 8. This distinction would be equally valid regardless of whether the claim is for loss of time on account of the Hours of Service Act or for loss of time due to a change in position by direction of proper authority.

In light of the history of the Rule and its practical construction over so many years, we find that Article 18 was not violated under the circumstances presented. We cannot consider that there has been a loss of compensation or loss of time where an employee has worked one trick instead of another on the same day.

Finally, we reject the Organization's argument that the Carrier failed to comply with the Memorandum of Agreement dated March 5, 1974. Item 2 of this Memorandum requires that, within 60 days from date the claim is received, the Carrier must notify the employee or his representative in writing of the reasons for disallowing the claim. The Board finds that the Carrier fully complied with this requirement when a timely explanatory letter of declination was provided to the Claimant.

Based on the foregoing reasons, the Board must deny the claim in its entirety.

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 22nd day of August 2006.