Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38131
Docket No. TD-38547
07-3-04-3-538

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
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(Soo Line Railroad Company

STATEMENT OF CLAIM:

"A. The SOO Line Railroad Company (the Carrier) violated the current schedule agreement between the Carrier and the Organization, including rules 15 and 46 thereof in particular, when on Sunday November 30, 2003 the Carrier failed to properly protect a vacancy existing on 3rd C&M. A dispatcher was called off his vacation and improperly used to fill this vacancy instead of the claimant.

B. Because of the lost work opportunity caused by said violation, the Carrier shall now compensate claimant J. J. Kottner $207.65 which represents lost earnings for Sunday November 30, 2003. This amount claimed is the difference between a days pay at the penalty rate plus the following day at straight time per Rule 7 (Nov. 30 & Dec 1) and a days pay at the penalty rate (which the claimant has already been compensated for working off assignment on December 1)."

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 Sunday, November 30, 2003, a vacancy existed on the third shift C&M Train Dispatching Position in the Minneapolis Operations Center when the regular incumbent laid off sick. There were no guaranteed assigned or extra Train Dispatchers available to perform the work at the straight time rate. Therefore, it was necessary for a Train Dispatcher to be called at the overtime rate in accordance with Rule 15, Order of Call.

The Carrier contacted Dispatcher J. L. Norris to fill the vacancy based on its determination that he was the senior "rested and available" Dispatcher under the Order of Call. Dispatcher Norris works the position of first shift C&M, with rest days on Saturday and Sunday. He had been on vacation for three days prior to observing his rest days on November 29 and 30, 2003.

The Claimant in the instant case holds the position of Swing 2. He, too, has Saturday and Sunday as rest days. The Organization contends that the Claimant, who is junior to Dispatcher Norris in seniority, should have been called to fill the November 30, 2003 vacancy because Dispatcher Norris did not fall within the Order of Call on his rest days following a vacation. The rest days following a vacation are considered as part of the vacation, in accordance with well-established precedent, the Organization maintains. In Third Division Award 29039, for example, the Board held:

> "Carrier has taken the position that an employee's vacation extends through the two rest days after the vacation period and consequently has not disturbed employees for work on these days. This Board agrees with Carrier in this regard."

The Carrier agrees with the conclusion set forth in the foregoing Award and in the other cases cited by the Organization which have reached the same result. See, Third Division Awards 24876 and 27616; Second Division Award 7900. The Carrier argues, however, that the prior cases addressed a seven-day vacation period beginning with the first day of the assigned five-day workweek and extending through the rest days following the vacation period. There is no established precedent, the Carrier asserts, and indeed no Rule or Agreement language, which require a similar outcome where, as here, an employee has taken a day or two of split vacation prior to observing his rest days. The Carrier submits that the Dispatchers on this property who take split vacation days are considered available under the order of call, and have been assigned to overtime in circumstances similar to the instant case. This practice further substantiates its position that Dispatcher Norris was properly called to protect the vacancy on Sunday, November 30, 2003.

The Board finds that the outcome in this case rests on the burden of proof. The Organization as the moving party in this contractual dispute must show that the Agreement has been violated. We carefully examined the Agreement provisions relied upon by the Organization. Neither Rule 15, Order of Call, nor Rule 46, Vacations, address the situation now before us. The Agreement language on its face fails to support the Organization's claim.

The precedent Awards cited by the Organization do not change the result. Those cases addressed the narrow circumstance in which an employee extended his vacation period through the five-day workweek to include the two rest days prior to returning to work. Split vacation provisions – which permit employees to take vacation one day at a time - were not the focus of analysis.

The usefulness of precedents, no matter how sound the reasoning and principles upon which they are based, nonetheless depends upon the similarity of the situations to which they are to be applied. The facts in the instant case are distinguishable from the cases relied upon by the Organization. It was the Organization's burden to prove that the logic in those cases was equally applicable to the matter at hand. It has not done so.

Our conclusion in this regard is bolstered by the assertions and counter assertions on the property regarding the practice of the parties. The Carrier

asserted that rest days have not been included as part of the vacation period when vacation is allowed for less than a full workweek. The Carrier provided various examples in which employees have been called on their rest days after taking vacation on a day-to-day basis. The Organization responded that it has not previously filed a claim because overtime was offered to those employees only after the Carrier had exhausted the order of call. Given the opposing assertions regarding the nature and scope of the past practice, it was incumbent upon the Organization to produce evidence to support its assertions. In the absence of such evidence on the record, we must conclude that the Organization did not shoulder its burden of proof.

On the basis of the foregoing, we find that the Organization failed to establish that the Carrier violated the Agreement when it did not select the Claimant for the overtime assignment on November 30, 2003. Accordingly, the 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 23rd day of April 2007.