

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 38133  
Docket No. TD-39060  
07-3-05-3-565

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  
(Soo Line Railroad

**STATEMENT OF CLAIM:**

- “A. The SOO Line Railroad Company (the Carrier) violated established past practice and deprived Claimant Jakusz of rightful earnings when on Wednesday August 25, 2004 the Carrier improperly filled a vacancy existing on the 2<sup>nd</sup> Dakota desk.
- B. Because of the lost work opportunity caused by said violation the Carrier shall now compensate Claimant M. G. Jakusz \$166.66 which represents the lost earnings for August 25, 2004.”

**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 Wednesday, August 25, 2004, a vacancy existed on the second shift Dakota Train Dispatching Desk as a result of the regular incumbent calling in sick. It is undisputed that no extra Dispatcher was available to protect the position, nor could it be filled utilizing the provisions of the Order of Call Rule of the Agreement. The vacancy was filled by holding Train Dispatcher J. T. Malek an additional four hours after working his regular assignment on the first shift River desk.

The Organization contends that the Carrier violated established past practice in the instant case. It argues that historical practice has firmly demonstrated that the regularly assigned incumbent Dispatcher is assigned to work beyond his normal tour of duty to protect the vacancy. Here, the Claimant should have been assigned to work the overtime because he was the incumbent on the first shift Dakota Train Dispatching Desk when the second shift Dakota Dispatcher marked off sick.

The Carrier argues that the Claimant was not eligible to work the second shift Dakota vacancy on Wednesday, August 25, 2004 because Hours of Service Act restrictions would have rendered him unavailable to work his own assignment on the first shift Dakota desk on Thursday, August 26, 2004. In the Carrier's view, the vacancy in this case was properly filled under Rule 16, Order of Call, because the Claimant was not available pursuant to the NOTE to Item No. 4, which provides:

**Rule 16 Order of Call**

"The call order for EXTRA TRAIN DISPATCHER WORK when there are no guaranteed assigned or extra train dispatchers available to perform the work at the straight time rate will be as follows:

\* \* \*

4. Senior qualified, rested and available train dispatcher

NOTE: It is understood that no train dispatcher in the above categories will be eligible for the overtime work involved if the

performance of such work would result in his/her unavailability to work his/her own assignment on account of Hours of Service Law restrictions.”

The Board finds that the Organization has not carried its burden of proof in the instant case. Past practice may play a role in determining the parties’ intent when the Agreement provisions are ambiguous or there is a gap in the contract language. In this matter, however, the parties negotiated the language of Rule 16, and it became effective on May 1, 2004. Clear language in the Agreement now governs the order of call in circumstances such as the one before us. It is controlling over any practice which existed prior to the new Agreement language. Therefore, the Claimant was not eligible to work the vacancy on the second shift Dakota desk on August 25, 2004 pursuant to the NOTE to Item No. 4 of Rule 16. 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.