

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38214
Docket No. TD-39052
07-3-05-3-487

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 Company)

STATEMENT OF CLAIM:

“(A) The Soo Line Railroad Company (the Carrier) violated an agreement between the Carrier and the Organization, with reference to the current Order of Call, when on June 18, 2004 the Carrier improperly protected a vacancy existing on the 2nd Wisconsin desk and failed to call the claimant for that vacancy.

(B) Because of said violations, the Carrier shall now compensate claimant K. J. Baum \$329.56 which represents lost earnings for June 18, 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.

Effective May 1, 2004, Rule 16, Order of Call was revised pursuant to negotiations to read as follows:

“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:

- 1. A relief train dispatcher due to perform ‘other service’ in the same shift as the vacant position.**
- 2. If a guaranteed assigned or extra train dispatcher is not available or available but not qualified on the position to be filled, a qualified dispatcher working the same shift may be used off assignment and will be compensated 1 hour at the straight time rate in addition to pay for time worked.**
 - a. If an employee stands to be used under this Section 2 more than two times in his/her work week, the position will instead be filled under section 3 or 4 of this rule. Should the position remain unfilled after completing this calling process, such employee may be used off assignment at the overtime rate.**
 - b. The intent of this Section 2 is the use of the qualified dispatcher off assignment which will enable the trailing positions to be filled from the GATD or extra board at the straight time rate and will minimize the number of positions on that shift to be backfilled.**
 - c. If there are no GATD or extra board dispatchers available to backfill a slid position at the straight time rate, the Carrier will continue through the Order of Call Sections to fill the vacancies at the overtime rate of pay.**

3. Incumbent of the position to be relieved if the vacancy occurs on his/her rest days.

NOTE: See Attachment No. 1 regarding split desks.

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."

On Friday, June 18, 2004, there was a vacancy on the second shift Wisconsin train dispatching desk. No qualified Extra Dispatcher was available to protect the vacancy at the straight time rate of pay. Moreover, no one responded to fill the vacancy under the Order of Call.

Before a position is combined or blanked for relief purposes, there must be negotiation and agreement between Management and the General Chairman in accordance with Rule 10. Accordingly, the Carrier contacted the General Chairman and told him that there was no one to work the vacancy and that it would be necessary to combine two positions in order to fill all vacancies. The Carrier responded in the affirmative when asked by the General Chairman if everyone observing rest days had been called. After obtaining the Organization's concurrence, the Carrier filled the vacancy by "sliding" the incumbent of the second shift Portal desk to cover the Wisconsin desk. The Portal position was then blanked and combined with the Dakota position.

The instant claim contends that the Carrier should have called the Claimant for the vacancy. In support of its position, the Organization relies upon an understanding it claims was reached during negotiations to revise Rule 16, Order of Call. The Organization maintains that the parties agreed to call in a Dispatcher ahead of shift after exhausting the Order of Call. That vacancy would then be backfilled. Pursuant to that agreed upon procedure, the Claimant should have been

called before resorting to blanking and combining a position to fill a vacancy, the Organization submits. Moreover, the Carrier improperly informed the General Chairman that there was no alternative but to combine the two desks. In the Organization's view, the Carrier should have informed the General Chairman of the Claimant's availability. Had the General Chairman known that the Claimant was not called to protect the vacancy, there would have been no agreement to combine the Portal and Dakota desks, it is asserted.

The Carrier submits that the Claimant was not eligible to work the vacancy on the second shift Wisconsin desk on June 18, 2004 because of the NOTE to Item No. 4, set forth above. This provision expressly states that a Dispatcher is ineligible for overtime if such work would result in his inability to protect his own assignment due to an Hours of Service Act conflict. Because the Claimant would not have been rested for his own assignment, he was not called. The Carrier further maintains that the Organization has not identified any Rule or Agreement provision which supports its position. Moreover, the Carrier denies that any extra-contractual understanding was entered into when Rule 16 - Order of Call was revised. On the contrary, the Carrier argues that the agreed upon modifications to Rule 16 - Order of Call granted it greater flexibility in filling positions. That greater flexibility was properly exercised here, the Carrier avers.

After careful examination of the evidence and the arguments presented by the parties, the Board finds that well-established principles of contract interpretation govern our determination in the instant case. Where there is language that is clear and certain, it must be applied as written. If a contract provision is ambiguous, then the Board's task is to ascertain what the parties intended and apply the provision based on their mutual understanding. Consideration of bargaining history can be an important form of extrinsic evidence if it demonstrates what unclear or ambiguous language meant to the negotiating parties when the provision was adopted.

Applying those principles to the evidence submitted on the property leads the Board to conclude that this claim must be denied. The Carrier properly applied Rule 16 - Order of Call in the circumstances presented. Under the clear and unambiguous language of the NOTE to Item No. 4, the Claimant was not eligible for the overtime work on June 18, 2004. Had he worked the overtime, he would have

been unavailable to work his own assignment due to Hours of Service Act restrictions.

The Board recognizes that there is a dispute between the parties as to what was intended when items 1 through 4 of the Order of Call have been exhausted and there is still a vacancy. Under the prior Order of Call, there were eight steps instead of four, and the Claimant would have been eligible for the vacancy. The applicable step is no longer included in the revised Rule and its omission must be given its normal significance. Generally, the plain inference of the omission is that the intent to reject prevailed over the intent to include.

The Organization did not succeed in rebutting that inference. It argued that the parties reached an understanding governing the procedures to be followed when the Order of Call has been exhausted, but there is an evidentiary conflict on this particular point that cannot be resolved by the Board. We are compelled to find that the parties negotiated specific changes to the Order of Call which must be applied as written and any unwritten understanding must fail for lack of probative evidence. In the absence of Agreement language or a side agreement governing the procedures to be followed when the Order of Call has been exhausted, the Carrier can properly exercise its discretion to take the action it did in this case.

Based on the foregoing, it follows that the General Chairman was not misinformed or misled by the Carrier prior to blanking the 2nd Trick Portal position and combining it with the 2nd Trick Dakota position. The Claimant was not eligible for the vacancy under the Order of Call and the Organization failed to establish that an unwritten understanding changed that result. The claim must be denied.

AWARD

Claim denied.

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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 25th day of June 2007.