

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32781
Docket No. TD-33252
98-3-96-3-681

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Consolidated Rail Corporation (hereinafter referred to as 'the Carrier') violated the current effective agreement between the carrier and the American Train Dispatchers Department (hereinafter referred to as 'the Organization'), Rule 5 in particular when on March 7, 1995, the Carrier failed to call dispatcher J. A. Ulasiewicz to perform service as senior dispatcher available to fill a vacancy on position 1st trick, Desk 5. Junior dispatcher E. J. Head was used instead at the overtime rate.

The Carrier shall now compensate dispatcher J. A. Ulasiewicz eight (8) hours at the overtime rate account he was entitled to this work but was not called."

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 relevant facts are not in dispute. On March 7, 1995, Claimant was a regularly assigned relief Dispatcher on Desk 4, second trick. Claimant had greater seniority than E. J. Head, who was a regularly assigned relief Dispatcher on Desk 5, second trick. A vacancy occurred on Desk 5, first trick. There were no extra Train Dispatchers available to fill the vacancy. In such circumstances, an employee had to be called on overtime. Rule 5, Section 2(e) provides for the order of call as follows:

“(e) Where, in the performance of extra work, no extra employees are available who can be used at the straight time rate of pay and it becomes necessary to assign an employee who must be paid at the overtime rate, assignment shall be made in accordance with the following order:

1. Available incumbent on his rest days.
2. Senior available relief incumbent on his rest days.
3. Senior available qualified train dispatcher on his rest days.”

No employees expressly listed in Rule 5, Section 2(e) were available to fill the vacancy. Carrier then diverted E. J. Head from his second trick position to fill the first trick vacancy on Desk 5. Mr. Head was paid overtime for the assignment, in accordance with Rule 12(b) which provides:

“(b) A regular assigned train dispatcher required to temporarily fill a position covered by this Agreement on a trick other than the trick to which he is regularly assigned shall be compensated at the overtime rate of the position so filled. . . .”

The Organization contends that Carrier violated the Agreement by giving the overtime opportunity to Mr. Head instead of to Claimant. There is no dispute that Claimant had the greater seniority. There is no Rule expressly addressing the order of call once the steps specified in Rule 5, Section 2(e) have been exhausted. The question is whether seniority must govern.

We do not write on a clean slate. In Third Division Award 31177, the Board sustained the claim under virtually identical circumstances. The Board observed that

each party had cited authority from this Division in support of its position as to whether seniority must govern in the absence of a Rule expressly so providing. The Board concluded:

"Given the extraordinary facts of this record, we find that the better approach to resolution of the matter is represented by the precedent cited by the Organization. We believe this approach more closely gives effect to the intentions of the parties to the extent they expressed their intention in the Agreement. Rule 5(e) clearly shows the parties intended to have overtime opportunities offered in seniority order within the classes of employees that they foresaw would be available to fill vacancies. They apparently did not anticipate the precise situation that arose in this case. But nowhere does the Agreement explicitly provide that seniority should be ignored for instances that did not precisely fit the situations the parties did foresee. For these reasons, the claim is sustained as presented."

The Board again confronted the identical issue in Third Division Award 31978, with a different Referee sitting as neutral. The Board declined to follow Award 31177. The Board wrote (emphasis in original):

"This Board has considered Third Division Award 31177. This Board is also very mindful of our obligation for stability purposes to follow Awards on the property unless those awards are palpably in error. However, for us to apply the rationale of Award 31177 to the facts in this case and to hold that seniority governs so as to require an overtime assignment to employees not on their rest days where the parties specifically limited Rule 5(e) to apply only to employees who are on their rest days would be tantamount to this Board writing a new provision into the Agreement where the parties have not, through the negotiation process, agreed to do so. We simply do not have that authority. That is for the parties to do."

The Board confronted the issue for a third time in Third Division Award 32231, with a third Referee. The Board did not discuss expressly the prior two Awards, although it did observe that the Organization had cited Award 31177, among others, in support of its position. The Board found no violation of Rule 5 or of Rule 12 and denied the claim.

We now face the issue again, with a fourth Referee. We have decided to follow the majority view on this property, i.e., the view expressed in Awards 31978 and 32231 for two reasons. First, it is the better reasoned approach. Second, following this view will better promote stability in labor relations and discourage further Referee shopping.

The Board in Award 31177 observed conflicting precedent concerning whether seniority governs the assignment of overtime in situations where the agreement is silent. The Board determined that the line of authority holding that seniority governed best reflected the implicit intention of the parties to this Agreement. The Board reasoned that Rule 5, Section 2(e) reflected a general intent to rely on seniority in determining which employee within a particular class of employees should be called for overtime, that the parties did not contemplate the situation where no employees were available as specified in Rule 5, Section 2(e), and that their most likely intent had they contemplated the situation would be to rely on seniority for the order of assigning the overtime. With all due respect to the Referee in Award 31177, we find this reasoning to be flawed.

Contrary to Award 31177, we do not find a general intent expressed in Rule 5, Section 2(e) that seniority governs the order of call. On the contrary, Rule 5, Section 2(e) provides that the first person to be called is the incumbent on his rest day, if available. The incumbent is given priority even if he is the most junior available qualified employee on a rest day. Next, relief incumbents on their rest days receive priority in order of seniority, followed by qualified Dispatchers on their rest days in order of seniority. In other words, Rule 5, Section 2(e) provides for a mix of considerations in determining the order of call, of which seniority is an important but not exclusive factor.

Furthermore, we cannot agree with the view expressed in Award 31177 that the parties "apparently did not anticipate the precise situation that arose in this case." On the contrary, it appears that the parties understood that situations would arise where the provisions of Rule 5, Section 2(e) would be exhausted and an employee would have to be diverted from another truck to fill the vacancy. In Rule 12(b) the parties expressly provided that in such circumstances the employee diverted would be paid at the overtime rate. If the parties intended to require that such overtime opportunity be assigned on the basis of seniority, they had two opportunities to state so expressly. They could have expressly provided for seniority to govern in Rule 12. Alternatively, they could have added a fourth step to Rule 5, Section 2(e). That they did neither, indicates that they did not intend to restrict Carrier to diverting the senior available employee.

However, merely because we disagree with the reasoning in Award 31177 does not provide cause to decline to follow it. Stability in labor relations carries tremendous weight. Generally speaking, when an issue is resolved on the property, the parties should be able to rely on that resolution. We should not encourage further litigation. As the Board recognized in Award 31978, we should follow prior Awards unless they are palpably wrong.

Were Awards 31177 and 31978 the only Awards before us, the question would not be which reached the better reasoned result. The question would be whether Award 31978 properly concluded that Award 31177 was palpably wrong. However, these are not the only Awards on point on the property. In Award 32231, a third Referee reached the same conclusion as Award 31978.

By following the better reasoned majority view on the property, we will further the cause of stability in labor relations. It is our hope that this Award will resolve the issue with finality before this Board. Award 31177 will now stand out as an anomaly and should not encourage the Organization to litigate this issue further. The proper place for the Organization to address the issue further is at the bargaining table.

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 September 1998.