Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32923
Docket No. TD-32851
98-3-96-3-188

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

(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"(a) The Carrier has failed to maintain an adequate number of qualified employees to fulfill the requirements of service. On June 16, 1995, the Carrier violated the 1/1/65 Agreement including, but not limited to, Articles 3 (e) and 4 (f) when it failed to separately fill the West Belt and the Merchants Train Dispatcher's position on the first shift (7AM-3PM). Instead, without agreement to do so the Carrier combined these positions to prevent providing relief as required by the Agreement.

(b) Due to such violation, the Carrier shall now compensate B. J. Hosp an additional 4 hours overtime pay (7AM 11AM) at the rate of the West Belt train dispatcher's position and K. E. Valdejo an additional 4 hours overtime pay (11AM-3PM) for service they should have performed under the Agreement."

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 June 15, 1995 at 8:40 P.M., incumbent West Belt Dispatcher D. G. Masek laid off sick creating a vacancy for the first shift (7:00 A.M. - 3:00 P.M.) on Friday, June 16, 1995. The Carrier called General Chairman R. W. Filges at 8:54 P.M. on June 15, 1995 to fill the position, which was refused. At 5:06 A.M. on June 16, 1995, J. H. Ward was called, with no answer. Claimant Hosp was working a third shift assignment and C. Volner was on vacation. The Carrier then blanked the June 16, 1995 West Belt Train Dispatcher position on the first shift and combined the West Belt and Merchants Train Dispatcher positions.

Articles 3(e) and 4(f) state, in pertinent part:

"(e) - RELIEF SERVICE:

* * *

It is understood that relief dispatchers may be used in lieu of extra dispatchers to perform extra train dispatchers services on days that will not interfere with their regular relief assignments. Relief requirements of less than four (4) days per week will be performed by extra dispatchers who will be paid the daily rate of each train dispatcher relieved.

Each dispatcher's position shall be considered a 'relief requirement' as referred to herein. Any exception must be by Agreement between the management and the General Chairman.

* * *

(f) - EXTRA WORK:

Except as provided in the second paragraph of Article 3 (b) and the last paragraph of this Article 4 (f), when an extra dispatcher is needed, the senior extra train dispatcher who is not performing train dispatcher

service, and who can be called and used without violating the Hours of Service Law, shall be called and required to perform the service unless prevented by physical disability, leave of absence, or other justifiable reasons, which reasons must be given to the supervisory officer in writing, and a copy will be furnished to the Office Chairman on request."

This is not a case where the Carrier has an unfettered right to combine positions. Article 3(e) is clear that "[e]ach dispatcher's position shall be considered a 'relief requirement'" and "[a]ny exception must be by Agreement between the management and the General Chairman." When the Carrier blanked the West Belt Train Dispatcher position on the first shift and then combined the two positions on Friday June 16, 1995, it did so on that day of the week without "Agreement between the management and the General Chairman" in violation of Article 3(e).

In this case, the requested relief shall be granted.

First, there is no reason expressed in the record developed on the property why Claimant Valdejo was not called. He is therefore entitled to the requested relief.

Second, even assuming as the Carrier argues that Claimant Hosp's working would have violated Hours of Service provisions, that fact does not preclude payment to him. "That [Hours of Service argument] is an affirmative defense to a prima facie violation of Article 4 (f) and we are not persuaded that Carrier has carried its burden of proof." Third Division Award 30454. The Carrier has not sufficiently shown why it would violate Hours of Service to require the Carrier to pay (not work) Claimant Hosp as a consequence of the Carrier's operating with a limited number of Dispatchers and an Agreement provision which requires "Agreement between the management and the General Chairman" to combine the positions in this case. To find otherwise would effectively allow a violation of the Agreement to go unremedied because the Carrier exercised a prerogative and chose to limit the number of available Dispatchers.

Third, this is not a case where there was a partial blanking of a position and no evidence that work of that blanked position was performed which could limit a remedy. See Award 30454. Here, the position was blanked for the entire shift. Had West Belt Dispatcher Masek not marked off sick, and without any evidence to the contrary, we must assume that he would have had a shift's worth of work to perform on June 16, 1995.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of November 1998.