Award Number 3097

Docket Number TD-3145

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Edward F. Carter, Referee)

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY—PACIFIC LINES

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that the Southern Pacific Company (Pacific Lines) did not comply with the provisions of Article 4 (f) of the Train Dispatchers' Agreement, effective October 1, 1937, when it failed and refused to compensate Train Dispatcher H. H. Mayberry, Dunsmuir, California in the amount of $92.21, to which he was entitled, when at its convenience the carrier held him off of his regular assignment on November 24, 25, 26, 27, 28 and December 1 and 2, 1944, requiring him to serve on other than his regular assignment. The time lost on these days was the opportunity to work the hours of his regular assignment, prevented because of the Hours of Service law, and H. H. Mayberry shall now be paid for such time lost.

EMPLOYES' STATEMENT OF FACTS: During the period involved in this claim, Train Dispatcher H. H. Mayberry was regularly assigned to a position as relief dispatcher in the Dunsmuir, California office of the carrier. The weekly schedule of his assignment was as follows:

Day	Position Relieved	Hrs. of Assignment		Rate
Sunday	Chief Dispatcher	1-A	8:00 A. M.—4:00 P. M.	$15.53
Monday	2nd Trick Dispatcher	5-A	4:00 P. M.—12 Midnight	12.43
Tuesday	Asst. Chief Dispatcher	2-A	4:00 P. M.—12 Midnight	14.53
Wednesday	Asst. Chief Dispatcher	3-A	12 Midnight—8:00 A. M.	14.53
Thursday	Rest Day			
Friday	1st Trick Dispatcher	7-A	8:00 A. M.—4:00 P. M.	12.43
Saturday	1st Trick Dispatcher	4-A	8:00 A. M.—4:00 P. M.	12.43

During the period involved in the claim, or from November 22 to December 2, 1944, the carrier removed Claimant Mayberry from his own regularly assigned positon (above described) and by direction caused him to serve on another assignment as follows:

Date	Position Relieved	Hours of Work	Allowed Compensation
Wednesday, Nov. 22, 1944	Trk. Dispatcher 6-A	12 Midnight—8:00 A. M.	$14.53
Thursday, Nov. 23, 1944	Trk. Dispatcher 6-A	12 Midnight—8:00 A. M.	18.64
Friday, Nov. 24, 1944	Trk. Dispatcher 6-A	12 Midnight—8:00 A. M.	12.43
Saturday, Nov. 25, 1944	Trk. Dispatcher 6-A	12 Midnight—8:00 A. M.	12.43
Sunday, Nov. 26, 1944	Trk. Dispatcher 6-A	12 Midnight—8:00 A. M.	15.53

The carrier submits that Article 4 (f) is in no way applicable to the case involved in this docket for the reason that the claimant did not, during the period involved in this docket, lose time because of the operation of the hours of service law, or in changing positions. As a matter of fact, in being used to fill the vacancy on position No. 6-A, during the period November 22 to December 2, inclusive, 1944, the claimant actually gained rather than lost time, to the extent that in addition to working on each of his assigned working days during said period, he also performed service and was compensated therefor at the rate of time and one-half on two days (November 23 and 30) on which he would not have worked had he remained on his regular assignment, which resulted in substantial additional compensation to the claimant.

Attention is directed to the fact that in progressing the instant claim with representatives of the carrier, the petitioner relied upon the interpretation placed upon Article 4 (f) of the current agreement by this Division in its Award 2742. The carrier asserts that notwithstanding the fact that it has conclusively established that Article 4 (f) is not in any way applicable to the claim involved in this docket, nevertheless, even though the Division should conclude that said award constituted such an interpretation as is contended by the petitioner, such fact would not present a basis for sustaining the claim involved in this docket for the reason that said claim (for certain dates during the period November 22 to December 2, inclusive, 1944) was first presented to carrier's division superintendent by petitioner's local chairman in a letter dated December 30, 1944, whereas Award 2742, was rendered on December 13, 1944. Thus, it will be observed that said claim was not pending or unadjusted on December 13, 1944. In other words, the presentation of this claim constitutes an attempt by the petitioner to obtain payments of additional compensation under what it claims is the proper interpretation of Article 4 (f) established by Award 2742, for dates antedating the date of said award and which payments were not claimed either at the time of the occurrence or prior to the date of the award.

It is a well established principle of the National Railroad Adjustment Board that claims predicated upon an interpretation established by a previous award of the Board, which claims were not made until subsequent to the rendition of such award, will not be considered: See Awards 336, 1177, 1238, 2044, 2730, 2748, 2671, 2929, 3064, 3385, 3523, 4007, 4443, 4555, 4936 of the First Division and Award 2261, Third Division, National Railroad Adjustment Board.

The Division will note that in its statement of claim the petitioner alleges that the claimant is entitled to an amount of "$92.21." The said amount is the amount of compensation the claimant would have received for the dates involved in this claim had he worked his regular assignment; however, the petitioner fails entirely to consider the fact that the claimant was compensated the same amount he would have earned on his regular assignment for said dates. Therefore, even though the petitioner's claim was valid, which it is not, the claimant would only be entitled to an additional amount of $87.01 (which amount represents seven days' pay at the rate of $12.43) as he has already been compensated at the rate of his own assignment for the days he worked on position No. 6-A.

CONCLUSION: The carrier submits that it has established that the claim in this docket is without basis or merit, and therefore respectfully submits that it should be denied.

OPINION OF BOARD: Claimant was a regularly assigned relief train dispatcher with a definite weekly schedule of work periods with Thursday his assigned day of rest. On November 22, 1944, Claimant was directed by the Carrier to work the third trick dispatcher's position because of the illness of the third trick dispatcher and the unavailability of any extra dispatchers. The Carrier correctly compensated the Claimant on the days he performed the work of the third trick dispatcher. The Claimant contends that he is entitled to be compensated for loss of time in not being able to work his regular assignment because of the Hours of Service Law. The applicable rule is:

"Loss of time on account of the hours of service law, or in changing positions, within an office, by the direction of proper authority shall be paid for at the rate of the position for which service was performed immediately prior to such change. This does not apply in case of transfers account employes exercising seniority." Article 4 (f), current Agreement.

The substance of the Hours of Service Law is that no train dispatcher handling orders affecting train movements shall be permitted to work more than nine hours in any twenty-four hour period except in case of emergency. It is clear to us that when Claimant worked the third trick dispatcher's position, he could not work his regularly assigned relief position because of the Hours of Service Law. This being true, Claimant is entitled to be paid as provided by Article 4 (f), current Agreement. This is in accord with Award 2742 which is directly in point. Carrier contends further that as Claimant suffered no loss of compensation, he suffered no loss of time within the meaning of the rule. This was also rejected in Award 2742 and we adhere to the conclusions therein reached.

Carrier urges that the claim should not be considered for the reason that it involves service antedating Award 2742 which is relied upon as the basis for an affirmative award. Award 2261 is cited as the controlling precedent on this point. An examination of that award reveals an attempt to assert a right to an affirmative award more than four years after the claim had been denied by the Carrier. In passing upon the claim, the Board said:

"To permit recovery on such a claim would not only be most inequitable to the Carrier but would certainly be against the spirit of the Railway Labor Act and the rules of procedure adopted by this Board. The Act provides for the prompt and orderly settlmeent of disputes. The Rules of Procedure represent an attempt to accomplish this result.

"If after an award changing the interpretation of a Rule, the Employes were permitted to go back and apply the new interpretation to the support of claims for additional pay for similar work completed and paid for long before the award was rendered, confusion and uncertainty to the Carrier, and delay in the settlement of disputes would result."

It is quite apparent that the foregoing award is bottomed on principles of acquiescence and laches, factors that do not appear in the confronting case and brings us, because of their absence, to a contrary result.

The Carrier contends also that an interpretation of the applicable rule was agreed upon by the Carrier and the Organization. In response to a request by the Vice General Chairman of American Train Dispatchers that some uniform practice be followed in using assigned train dispatchers where no extra train dispatchers were available, the Carrier advised that,

". . . the assigned train dispatcher required to work on his relief day should be used on his regular assigned position, when possible, and the assigned relief dispatcher used or held back to protect the unanticipated condition or added requirements, instead of the regular man being required to work some position other than his own."

Approximately a year later, the Vice General Chairman advised all chairmen of the announced rule and closed his letter with the following statement:

"Any loss in compensation to such relief or extra train dispatchers due to this arrangement should be taken care of without necessity of filing a formal claim, however, they are, if necessary, protected by Article 4 (f)."

We find nothing in these two letters that constitutes an agreed upon interpretation of Article 4 (f). In fact, the Vice General Chairman's letter

indicates that in case of any dispute, Article 4 (f) is available for the employe's protection. There appears to have been no intent to modify or construe the rule by mutual agreement. The claim of the Carrier that there was a modification by mutual agreement cannot be sustained on the record before us.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated as alleged.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of January, 1946.

DISSENT TO AWARD NO. 3097, DOCKET TD-3145

The controlling Agreement recognizes that conditions may require the use of assigned train dispatchers on other than their regular assignments and provides the basis of compensation for such service, whether it be in the same office or at other points.

This Award holds that while the claimant was temporarily filling the third trick during the illness of the incumbent of that position, under Article 4 (f) he was entitled to two days' pay for each day's work. This holding disregards the definite provisions of the Agreement which provide for the same rate of pay as if working his regular assignment.

Article 4 (f) does not justify compensation in excess of that provided for by specific provisions of the agreement.

/s/ R. H. Allison
/s/ C. C. Cook
/s/ R. F. Ray
/s/ A. H. Jones
/s/ C. P. Dugan