Award No. 5369
Docket No. TD-5299

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association for and in behalf of Train Dispatcher F. C. Davis that:

(1) The Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas failed to comply with the intent of the current agreement when this Carrier refused and continues to refuse to compensate Train Dispatcher F. C. Davis in accordance with the requirements of Article IV-(c) of that Agreement, and

(2) The Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas shall now compensate the said F. C. Davis in an amount representing the difference between what was paid him and what he should have been paid under the terms of the Agreement.

EMPLOYES' STATEMENT OF FACTS: An agreement on rules governing compensation, hours of service and working conditions between the parties to this dispute, and applicable to Claimant F. C. Davis, was in effect at the time this dispute arose. A copy of that agreement is on file with the Board and is, by this reference, made a part of this submission as though fully incorporated herein.

Claimant F. C. Davis is employed as a train dispatcher by this Carrier in the Parsons, Kansas office. His regular tour of duty comprehends the performance of train dispatcher service from midnight to 8:00 A. M. on Saturdays, Sundays, Mondays, Tuesdays and Wednesdays. He is off duty on Thursdays and Fridays of each week.

At about 4:30 P. M. Thursday, December 22, 1949 (Claimant's first off-duty day), Mr. Davis, who at the time was visiting in Kansas City, Missouri, was directed by his employer to leave Kansas City on this Carrier's Train No. 27, due to leave Kansas City at about 9:40 P. M., on Thursday, December 22, and come to Parsons, Kansas and, upon arrival, work as third trick train dispatcher. The position he was to fill was the one on which he had, under the terms of the agreement rules, completed his regular tour of duty on Wednesday, December 21, and on which his regular tour of duty did not again begin until 12:01 A. M., Saturday, December 24.

for less than a day's work as evidenced by the fact Petitioner has cited no rule or agreed interpretation of any rule to support such a contention. The fourth paragraph of Agreement No. DP-116, specifically and clearly provides for payment of time and one-half **for service performed.** It does not provide for payment of a minimum day, or for service not performed, as evidenced by the plain wording of the rule and the fact that no such claim or contention is made. The fact that claimant was not available and could not make himself available for service until 2:00 A. M., December 23, 1949 is a responsibility he assumed when he left his place of employment for personal reasons and is no responsibility of the Carrier. He is not entitled to any compensation for service not performed or for service he is not available or could not make himself available to perform.

Payment of claim for minimum of one day at time and one-half rate would not only be contrary to Article 3 (a) and (b) as revised by Agreement DP-116, effective September 1, 1949, and Article 4 (c) of the current agreement and agreed interpretations thereof, but would in fact have the effect of revising those rules to require payment of minimum day at time and one-half rate for service performed under those rules, which those rules and agreed interpretations thereof definitely and unmistakably do not provide for nor require. Those rules and the agreed interpretations thereof can only be changed by negotiations between the parties in accordance with the agreement provisions and the amended Railway Labor Act.

The claim is, therefore, without merit, agreement support, and should be denied.

Except as expressly admitted herein, the Carriers deny each and every, all and singular, the allegations of Petitioner's claim, original submission and any and all subsequent pleadings.

(Exhibits not reproduced.)

OPINION OF BOARD: Claim is made for 2 hours at the rate of time and one-half for service performed by Train Dispatcher F. C. Davis on one of his regularly assigned rest days. The facts are not in dispute and are set forth in full hereinabove.

Briefly summarized, the controlling facts are that on Tuesday, December 22, 1949, about 4:30 P. M., one of claimant's rest days, he was called to protect vacancy on third trick, 12:00 midnight to 8:00 A. M., December 23, 1949, at Parsons, Kansas, dispatching office. Claimant was in Kansas City, Missouri, when called. He left on the first available train, which was due to arrive in Parsons at 12:25 A. M., but did not arrive until 1:55 A. M. Claimant reported at 2:00 A. M. and worked 6 hours. He was paid for 6 hours, the actual time worked, at the rate of time and one-half. He claims that he should have been paid for 8 hours at the time and one-half rate.

The relevant contract provisions are: Article III (a) of the current Agreement, second paragraph, as revised, effective September 1, 1949, which reads as follows:

> "Regularly assigned train dispatchers who are required to perform service on the rest days assigned to their position will be paid at rate of time and one-half for service performed on either or both of such rest days."

and Article IV (c), which reads:

> "Train dispatchers notified or called for such work outside their regular tour of duty and not used will be paid for three (3) hours; if used they shall be paid a minimum of one day's pay."

The claim is made under Article IV (c), which guarantees a minimum of one day's pay when an employe is called outside his regular tour of duty

and is used. The Employes contend that Article IV (c) guarantees pay for 8 hours, and Article III (a) fixes that rate of pay at time and one-half. The Carrier contends that since the work was performed on a rest day, the rest day provision of Article III (a) is the only provision applicable and that since this limits the right of compensation to **service performed,** claimant was properly compensated when he was paid for the 6 hours he actually worked at time and one-half.

The Carrier states, and this is not disputed by the Employes, that train dispatchers have always claimed and been paid for service on rest days under the rest day rule in effect. The call day rule was put into effect July 16, 1937, and the rest day rule which was part of that Agreement, Article III (a), and which continued until it was changed as shown above, September 1, 1949, read as follows:

> "If required to work such relief day, compensation will be allowed at one and one-half times the daily rate."

This rest day provision was changed to its present language. The Employes, however, counter by saying that no use was made of the call rule because in all previous instances the employes worked a full day on their rest days.

The issue here presented is one solely of construction of the Agreement. This Board will follow the customary rules of construction. It must endeavor to give meaning and effect to each part of the Agreement; it may not read into the contract a provision not expressly or by implication justified by the language of the Agreement; it must attempt to give effect to the intent of the parties as that intent is expressed in the language of the contract and the past practice of the parties. It may not because of equitable consideration read into an Agreement a benefit or limitation which is not justified by the language of the Agreement, but must leave such amendment of the Agreement to the collective bargaining process.

At this point it may be well to dispose of one point which recurs throughout the record. The claimant was in Kansas City when called. He travelled by the first available train of the Carrier to Parsons. The train was late in arrival and because of this circumstance, he reported at 2:00 A. M. instead of 12:25 A. M. The Agreement contains no provision for travel or deadhead time. The Employes suggest that a hardship was imposed on the claimant because he was late not because of fault on his part, but because the Carrier's own train was late, and also that his plans for his rest period were upset. These are strong equitable considerations, but regardless of how the individual members of this Board may react to them, this Board has no choice but to exclude them from its considerations. It is an old saying that hard cases make bad law. We do not have the power, nor are we inclined to make bad law. We could not rectify the situation complained of without writing into the Agreement a provision which has not been obtained by collective bargaining. This we will not do.

The basic contention of the Employes is that Article IV (c) is not complete in itself in that the rate of pay is not stated and that therefore it must be read together with Article III (a). Let us examine Article IV (c). It contains two guarantees: (1) a guarantee of 3 hours' pay if called and not used, and (2) a guarantee of one day's pay if called and used. Article III (a) provides for a rate of time and one-half "for service performed" on a rest day. Article III (a) by its express language does not fix a rate of pay for a situation when an employe is called on the rest day but not used. In that situation an employe has not performed any service. It is obvious that the rate of pay for the 3 hour guarantee under Article IV (c) is not fixed by Article III (a), and that the employe's rights are fixed exclusively by Article IV (c).

This leaves the guarantee of 8 hours for a call when used to be considered. The only way in which this Board can give effect to the Employes' contention that Article III (a) fixes the rate of pay at time and one-half on a rest day is to read Article III (a) as though the words "for service performed" were deleted from the text of this Article. In other words, the Employes' contention if sustained would render nugatory an important part of the rest day rule. Our obligation is to give effect and meaning to all parts of the Agreement. Article III (a) was revised in September 1949. The call rule has been in effect unchanged since 1937. It is difficult to believe that the parties would add a provision to an Agreement intending that a vital portion of it should be a nullity from its inception.

Our obligation is to give effect and meaning to all parts of the Agreement. This can be done. Article IV (c) guarantees 8 hours' pay at the pro rata rate to an employe who is called to work outside his regular tour of duty, and this certainly would include his rest days, if he is used at all on such a day. He receives this guarantee irrespective of the length of his tour of duty. Article III (a) provides he shall receive time and one-half for all hours during which he performs services on a rest day. In this case the call rule guaranteed 8 hours at the pro rata rate. The employe was paid for 9 hours at the pro rata rate, or 6 hours at time and one-half for the 6 hours he actually worked. In our judgment giving effect to the clear meaning and intent of all provisions of the Agreement, the claimant was compensated in accordance with the Agreement and the claim is accordingly without merit.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of June, 1951.