

Award No. 5685

Docket No. TD-5671

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Colorado and Southern Railway Company violated the provisions of Rule 16 (b), of the current train dispatchers agreement, when it removed Dispatcher A. H. Wendt from the first relief position to which he was assigned on November 29, 1949, the position upon which Dispatcher Wendt was placed by the carrier, pursuant to the provisions of Rule 16 (e), December 2, 1949, and,

(b) The Colorado and Southern Railway shall now compensate Dispatcher Wendt, for services performed between January 26, 1950, and March 17, 1950, both dates inclusive, in accordance with the provisions of Rules 4 (d) and 5 (b), and,

(c) The Colorado and Southern Railway shall now compensate Dispatcher Wendt for the time lost from his first relief position, between January 26, 1950, and March 17, 1950, both dates inclusive, in accordance with the provisions of Rule 8 (c), as a result of instructions issued by management January 23, 1950.

EMPLOYEES' STATEMENT OF FACTS: There exists between the Colorado and Southern Railway and its train dispatcher represented by the American Train Dispatchers Association an Agreement effective February 1, 1945, partly revised effective September 1, 1949, governing compensation, hours of service and working conditions. A copy of that Agreement is on file with your Honorable Board and is, by this reference, made a part of this submission as though fully incorporated therein. The contract rules of that Agreement, pertinent to this claim, read as follows:

"RULE 4—BASIC DAY AND OVERTIME

(d) Train dispatchers notified or called to perform work not continuous with their regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less at pro rata rate and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

Dispatcher Wendt did not lose any time in transferring from temporary Relief position to his regular assignment.

Dispatcher Wendt was regularly employed from January 26, 1950, to March 17, 1950, on his regular assignment and did not lose any time unless during that period he laid off of his own accord. He was compensated for each day he was worked. The Carrier has never contracted to pay more than one day's pay for one day's service. The Agreement does not provide otherwise.

When first trick Dispatcher C. E. Conroy was taken sick and the Superintendent was advised by the Chief Surgeon that he would be off possibly 60 days, his vacancy and other vacancies occasioned thereby were advertised for bids in accordance with long undisputed practice for 60 days. The Dispatchers bidding on these vacancies bid and accepted the assignments with that provision and without protest. When it became known that the vacancy of C. E. Conroy would be longer than that period, the vacancies were re-advertised and Dispatcher Wendt had an opportunity, if he desired to work the Relief position, to again bid on the vacancy of the Relief position—this he willfully did not do. When the protest was received from the Vice President under date of January 23, 1950, in regard to bulletining temporary positions for a given number of days, which was after assignments had been made, the Carrier agreed, in order to satisfy the complaint and protest, that hereafter it would advertise for the vacancies with no definite duration.

The Carrier contends it did not violate Rule 16(b) when it advertised the vacancy for 60 days which, at that time, was contemplated would be for 60 days, and further contends that temporary positions have been advertised for a given number of days for many years past without protest. Furthermore, Dispatchers bid on the vacancies and accepted same without protest. The Organization did not make any protest in connection with this matter until January 23, 1950, which was after assignments had been made on the notices posted.

Dispatcher Tober bid on Notice No. 1 and was assigned under that Notice. Dispatcher Wendt had the opportunity of bidding on Notice No. 2 the same as Tober bid on Notice No. 1, if he had desired to continued on the temporary Relief position. When he failed to bid on this position, the Carrier contends it was proper to assign him to his regular position.

The Carrier contends that claim for compensation under Rule 4(d), which is a call rule, has no merit. Dispatcher Wendt was assigned to his regular position and was not called to for work outside of his regular assignment, therefore, there can be no claim under Rule 4(d).

The Carrier contends that Dispatcher Wendt was accorded relief on his regular assigned rest days under the provisions of Rule 5(b) and, therefore, there can be no claim for working on rest days assigned to his position.

The Carrier contends that there can be no claim under Rule 8(c) as there was no loss of time in changing from the Relief position to his regularly assigned position.

In view of the above, this claim in its entirety should be declined.

Dispatcher Wendt did not lose any compensation. He was afforded five days work per week and was paid for all days worked. He is not entitled to double compensation.

ment when on or about January 23, 1950 Claimant was removed from first
(Exhibits not reproduced.)

OPINION OF BOARD: This docket involves a claim of Dispatcher A. H. Wendt that respondent Carrier violated Rule 16(b) of the applicable Agreement when on or about January 23, 1950 Claimant was removed from first

relief position and placed on the third trick dispatcher position effective January 26, 1950.

On or about November 25, 1949, Carrier's representative issued Notice No. 5 calling for bids on a relief dispatcher position. Claimant having placed a bid on the position, the Carrier formally assigned him to the position on November 29, 1949, to begin work thereon on December 2, 1949. The record shows that this was intended as a temporary assignment occasioned by the illness of another dispatcher.

Under date of January 19, 1950, Carrier's representative posted this same first relief position for bids again. Claimant did not place a bid therefor and was consequently taken from the first relief position and placed on the third trick dispatcher position effective as of January 26, 1950.

Petitioner holds that under Rule 16, Wendt, the Claimant dispatcher, was entitled to remain on the temporary vacancy for its duration; that no provision of Rule 16 gave the Carrier the right to readvertise the position as was done in the instant case.

Respondent contends that when Notice No. 5 was posted it specified that the assignment of the first relief position would be for a period of 60 days. Hence when it was readvertised on January 19, 1950, it was because the 60-day period was about to expire. The Carrier further states that all Claimant had to do in order to continue in the position after the 60-day period was to place a bid on Train Dispatcher Notice No. 2 issued on January 19, 1950. This he failed to do, hence he was taken from the first relief position and placed on the third trick job.

The Carrier contends that the practice of specifying the number of days in the Notice is one of long standing, and is a practice to which the Association has not heretofore objected.

The Petitioner contends that Notice No. 5 contained no mention of 60 days as the duration of the job, and that even if it had such a time specification would have been in violation of Rule 16 (b). The Carrier concedes that Notice No. 5 as originally issued did not contain the mention of "60 days." However, Respondent claims that this Notice was cancelled and an amended Notice No. 5 was issued which did contain the reference to "60 days."

Rule 16 (b) relied upon by Petitioner reads as follows:

"(b) Vacancies and new positions of more than six (6) days duration will be bulletined and may be filled by the senior train dispatcher on the division making application therefor. Such applications must be made in writing within three (3) days from date of notice.

An assigned train dispatcher bidding in a temporary position under the foregoing paragraph will return to his former assignment when temporary position no longer exists."

We must conclude that under the language of this rule Claimant was entitled to stay on the first relief position as long as it continued. The rule above quoted states that the "assigned train dispatcher * * *" will return to his former assignment **when temporary position no longer exists.**" (Emphasis supplied). The record shows that the position here in question continued until March 17, 1950.

Carrier's contention that it was justified in this matter on the basis of past practice cannot be accepted as controlling. At no point in the record does the Carrier give any evidentiary support for this claim. Instead there is simply a reliance upon a generalized conclusion. We have held on previous occasions that he who pleads past practice as a defense must provide evidence of such practice. (Awards 5421 and 5501).

In the instant case no such proof has been forthcoming.

In view of the clear language of the rule we hold that the Agreement was violated by the Carrier, and that Claimant is entitled to monetary payments at pro rata rates for the time he would have worked on the first relief position between January 26, 1950, and March 17, 1950, had Respondent allowed him to continue in that position for its duration.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated the Agreement.

AWARD

Claim sustained to the extent provided in the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of March, 1952.