Award No. 5899
Docket No. TD-5849

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

READING COMPANY

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

(a) The Reading Company failed to comply with the requirements of Rule 4-(e) of the current agreement when it refused and continues to refuse to pay Train Dispatcher Irvin J. Kelly for loss of the opportunity to perform train dispatcher service on Friday and Saturday of each week during a period between January 1, 1951, and February 19, 1951, on the hours of his regularly assigned position due to the fact that he was required by direction of the Carrier to fill another assignment not acquired by him through exercise of the seniority provisions of the agreement and which assignment did not include working days on the days herein claimed.

(b) The Reading Company failed to comply with the requirements of Rule 3-(a) of the current agreement when it refused and continues to refuse to compensate Train Dispatcher Irvin J. Kelly for the difference between pro rata rate which he was paid and time and one-half rate to which he was entitled for service on Monday and Tuesday of each week during a period between Monday, January 1, 1951 and Sunday, February 18, 1951, both dates inclusive, which were the two regularly assigned rest days of the assignment which was his property right because he acquired it through the seniority provisions of the contract agreement and on which he was prevented from serving due to the fact that, by direction of the Carrier, he was caused to serve on another position, not his property and which required service on the days claimed herein.

(c)-(1) The Reading Company shall now be required to pay Claimant Irvin J. Kelly at pro rata rate, trick train dispatcher rate for each Friday and Saturday embraced in the period stated in Section (a) of this claim on which he lost the opportunity to perform service on his own assignment—and

(2) The Reading Company shall be required to pay Claimant Irvin J. Kelly the difference between the pro rata rate, trick train dispatcher rate, which was paid and the time and one-half rate to which he was entitled on each Monday and Tuesday on which he was required to perform service on the rest days of his own position while serving on an assignment, not his own, in the period stated in Section (b) of this claim.

EMPLOYES' STATEMENT OF FACTS: In its Philadelphia, Pennsylvania train dispatching office during the period of the instant dispute, the Carrier maintained a train dispatching force consisting of:

OPINION OF BOARD: There is agreement between the parties on the facts material to our decision on the dispute. (1) Among five Relief Dispatchers in the Carrier's Philadelphia Division dispatching office Claimant Kelly was regularly assigned as Relief Train Dispatcher on relief position No. 5. (2) The rest days for this position, regularly assigned under the Agreement, were Monday and Tuesday of each week. (3) In the above mentioned office there were four dipatching areas known as Desks A, B, C, D, each occupied by three regular Train Dispatchers on respective successive tricks. (4) Kelly relieved on Desk D, various tricks. (5) In this office there were also four extra Train Dispatchers. (6) On December 31, 1950 the regular Dispatcher assigned to the second trick on Desk D died suddenly. The rest days for this trick and Desk were Friday and Saturday. (7) On January 1, 1951 Relief Dispatcher Kelly was asked to fill the regular second trick position, which he did through February 18, 1951. On February 19, 1951 he became ill, was out several days, and upon his return was put back on his previous relief assignment. (8) The Carrier bulletined the vacant regular second trick position and selected a man therefor, in accordance with the Agreement's provisions, by January 15, 1951 but did not place him on the job until February 24, 1951, because he did not until then qualify for the duties thereon. (9) On January 1, 1951 none of the four extra Dispatchers were qualified for temporary assignment to the suddenly vacant position, but by January 19, 1951 one had so qualified. Nevertheless, he was not used thereon from January 19 to February 18. (10) During his incumbency in the regular trick position, Kelly worked the regularly assigned rest days (Monday and Tuesday) of his relief position, but had the regularly assigned rest days of the position he was temporarily filling. (11) Several times previously without protest by the Organization, regularly assigned Dispatchers, relief or regular trick, had been moved about by the Carrier to fill unexpected vacancies. (12) The Carrier had been experiencing difficulty in getting extra men to qualify for the Desk D position, and had not used its authority to require them to do so.

In opposing what seems to it to be an unreasonable, inequitable claim for pro rata payment for time not worked, and penalty payment for two days of time worked, the Carrier places main reliance on Rule 3(e) of the Agreement, which says that "anyone who works in place of a regularly assigned train dispatcher shall assume the regularly assigned weekly rest days of the position." The Carrier contends that—(1)—this rule, particularly because of its use of the word "anyone", affords ample justification and sanction for its action in the instant case; and—(2)—this rule is a special, specific one taking precedence over any other more general rules.

As further justification, the Carrier also points to past unprotested practice; to the emergency conditions under which the vacancy arose; and to the second paragraph of Rule 5(j), which states that temporary vacancies of six months or less, due to sickness, etc., will not be bulletined but will, upon application, be assigned to the senior qualified applicant.

The Organization holds that the circumstances of this case Rule 3(e) is not controlling—first, because this section of the rule must be interpreted in the light of other sections thereof; and second, because the regular incumbent having died, there was no "regularly assigned Train Dispatcher" for whom Kelly was substituting. In respect to the allegation of previously unprotested past practice, the Organization minimizes the extent thereof and cites Awards of this Board which hold such practice not to be controlling when in violation of the terms of an Agreement. In respect to the allegation of emergency, the Organization contends that, if such existed, it was due to the Carrier's failure to exercise its agreed on managerial prerogatives to require extra men to become qualified for the position. In respect to Rule 5(j), second paragraph, the Organization contends that the position was not a temporary one of the sort contemplated by this rule; and in any case, this rule is not applicable to this case, for it uses the words "upon application", and Kelly, not desiring the position, did not apply for it.

In positive justification of the two-fold claim the Organization relies on Rules 3(a) and 4(e). The former is used to support claims (b) and (d),

the latter to bolster claims (a) and (c). Rule 3(a) provides for time and one-half pay for work required on the regularly assigned rest days of a position. Rule 4(e) states that time lost in changing positions by direction of proper authority shall be remunerated at the pro rata rate of the position held immediately prior to the change. The Organization contends that, unless these rules are strictly adhered to, the Carrier would feel free to shift men from position to position at will, in disregard of the basic purpose and intent of the Agreement.

The Organization does not deny the right of the Carrier to place Kelly temporarily into the vacant position. It simply asserts that, having done so, it is properly subject under the Agreement to the claims hereinbefore set forth.

We think that under the circumstances of this case, we must rule in favor of the Claimant. In essence, our first decision lies between—(1)—relieving the Carrier from making what might be held to be inequitable payments for work not performed and —(2)—adhering to a strict and proper construction of the applicable terms of the Agreement. In respect to equities, it does not appear from the record that Claimant Kelly was inconvenienced by the temporary change in position, or that he lost time or pay during his work week. On the other hand, it might be held that to grant the claim would be unfair to the Carrier: Each week from January 1 through February 18, 1951 it would be required to pay for two days not worked at all, and for eight penalty hours over a two day period also. However, we believe that there is merit in the Organization's contention that much of the blame for such inequity must be laid at the Carrier's own door. It failed to exercise its authority to require extra men to obtain the necessary qualifications for the position in question.

In any case, this Board has long held that where considerations of equity are in conflict with a proper construction of the Agreement, the integrity of the Agreement must be preserved; and inequities in the application of its terms are appropriately to be handled by collective bargaining between the parties.

We come then to the second decision required of us by this case: What is the proper interpretation of the Agreement? It appears that the purpose of relief positions is to enable continuous operations to be performed while the rest days required by the Agreement are provided for the regular trick men as well as for the relief. It appears further, that the purpose served by extra positions and men is to provide continuous service for regular trick jobs and/or relief jobs when the incumbents of either are temporarily absent. Clearly then, the suddenly vacant position should have been filled temporarily by an extra man, and permanently by a qualified bidder, in accordance with the general intent and specific provisions of the Agreement's rules. It does not appear to have been the fault of the Agreement or of the Claimant or of the Organization that no extra man was qualified to work on the position on January 1, 1951, or for that matter, that the employe who was properly awarded the vacancy on January 15, 1951 was not qualified to assume the duties on the latter date. The Carrier, it seems to us, should have taken appropriate steps to have qualified extra men available.

From the record, we think that Rule 3(e) was not mainly designed to cover cases such as the one before us now. Viewed in the context of the whole rule, it seems to us that its chief application was to be in respect to extra men, rather than regularly assigned relief employes.

We think also that we must hold with the Organization in its interpretation of Rule 5(j). Claimant Kelly did not want or apply for the position, even if it could have been considered temporary. And we do not believe the position was a temporary one, in the sense intended by that rule.

It might be argued that the claim should not be allowed in full, but only to the extent (January 19 through February 18) resulting from the

Carrier's failure to place in the position the extra man who became qualified for it on January 19, 1951. We recognize that this resolution might be deemed a sort of compromise between the conflicting contentions. But on the premises underlying our ruling there would be very little justification for adopting such compromise. If the Carrier was remiss in not having a qualified extra man available January 1, it appears to have been only slightly more remiss in not putting on such a man when he became available. The "emergency" was over by January 19, but it need not have existed on January 1. And if our interpretation of the Agreement is a proper one, it should apply to the entire period January 1 through February 18. We do not see how we can interpret the applicable provisions of the Agreement one way for the January 1-January 18 period, because an emergency might be said to have existed during those days, and another way for the January 19-February 18 period when the "emergency" was over because a qualified extra man became available. We think the Agreement, as we have construed it, was not adhered to for the whole January 1-February 18 period.

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 violated the properly applicable provisions of the Agreement.

AWARD

Claims (a, b, c) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 30th day of July, 1952.