Award No. 5975

Docket No. TD-5971

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred E. Messmore, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(a) The Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the Carrier, failed and continues to fail to comply with the intent of Rule 16-(a) of the currently effective agreement between the parties hereto, when it declined and continues to decline to pay to Train Dispatcher H. L. Tackett, et al (specifically named in the Statement of Facts) at a daily rate computed in accordance with said Rule 16-(a) on days when the Carrier required these Claimants to perform chief train dispatcher service, and

(a) The Carrier shall be required to pay to each of the Claimants the difference between what they have been paid and the amount they were contractually entitled to be paid under the provisions of Rule 16-(a), also, that during the life of said Rule 16-(a), the Carrier shall comply with its requirements when compensating any train dispatcher who is subject to the rules of the agreement between the parties whenever he is used to perform chief train dispatcher service.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the Carrier and the claimant organization, effective March 1, 1943. There is also a memorandum agreement, effective September 1, 1949, revising certain rules of the agreement. Both are on file with your Honorable Board and by this reference they are made a part of this submission the same as though fully set out herein.

For ready reference the rules material to the adjudication of this claim, and the effective dates thereof, are:

Rule 1. (Effective March 1, 1943).

This agreement shall govern the hours of service and working conditions of train dispatchers.

The term "train dispatcher" as herein used shall include all train dispatchers except one Chief Train Dispatcher in each dispatching office.

4. Award 5244 cannot control the decision here since a similar interpretation of the Northern Pacific rules were not in evidence when that decision was made.

In view of the above, the Carrier respectfully requests this claim be denied.

(Exhibits not reproduced).

OPINION OF BOARD: The facts are not in dispute. The claimants held regular assignments as Relief Train Dispatchers in Carrier's various dispatching offices. They were covered by the agreement between the parties. These positions were secured through procedure provided for in the agreement and by the exercise of seniority rights granted under the seniority rules contained therein. These relief assignments provided that they work on the position of Chief Train Dispatcher one day each week, a position excepted from the general provisions of the agreement.

On the dates set forth in the Employe's Statement of Facts claimants worked the position of Chief Train Dispatcher rate of pay. For this service the Carrier paid claimants one three-hundred and thirteenth of the yearly rate of the Chief Train Dispatcher position. When the National Five-day week agreement became effective, September 1, 1949, Relief Train Dispatcher's rate was computed on a daily basis as follows: The daily rate to be determined by dividing the yearly rate, as provided by Article III, Rule 16 (a) of the agreement. Claim is here presented to enforce payment of the Chief Train Dispatcher rate on the formula as contained in Rule 16 (a).

The Employes contend all rules of the agreement between the parties, including Rule 16 (a) apply to Train Dispatchers for work performed on each day of his assignment, including the position of Chief Train Dispatcher. This being true, the Carrier is obligated, as provided for in Rule 16 (a), to compensate claimants at the daily rate by multiplying the regular monthly rate by twelve and dividing the result by two hundred sixty-one.

Rule 16 (a) of the agreement provides: "Train Dispatchers shall be monthly employes but the monthly compensation shall be computed on a daily basis. To determine the daily rate, multiply the monthly rate by 12 and divide the result by 261***.

The Carrier contends the position of Chief Train Dispatcher is excluded from the scope of the current agreement, and Rule 16 (a) therefore is inapplicable in this connection. Rule 18 (a) is cited. It reads: "Where relief requirements (including position of Chief Train Dispatcher) regularly necessitate four (4) or more days of relief service per week, a relief train dispatcher shall be employed and regularly assigned, and shall be compensated at the rate applicable to position worked. On days when not engaged in 'train dispatcher' service, he will be assigned to such other service as may be directed by the proper supervisory officer and shall be paid for such service at the rate applicable to trick train dispatchers.

That Rule 16 (a) relates to train dispatchers and the monthly rate referred to can only relate to them. Therefore, inasmuch as the Chief Dispatcher's wage rate or salary data is entirely excepted from the agreement in the instant case, Rule 18 (a) is applicable and train dispatchers occupying the position of Chief Train Dispatcher are paid accordingly. Since this is true, the Carrier can properly, by unilateral action, determine the rate of pay and conditions of employment which attach to such excepted positions and to any employe that may fill it.

The question to be determined here is, when a train dispatcher working a Chief Train Dispatcher's position on a rest day and regularly assigned to such position, is such train dispatcher, under the circumstances, still subject to the terms of the contract between the parties governing his rates of pay and working conditions?

Awards of this Division adopted before the advent of The National Five-day week agreement involving claims of pay for time and one-half for a regularly assigned relief train dispatcher relieving the Chief Train Dispatcher on the regular relief days of that position held: "The claimant did not become Chief Dispatcher by virtue of the fact he performed service on that position on the day in question, and he relinquished none of his rights and privileges under the rules applicable to the regular assignment by the performance of such service." See Awards 2905, 3344, 5371, 5202, 3906, 2944, and 5904. These awards are self-explanatory and require no discussion of the point determined therein.

Award 5244, this Division, involving the same question under rules very similar to the rules here being considered based on an identical condition as in the instant case, said: "Train dispatchers may perform the work of the excepted Chief Dispatcher but that does not change them from train dispatchers where there is one holding the appointment of Chief Dispatcher. On such days the relief train dispatcher may be acting Chief Dispatcher, but he is yet a Train Dispatcher." Citing Awards 2905, 3344, 5202. See, also, Awards 5371 and 5904. The claim was sustained—the formula for calculating pay of such train dispatcher under the circumstances was in conformity with Rule 16 (a) as the same appears in the instant case.

The Carrier directs attention to Rule 18 (a) and asserts the practice between the parties has been, in reference to this rule, to use the Chief Dispatcher's monthly salary because that is the salary of the position worked, and this practice has been in effect since July 1, 1921. The language of all subsequent agreements has maintained the provision "shall be compensated at rate applicable to position worked." That the issue of practice under the agreement was not before the Board in Award 5244.

Furthermore, for 18 months after the five-day week was effective payment was made to the relieving dispatcher in this manner and accepted.

On this phase of the case, payment was made to relief train dispatchers, relieving the Chief Train Dispatcher and occupying such positions prior to September 1, 1949, the effective date of the National Five-day week agreement, was in accordance with Rule 16 (a) at that time.

The argument of the Carrier as to "long interrupted practice in effect" is not sustainable. Eighteen months after the effective date of the agreement, September 1, 1949, having reference to the Five-day week agreement wherein Rule 16 (a) sets forth the formula for computing pay as announced therein to parties fully covered by the agreement as heretofore referred to is a reasonable time to file a claim under the circumstances.

In the light of the foregoing cited Awards of this Division and the rules heretofore set out and discussed, the claim should be sustained. As to any determination that may occur in the future with reference to Rule 16 (a) we are not privileged to determine at this time.

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 claim should be sustained in accordance with the Opinion.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of October, 1952.

DISSENT TO AWARD 5975, DOCKET TD-5971

There is no reason for indulging in the error of this and the previous Awards to which this one has referred.

A trick dispatcher was properly used to relieve the chief dispatcher on the latter's day off. The rule provides for paying the relief chief dispatcher at "rate applicable to position worked." That was done but the majority says pay him at the chief dispatcher's rate yes, and calculate it on the basis you would use to calculate a trick dispatcher's daily rate. Such a formula effects a quotient still higher than the "rate applicable" to the chief dispatcher's position. Therefore, the formula for which the Referee has an expressed affinity creates a rate **which is not** the "rate applicable to the position worked" and the rule is completely ignored. Attractive arithmetic, not rule interpretation, is the order of this Award and it is wrong. The Award illegally creates a rate of pay for this position.

In an endeavor to find support for this bewildering conclusion, the Referee refers to Awards 2905, 3344, 5371, 5202, 3906, 2944, and 5904, all of which involve claims for punitive rates in behalf of regularly assigned relief train dispatchers for service as chief dispatchers. On the property of the respondent Carrier, the petitioning Organization is on record that the overtime rules of the collective agreements do not apply in the circumstances that obtained in the Awards relied upon by the Referee. This is clearly explained in the Carrier's submission and is evidenced in an irrefutable manner by Carrier's Exhibit No. 1.

The explanation is made that there is only "one chief dispatcher" and this is his day off; that, therefore, "on such days" the relief chief dispatcher "is yet a train dispatcher." Thus the Award says that because the relief chief train dispatcher is not a chief dispatcher but he is "yet a train dispatcher" he shall be paid several dollars more for the day than the rate applicable to the chief dispatcher's position. This is the fallacy. If he were yet a train dispatcher he should not be and would not have been paid more than the rate of a train dispatcher.

Because the Award is a departure from the rule, we dissent.

/s/ E. T. Horsley
/s/ J. E. Kemp
/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan