Award No. 6008
Docket No. TD-5938

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(1) (a) The Southern Pacific Company (Pacific Lines) hereinafter referred to as the Carrier, failed and continues to fail to apply the literal intent of Section (g)-4, Article 4, and other rules of the currently effective Agreement between the parties, when the Carrier refused to permit Train Dispatchers A. L. Bails, W. V. Booth, and O. L. Jackson (now deceased) to exercise displacement privileges to acquire certain relief positions as their regular assignments when the compensation in those relief assignments had been changed by the Carrier, and

(b) The Carrier shall now be required to permit Claimants A. L. Bails to place himself on the first relief position at Sparks, Nevada, and to permit W. V. Booth to place himself on the first relief position at Ogden, Utah.

(2) (a) The Carrier failed and continues to fail to comply with the intent of Section (g), Article 2, of the current Agreement, when it refused to compensate Claimants A. L. Bails, W. V. Booth, and O. L. Jackson (now deceased) at the overtime rate of the positions worked by them, and

(b) The Carrier shall now be required to pay to Claimants A. L. Bails and W. V. Booth, and to the estate of O. L. Jackson, such amounts as represent the difference between what they have been paid and what they should have received for working positions other than the positions which would have been their regular assignments if the Carrier had correctly applied Section (g)-4 of Article 4; i. e., such additional amounts as are due A. L. Bails and W. V. Booth from the date the Carrier should have permitted these Claimants to acquire the positions involved as their regular assignments and until they are permitted to place themselves thereon, and to the estate of O. L. Jackson the amount due from the date he should have been permitted to acquire as his regular assignment the first relief position at Portland, Oregon, and to the day of his last service on another position immediately prior to his death.

repudiate in whole or in part the said oral agreement and the uniform practice under the same, it is clear that all of the elements of a true estoppel exist as against the claims for money which are asserted in this docket.

IV

CONCLUSION

Carrier respectfully asks your Honorable Division to deny the claim.

All data herein submitted have been presented to the duly authorized representatives of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: There is in evidence an agreement between the Carrier and the American Train Dispatchers effective April 1, 1947, last revised as of September 1, 1949, governing the hours of service, compensation, and working conditions of train dispatchers.

The claimants, train dispatchers, base their claim on the failure of the Carrier to apply the literal intent of Section (g)-4, Article 4, of the rules. There is also as is evidenced by the claim numbered 2, Items (a) and (b) that claimants be compensated as set forth therein.

We quote the pertinent rule.

ARTICLE 4—SECTION (g)—CHANGED CONDITIONS.

"A permanently assigned train dispatcher may exercise displacement privilege under Section (e), paragraph 1, when his position is changed or to obtain a position on his home division, which has been changed in the following manner:

. . . . . .

"4. Change in compensation of relief assignments."

Section (e), paragraph 1, referred to in the foregoing rule, reads as follows:

"Section (e). Displacement Privileges. An assigned train dispatcher displaced from, or whose permanent position is abolished shall, if qualified, have one of the following displacement privileges, which shall be exercised in the order named and within the time limits specified, dating from abolishment of, or displacement from, his permanent position:

"1. Within five (5) days, exercise division seniority to displace on the position of any junior permanently assigned train dispatcher or to obtain and become assigned to a permanent vacancy on the division which has been advertised on the division and is awaiting issuance of, or assignment on, system vacancy notice; such system vacancy notice shall then be cancelled.

On January 1, 1951, Chief Train Dispatchers, who are excepted from the scope of the current agreement, received an increase in salary. By special agreement subscribed to by the parties on April 1, 1947, a train dispatcher relieving the Chief Train Dispatcher for any reason is paid one day's compensation at the rate of Chief Train Dispatcher under a mathematical calculation shown in the record.

When the change in rate of pay of Chief Train Dispatcher occurred, the claimants invoked the above cited rule, claiming displacement rights against dispatchers junior to them who held first relief dispatcher assignments at Sparks, Nevada, Ogden, Utah, and Portland, Oregon. (Claimant O. L. Jackson, Portland, Oregon, is now deceased.)

The Carrier denied the claims here presented, and refused to displace the junior men on the positions mentioned. The reason for the denial of the claims is based upon an oral agreement between the parties subsequent to the adoption of the foregoing rules, which has been adhered to since 1932.

The Carrier asserts the above quoted rules were adopted by the parties in 1931. The first change thereafter made in the pay of dispatchers, effecting a change in earnings of relief dispatchers, occurred January 1, 1932.

The question was raised as to whether or not displacements would be allowed under said rules.

The Petitioners' representatives expressed a desire not to have the rule applied in cases of general or system-wide wage changes, but only in cases where changes were made in the positions filled by any particular relief assignment. The Carrier agreed to such application of the rules, and this position has been maintained by the parties since that time.

The position taken in behalf of the employes that the general wage increase of all Chief Dispatchers on Carrier's system is not a system-wide wage adjustment, is not sustainable. The fact that dispatchers and assistant chief dispatchers were not affected by the raise is not material. The oral agreement entered into by the parties in January 1932, limited the application of Article 4, Section (g)-4, to those situations wherein the compensation of relief assignments is changed through changes in the positions covered by the assignments.

The Carrier specifically states that each of the claimants here was perfectly capable of filling the relief assignments to which they sought to displace. Carrier would have been perfectly content to permit each of them to exercise displacement which they sought to make had Carrier not felt bound by the oral agreement.

The record clearly indicates there was an oral agreement between the parties, as appears heretofore in this opinion, and there is no substantial denial of Carrier's contention in such respect.

The parties, by oral agreement, modified Section (g)-4 of the written agreement between them in 1932. Since that time the parties have recognized and adhered to the oral agreement.

Under the general rule of law applying to contracts, the original written contract is admissible in evidence as modified. The oral agreement between the parties stands undenied. In addition, the conduct of the parties in recognizing the written contract as modified by the oral agreement constitutes a mutual interpretation given it by the parties as evidenced by their actions with reference thereto, and affords a safe guide in determining what the parties had in mind when the written contract was made and modified by the oral agreement. We believe the evidence warrants that 1 (a) and (b) of the claim should be sustained.

We further believe, under the circumstances, the evidence is sufficient to raise the doctrine of estoppal against the claimants in enforcing the penalty claims for which they contend. Therefore, claims 2 (a) and (b) should be denied.

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 Claims 1 (a) and (b) are sustained. Claims 2 (a) and (b) are denied, in accordance with the opinion.

AWARD

Claims 1 (a) and (b) sustained; claims 2 (a) and (b) denied, in accordance with the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1952.