

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

**THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association for and in behalf of the train dispatchers hereinafter named that,

- (a) The Delaware, Lackawanna and Western Railroad Company failed to comply with the requirements of Article 4 (b) of the currently effective Agreement between the parties when the Carrier failed to compensate, in accordance with the provisions of said Article 4 (b), train dispatchers F. P. Wagner, C. L. Hewey and B. F. Edwards on the days when they were used to perform relief service in the position of the chief train dispatchers, and
- (b) That the Carrier shall now compensate Claimants Wagner, Hewey, and Edwards in amounts represented by the difference between what they were paid and what they should have been paid on each day for performing relief service as chief train dispatcher if the Carrier had complied with the agreed upon requirements of Article 4 (b), supra.

EMPLOYEES' STATEMENT OF FACTS: The individuals for and in whose behalf this claim is filed, viz. F. P. Wagner, C. L. Hewey and B. F. Edwards are employed by the Carrier party hereto as train dispatchers and the positions which they occupied during the period covered by the instant claim fall within the scope and are subject to all the rules of an Agreement, effective August 1, 1937, revised effective September 1, 1949, between the Carrier and its train dispatchers, represented by the American Train Dispatchers Association. Copy of said Agreement as revised and presently effective is on file with your Honorable Board and is, by this reference, made a part of this submission as though fully incorporated herein.

For ready reference of the Board, the rules of said Agreement relevant to the instant claims and upon which your Petitioner places particular reliance are quoted below.

"Article 1, SCOPE. (a) The term 'Train Dispatchers' as hereinafter used and as defined in Section (b) of this Article shall be understood to include Assistant Chief Dispatchers, Trick Dispatchers, Relief Dispatchers and Extra Dispatchers."

"Article 4-(b). To determine the straight-time hourly rate, divide the monthly rate by 174. To determine the daily rate, multiply the monthly rate by 12 and divide the result by 261."

The method of determining the daily rate of pay for temporary occupants of the position of "Chief Dispatcher" is not new or unusual. As a matter of fact the method is universally recognized as a proper method to determine the daily rate of a monthly rated position, unless specifically covered by agreement otherwise.

There is no agreement on this property covering Chief Train Dispatchers. These are official positions.

There was never any protest prior to August 15, 1951 with regard to compensation paid to employees covered by the Dispatchers' Agreement when temporarily working Chief Dispatchers' positions. Such employees were paid as hereinbefore outlined. Subsequent to September 1, 1949—Train Dispatchers covering Chief Dispatcher positions were paid not less than the amount they would have earned if working on Train Dispatcher positions. In other words, if the daily rate for Chief Train Dispatchers figures less than the amount the Train Dispatcher would have earned at the Train Dispatchers' rate such employees are compensated at the higher rate for the day. The method used has been recognized as a proper way to compensate such employees. The Carrier did not change its method of arriving at a daily rate for Chief Dispatchers until January 1, 1952 when two rest days per week were granted Chief Dispatchers.

The Employees are not entitled to any adjustment in the instant cases. This is admitted in letters addressed to the Carrier by the General Chairman. (See Carrier's Exhibits 4 and 5). Moreover, no protest was made until August 15, 1951 in the case of Mr. Edwards, and August 22, 1951 in the cases of Mr. Hewey and Mr. Wagner. The compensation paid to the three claimants during the period January 2, 1950 and August 15, 1951 was proper and acquiesced in by the Employees until protests received on August 15, 1951 and August 22, 1951, respectively. As this Board said in Award 2137:

* * * "Wages are not accepted over a long period of time without protest if an employee believes that he is not receiving what is due him." * * *

Moreover, the daily rate paid the claimants for performing service as Chief Dispatchers was determined prior to the Agreement of August 1, 1937 and was not changed until January 1, 1952 when the Chief Dispatchers were granted two rest days per week. Effective January 1, 1952 the daily rate for Chief Dispatchers is arrived at by multiplying the monthly rate by 12 and dividing the result by 261.

This is the same as the formula used under the agreement with the American Train Dispatchers, Section 2, paragraph 2 of the agreement signed in Chicago, Illinois, March 25, 1949, effective September 1, 1949.

The Carrier has shown conclusively that the claims are without merit and that the action of the Employees in requesting a change in rules to prevail when Train Dispatchers occupy positions of Chief Train Dispatchers is evidence sufficient to defeat the Employees' case.

It is respectfully submitted that the claims should be denied in all respects.

All data in support of the Carrier's position have been discussed with the Employees on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: Claims are presented in behalf of three (3) employees, F. P. Wagner and B. F. Edwards, holding regular assignments as Assistant Chief Dispatchers, and C. L. Hewey holding regular assignment as Relief Dispatcher, for compensation alleged to be due them for specific dates,

when each was used by Carrier to perform relief service in the position of Chief Train Dispatcher. The employees are requesting payment of the difference in what they were paid by Carrier, and what they claim they should have been paid under Article 4(b) as provided in the effective Agreement between the parties.

Before taking up the merits of the claims as presented, we will dispose of the objection of Carrier, to the filing of the claim before us some twenty-three (23) months from the time the alleged work was performed until the claims were presented to Carrier, as being an unreasonable time, and that such claims should be considered only from the date, August 15, 1951, the date the claims were first presented. To this objection we cannot agree, and hold that neither the Agreement nor the Railway Labor Act contain any provision as to a time limit allowed in filing a claim, and therefore under prior awards of this Board, we hold and reaffirm the opinion in Award No. 5975 and other awards on this proposition, as controlling. For that reason we deny Carrier's contention the claims were not filed within a reasonable time.

There is no dispute between the parties as to the contention of Carrier that Scope Rule, Article 1, Sections (a), (b) and (c), cover the positions of Train Dispatchers to include Assistant Chief Dispatchers, Trick Dispatchers, Relief Dispatchers and Extra Dispatchers. It is also conceded that the position of Chief Train Dispatcher is nowhere named as a position within the provisions of the current agreement.

The claims herein are for compensation allegedly due the employees in two instances holding regular assignments as Assistant Chief Dispatchers, and one employee holding regular assignment as Relief Dispatcher, who were required by Carrier to serve in the position of Chief Train Dispatcher, and were paid by Carrier on the basis of pay as prescribed by the Agreement covering their respective regular assignments. The Organization contends they should have been paid at the Chief Dispatchers' rate, and should be paid the difference between the two rates. The Organization further contends the employees, when filling the position of Chief Train Dispatcher, remain under and are entitled to protection under their agreement, when they are required to perform work entirely outside the scope of the agreement.

The only question for us to determine is whether or not the employees when required to perform duties of Chief Train Dispatcher, a position not included in their agreement, are governed as to their work performed in such relief position, by the provisions of the Train Dispatchers Agreement.

The Carrier takes the position that the agreement is silent as to the position of Chief Train Dispatcher, that such position is an official position, and the agreement before us cannot be construed to cover the position of Chief Train Dispatcher. It is immaterial in our consideration here whether the position of Chief Train Dispatcher is a specifically excepted position, or whether the Agreement is silent as to the inclusion of such position. The final result is the same since the claims before us are for work performed on a position not included in the Scope Rule.

This Board in a number of Awards has consistently held that the employees occupying the position of Chief Train Dispatcher, where such position is excepted or not included, are subject to the provisions of the Dispatchers' Agreement, while relieving the Chief Dispatcher for any cause.

Awards 2905—2944—5244—5716—5904—5829.

It is therefore the Opinion of the Board that the Agreement in effect between the Carrier and the Organization is controlling in determining the claims before us. It is our further opinion that the Carrier violated the agreement as alleged and the claims should be sustained and Carrier be required to compensate the employees at the Chief Train Dispatcher rate during the periods involved.

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 Carrier has not properly complied with the provisions of the agreement.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 3rd day of August, 1953.

DISSENT TO AWARD NO. 6292, DOCKET NO. TD-6317

The Opinion admits that the position of Chief Train Dispatcher is not covered by the Agreement, therefore, any person while working that position performs no work covered by the Agreement.

The decision of the majority attempts to write into the Agreement a provision or rule that the parties themselves did not place therein, in flagrant disregard of the statutory limitations on the jurisdiction of this Board. The Board's function is limited to interpretation of agreements. It may not make agreements for the parties under the guise of construing them. The Railway Labor Act makes this clear. The Board itself has disclaimed any right to make agreements. The Courts have repeatedly admonished the Board that it has no jurisdiction to do so. (Crowley v. Delaware and Hudson Railroad Corporation, 63 Federal Supplement, page 164.) In the latter case the Court said, "We are not at liberty to revise while professing to construe," and refused to enforce an award of this Board.

"Agreements concerning rates of pay, rules and working conditions are in derogation of the general rule of the right of carrier to conduct its business in a lawful manner and must be strictly construed." (Award No. 572, Fourth Division.)

The Agreement between the parties does not contain any rule with reference to the use of Train Dispatchers to afford relief on the position of Chief Train Dispatcher. There is no obligation or rule requirement between the parties to the effect that Train Dispatchers will be used to act in the capacity of Chief Train Dispatcher, therefore, when the Carrier elected to use a Train Dispatcher to afford relief on the position of Chief Train Dispatcher, such Train Dispatcher, during the period of filling the position of Chief Dispatcher, passed completely from under the control of the Agreement between this Carrier and the American Train Dispatchers Association.

The long passage of time before the filing of the claim, the proposal of the Organization to negotiate into the Agreement the rule now negotiated for it by this Board, as well as other facts and circumstances, clearly show that the claim should be denied and the case remanded to the parties for the conduct of such negotiations as they see fit, if they choose to do so.

For the above reasons we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp