Award No. 6743

Docket No. TD-6755

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

FORT WORTH AND DENVER RAILWAY COMPANY

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

(a) The Fort Worth & Denver Railway Company, hereinafter referred to as "the Carrier," acted contrary to the intent of its Agreement with the American Train Dispatchers Association, effective May 1, 1950, when it refused and continues to refuse to compensate Train Dispatcher J. H. Lowder in accordance with the provisions of Rule 4-(d) thereof when, in accordance with instructions given him by proper authority, he reported for and began service two (2) hours in advance of his regular work period, and

(b) The Carrier shall now pay Train Dispatcher Lowder the sum representing the difference between what he was paid for service performed by him on October 20, 27, November 3, 10, 17, 24, December 1 and 8, 1951, and what he would have been paid if he had been compensated for service on these dates in accordance with Rule 4-(d) of the Agreement.

EMPLOYES' STATEMENT OF FACTS: There is in effect an Agreement, effective May 1, 1950, between the parties to this dispute, covering Hours of Service and Working Conditions governing train dispatchers. Said Agreement is on file with your Honorable Board and is, by this reference, made a part of this submission as though fully incorporated herein. It will, hereafter, be referred to as the "Agreement".

This claim is based on the provisions of Rule 4-(d) of the Agreement, and reads:

"Rule 4-(d) Train dispatchers notified or called to perform work not continuous with their regular work period will be allowed a minimum of three hours for two hours' work or less at pro rata rate and if held on duty in excess of two hours, time and one-half will be allowed on the minute basis."

During the period involved in this claim, Train Dispatcher J. H. Lowder was regularly assigned to what is known as No. 1 relief dispatcher position

conclusive against the right to maintain an action for the residue as if it had embraced the whole." (Emphasis added.)

Other cases cited in Third Division Award 1215 are **Baldwin v. Travelling Men's Assn.**, 283 U. S. 522, and **Empire Oil and Refining Co. vs. Chapman**, 183 Okl. 639, 79 P. 2nd 608.

The Carrier firmly believes the decision in this claim is controlled by Third Division Award 6137. The assignment here complained of was there held to be proper, and there can be no justifiable claim for work performed not continuous with that assignment. Furthermore, the Organization cannot prosecute two separate claims to the Third Division, on behalf of the same party, based on a single set of facts and circumstances.

This claim is utterly devoid of support and must be denied.

* * * * *

The Carrier affirmatively states that all data herein and herewith submitted has been submitted to the Employes.

* * * * *

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to the violation herein claimed Claimant had a regularly assigned relief position as a relief trick train dispatcher. His assigned days were Sundays, Mondays, Tuesdays and Wednesdays as a relief dispatcher and Saturdays as a telegrapher; all at trick train dispatchers' rate of pay, hours 7:00 A. M. to 3:00 P. M., with Thursdays and Fridays as rest days.

October 16, 1951, the Carrier established a new temporary trick train dispatcher's position with assigned hours 5:00 A. M. to 1:00 P. M. daily except Sunday and required Claimant to work that position from 5:00 A. M. to 1:00 P. M. on Saturdays for the dates specified in the claim. Otherwise stated Claimant, instead of working as a telegrapher as theretofor, worked Saturday as a dispatcher from the time the temporary trick train dispatcher's position was created until January 9, 1952, the date it was discontinued, and thereafter started to work again as a telegrapher on that day of the week.

At the outset we are met by a contention the claim should be denied because it involves the same parties, the same Agreement, the same dates, and arises from the same cause that was brought to and decided by this Division of the Board in Award 6137, thereby disclosing a clear case of splitting of causes of action. It may be conceded there are sound Awards holding that claims may be denied on the basis suggested. However, we do not understand we are required to determine whether the harsh remedy Carrier seeks to invoke is applicable where, as here, other good and sufficient reasons appear for the denial of a claim on its merits. Therefore we should not here pass upon that question.

Be that as it may it should be noted at this point that the record makes it clearly appear this is a case where Claimant has split his claim and is claiming the right to institute claims on the property in piece-meal fashion and progress them to this Board in that manner.

Turning to the merits it should be stated the basic premise of the instant claim, as presented on the property and before this Division, becomes highly important and should be fully demonstrated. This can be accomplished only by reference to, and somewhat extensive quotation from the record.

At page 1 of Claimant's ex parte submission it is said:

"This claim is based on the provisions of Rule 4-(d) of the Agreement."

On page 3 of the same document, in summing up his position the Claimant states:

(1) "It is the position of the employes that the work performed by Dispatcher Lowder on each of the days for which claim is made, on instructions by proper authority, was extra service, for the purpose of relieving extra Dispatcher Zeb Ellis on the sixth day, on a position designated by the Carrier as an 'Extra dispatcher's position.'"

and;

(2) "This claim is fully supported by Rule 4-(d) of the Agreement * * * *."

Exhibit 3 of Carrier's ex parte submission is a copy of a letter written by Claimant himself, after adoption of Award No. 6137, presently to be discussed, where, with reference to the instant claim, the following statement appears:

"Case No. 25 involves claim of Dispatcher J. H. Lowder wherein he was called or notified verbally, by the Chief Dispatcher to report for duty two hours before his regular assignment began on the dates listed in the claim."

The foregoing quotations clearly reflect Claimant's position up to the time his Board representative submitted his brief to the Referee. There for the first time, notwithstanding such rule had not theretofore been mentioned or relied on, it is contended that Carrier's action also resulted in a violation of Rule 11, the starting time rule. Under such circumstances we do not think the question whether that rule was violated is a proper subject for either consideration or determination regardless of its merit. This we believe is particularly true and is the inescapable conclusion when, as here, it must be admitted the Claimant is claiming the right to present, and is presenting, separate claims, involving the same facts but basing them on different rule violations.

With Rule 11 out of the way, which we pause to note would have presented a far better reason for a sustaining Award than any herein urged, Claimant actually asserts only two grounds, which will now be disposed of, for the allowance of his claim.

The first of the foregoing grounds relied on is stated in the next to the last paragraph (page 2) of Claimant's reply to Carrier's oral submission where he asserts:

"The issue of whether or not the Carrier was wrong in **the manner** in which it 'assigned' the work in question to Claimant was NOT decided in Award No. 6137, nor was the issue of the penalty rate presented here involved in the claim there at issue."

Contrary to his contention the first issue Claimant says was not decided in Award No. 6137 was the very question determined by the Referee (Shake) sitting with the Division at the time of the adoption of such Award when, in the last and all decisive paragraph of such Award it is said:

"Bearing in mind that Claimant was primarily assigned as a relief train dispatcher and that previous to October 16, 1951, he worked as a telegrapher on Saturdays only because there was no dispatcher's work available on that day, we do not deem it to have

been improper to assign him to work as a dispatcher on the Saturdays when dispatcher's work was available. Any other conclusion would defeat the manifest purpose and clear meaning of Rule 5 (d)."

Obviously the second issue to which Claimant refers in his heretofor quoted conclusion was not determined. Just as obviously there was no occasion for its decision when concededly Claimant was limiting his right of recovery in that case to the violation of an entirely different rule of the Agreement than the one to which reference is therein made and on which he now relies.

The second and last contention advanced by Claimant is that under the confronting facts and circumstances the decision in Award No. 6137 is erroneous. After an extended examination of the records in that case and the one here involved we are forced to disagree. With the issue limited in the instant case as heretofore indicated we are in entire accord with what is said and held, and with the conclusions reached, in the last two paragraphs of the challenged Award. This, under the facts entitled to consideration, compels us to conclude that the involved assignment was not improper, that such assignment was not in violation of Rule 4-(d), and that the claim must 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 the record discloses no violation of Rule 4-(d).

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 5th day of August, 1954.