

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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

(a) The Chicago and North Western Railway Company, sometimes hereinafter referred to as "the Carrier," violated the provisions of Rule 12 (c) of the currently effective Agreement between the parties to this dispute when it failed and refused to permit Train Dispatcher W. M. Pendell of its Chicago office (Galena Division) to fill a temporary vacancy in the position of Chief Train Dispatcher in that office during the absence of the regular incumbent of that position during a period between and including July 21 and July 31, 1952.

(b) The Carrier shall now pay to W. M. Pendell the difference between the trick train dispatcher rate which he was paid and the chief train dispatcher rate which he would have earned on July 22, 23, 24, 25, 29, 30 and 31, 1952, and one full day at chief train dispatcher rate for July 21 and July 28, 1952, which he would have earned had the Carrier permitted him to fill the temporary vacancy in the position of Chief Train Dispatcher on the dates above shown.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties to this dispute, bearing the effective date of September 16, 1950. A copy thereof is on file with your Honorable Board, and by this reference is made a part of this submission the same as though fully set out herein.

For the convenience of the Board and for ready reference we are quoting below certain rules relevant to the instant dispute:

"SCOPE 1. The term 'train dispatcher' as used in this agreement shall include all train dispatchers, *excepting only one chief train dispatcher* in each dispatching office, who will not be required to perform trick train dispatcher's duties." (Emphasis supplied.)

"The provisions of sections (a), (b), and (c), Rule 5, and Rule 6 of this agreement, will apply to chief train dispatchers."

Section (a) of rule 5 deals with the question of rest days and work on rest days. Section (b) of rule 5 deals with duration of rest days and section (c) of rule 5 covers the establishment and change of rest days. Rule 6 deals with vacation allowances, so that rule 14(b), as cited by the Local Chairman, is not applicable to the facts here in evidence.

Rule 12(c) on which the General Chairman is basing his claim provides, in part:

“In filling positions of chief train dispatcher, train dispatchers on the seniority district where vacancy occurs will be given full and unprejudiced consideration on basis of seniority, for such vacancies.”

In filling the vacancy in chief train dispatcher's position as result of the regular assignee thereof being on annual vacation during period July 21 to 31, inclusive, train dispatcher W. M. Pendell was given full and unprejudiced consideration and it was felt by supervising officers that Mr. Pendell did not have the necessary fitness and ability to properly perform the duties of a chief train dispatcher and accordingly, the senior train dispatcher who did have the necessary fitness and ability to fulfil the duties of a chief train dispatcher was assigned to the position.

It is the position of the carrier that the position of the employee is not supported by provisions of any schedule rule or agreement between the carrier and the Association and this Board cannot properly sustain the claim of the employee, for to do so would be the equivalent of amplifying the present agreement between the carrier and the Association by adding thereto a rule making mandatory that train dispatchers be assigned to fill temporary vacancies in chief train dispatchers' positions on basis of seniority.

All data herein used in support of the carrier's position has been previously furnished the authorized representative of the employees and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: A temporary vacancy arose on the position of Chief Train Dispatcher because of the incumbent thereof going on vacation. The position was assigned to a man junior to claimant who had asked to be placed thereon.

The sole issue in this docket is whether or not Carrier complied with the provisions of Article 12 (c) which reads as follows:

“In filling positions subject to this agreement, ability being sufficient seniority shall govern. In filling positions of chief train dispatcher, train dispatchers on the seniority district where vacancy occurs will be given full and unprejudiced consideration on basis of seniority, for such vacancies.”

It is to be noted that under the above rule Carrier is less restricted in its choice of employees to fill the position of chief train dispatcher than in filling positions under the Agreement. The rule merely requires that full and unprejudiced consideration on basis of seniority be given. Carrier is, however, required to give bona fide consideration to the request of the senior man. Our problem here is to determine whether or not the facts indicate that such good faith consideration was given to claimant.

The record shows that claimant by letter requested a bulletining of the vacancy under date of July 12, 1952. Apparently, no answer was received by claimant. Later, under date of July 17, 1952, claimant tendered application to fill the vacancy effective July 21, 1952. Apparently, no answer was made to that letter. After claim was filed by claimant and under date

of October 30, 1952, the Carrier in replying to the General Chairman merely quoted 12 (c) in its letter and stated that its provisions were complied with in assigning the vacancy. In its submissions before this Board the Carrier states that claimant was given full and unprejudiced consideration and it was felt by supervisory officers that claimant did not have the necessary fitness and ability to properly perform the duties of the chief train dispatcher who did have the necessary fitness and ability was assigned to the position.

In its submission the Employees show that claimant had relieved on the position of chief dispatcher as well as on night assistant chief for over three years from 1939 to 1942, apparently without complaint. That would indicate on the surface that the claimant had qualifications to fill the chief's position. At no time prior to filling the vacancy did Carrier indicate to claimant why they preferred to fill the vacancy with another man. The only fact which Carrier has shown in the record here which it urges as reflecting upon claimant in his failure to bid in a night chief's assignment for which he was eligible. However, any number of factors not related either to an individual's own estimate of his ability or to an objective appraisal of an individual's ability could dictate a choice of jobs. The rest of Carrier's submission contains, as indicated above, merely conclusions to the effect that the provisions of the rule were complied with and that claimant was given full and unprejudiced consideration. No facts are shown to indicate that any consideration was given to complaint. On the facts as they appear here, we can only conclude that claimant was not given the full and unprejudiced consideration on his application to fill the vacancy which the rule requires.

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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of November, 1954.

DISSENT TO AWARD NO. 6816; DOCKET NO. TD-6680.

This is a sick award on a puny framework of biased predilection. It is shot through with the basic errors of suppressing the controlling rule and arbitrarily transferring the burden of proof from petitioner to respondent.

Let us first clarify the pertinent distinction between a chief train dispatcher, which is the position involved here, and a night chief train dispatcher position, which is not involved here. The latter position is subject to bulletin rules and all other rules of the agreement. The award Opinion obscures this distinction and strives to create the inference that the carrier had placed the claimant "... on the position of chief dispatcher as well as on night assistant chief for over three years from 1939 to 1942 ...". That was **over eleven years ago** and the carrier did not select him for that job. It was a relief position; it was amenable to all of the rules and was bulletined. But the outstanding fact is that the relief even then performed by claimant "on the position of chief dispatcher" occurred **only one day per week**. Moreover, the claimant had not been used as a chief dispatcher at all, and had not bid on a job as night assistant chief, for the following period of **eleven years**.

Let us now look at the rule. In **Award 3131** we treated a rule with the same organization, containing the same elements, and we said this about it: "The rule leaves the final determination in the selection of the employee to the judgment of the Carrier."

The employee selected by the carrier, who was junior to claimant, was the night assistant chief at the time of his selection. The claimant was and for many years had been a second shift, trick dispatcher. This was fully shown by the carrier. It was testified to by the carrier that it had given full and unprejudiced consideration to the senior man. Yet, the referee says "No facts are shown to indicate that any consideration was given to claimant." However, the paramount question before him was not this, but rather, whether any proof was shown by the claimant that consideration was not given him. It is well settled, under a like rule, that the burden is upon the claimant to prove that "such consideration was not given". (**Award 3131**.) The Opinion blandly ignores the allocation of that burden in this case.

In this Opinion the referee also considers the fact that "At no time prior to filling the vacancy did Carrier indicate to claimant why they preferred to fill the vacancy with another man." This is an emotionally immature observation. The contract provision mistreated here, which was soundly met in **Award 3131**, places no obligation whatever upon the carrier to give any such indication. In the earlier award we said of this rule: "We cannot read into the Agreement a requirement that discussion must first be had with dispatchers or consent be first obtained from them before Carrier is justified in making the appointment."

It is therefore readily apparent that the petitioner's failure to carry the burden of proof, which was his, is completely ignored; that the carrier's right to the final determination in the selection of an employee has been arbitrarily subordinated in the face of a soundly contrary holding by this Division on a like rule provision in a contract with the same labor organization.

Carrier officers, having the right to exercise judgment in selecting the qualified employee without the obligation to confer or discuss its decision, under the rule, felt that the claimant (a trick train dispatcher) did not have the necessary fitness and ability to properly perform the duties of the chief train dispatcher and chose the senior train dispatcher (assistant night chief train dispatcher) who had the necessary fitness and ability. The carrier's purpose was, as we said in **Award 5238 (Boyd)**, to appoint one "who was qualified to give instruction and additional supervision of the work". The night assistant chief dispatcher was chosen after giving full consideration to the claimant who elected to remain on a trick dispatcher position and had not occupied a position of instruction and supervision for eleven years. On this point we said in **Award 5966**: "By observing an employee for a period of years, an employer usually can get a general knowledge of the capabilities of the employee."

We dissent and cite the award as in error for the reasons we have given.

/s/ E. T. Horaley

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ W. H. Castle

/s/ J. E. Kamp