Award No. 6817
Docket No. TD-6688

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ERIE RAILROAD COMPANY

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

(a) The Erie Railroad Company, hereinafter referred to as "the Carrier" failed to comply with the requirements of Article 4 (c) of the currently effective agreement when it refused to pay Train Dispatcher G. C. Beckwith for loss of time on Monday, December 29, 1952, when, because the Carrier required him to change positions, he lost the opportunity to perform compensated service in his regular assignment to which he had a contractual right.

(b) The Carrier shall now be required to pay Train Dispatcher G. C. Beckwith one day's pay at pro rata rate of trick train dispatcher.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the Erie Railroad Company and their Train Dispatchers represented by American Train Dispatchers Association, effective April 8, 1942, including amendments thereto, governing hours of service and working conditions of train dispatchers. Said agreement is on file with your Honorable Board and by this reference is made a part of this submission as though fully incorporated herein.

During the period involved in this claim, Train Dispatcher G. C. Beckwith was regularly assigned to a position as relief dispatcher in the Jersey City, New Jersey office of the Carrier. The weekly schedule of his assignment was as follows:

Day	Position Relieved	Hours of Assignment
Sunday	First trick Side Lines	6:15 AM to 2:15 PM
Monday	Second trick—East District, Main Line	2 PM to 10 PM
Tuesday	Second trick—East District, Main Line	2 PM to 10 PM
Wednesday	Third trick—West District, Main Line	10:15 PM to 6:15 AM
Thursday	Third trick—West District, Main Line	10:15 PM to 6:15 AM
Friday	Regularly assigned rest day	
Saturday	Regularly assigned rest day	

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The foregoing clearly exemplifies the strained reasoning of the Organization in its attempt to support an unjust claim in the absence of an express or explicit rule to cover. The Organization is familiar with the procedure under the Railway Labor Act to amend rules, and it would seem that if it desires to revise a rule, the proper procedure would be followed instead of asking this Board under the guise of a claim to adopt an award that would unilaterally change the meaning and intent of Article 4 (c). The Board, of course, has no jurisdiction or authority to take such action. Awards 4386, 4563, 4564, 4594, 4763, 4818, 5079, 5294, 5369, 5864, 5971, 5977, 5994, 6007 and others.

This Division has consistently held that the practice and custom of the parties is of primary importance in determining their intent. In Award 5564 (Erie) the Board said:

> "The Organization relies on a long series of awards by this Board holding that the Scope Rule bars copying of train orders by other than those covered by the Agreement despite past practice. We are in agreement with these awards and their basic principle that long existing practice does not change the clear meaning of the Agreement. **However, this Board has also adopted by numerous awards the well-known principle of contract construction, that the incorporation of a rule in an agreement which has been in effect prior to that agreement has the effect of readopting the mutual interpretation which the parties have placed upon that rule. The failure to change the existing interpretation evidences a mutual intent that the existing interpretation shall continue.**" (Emphasis supplied.)

In Award 2436, referred to in Award 6011, the Board held:

> "The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made." Compare Awards 1397, 2090, 2326, 2466, and 3603, 5884 and others.

The Carrier has given the history of Article 4 (c) and has established the past practice and custom thereunder on this property. This practice and custom antedated the first agreement between the parties and has been adhered to throughout the years. In the light of these facts, it is clear that the Organization is here attempting to force this Carrier to accept a new rule without its consent and without due process of negotiation as provided for in the Railway Labor Act.

The Carrier has shown that under the applicable Agreement between the parties to this dispute, the claimant suffered no loss of compensation, and no violation of the basic intent of Article 4 (c) has occurred.

It is, therefore, respectfully submitted that the claim is without merit and should be denied.

All data contained herein have been presented to the Employes or is known to them.

(Exhibits no reproduced.)

OPINION OF BOARD: Because of a shifting of dispatchers made necessary by reason of the illness of a dispatcher in the office, claimant was required to work a second trick Side Lines dispatcher's position from 2:15 P. M. to 10:15 P. M. instead of his regularly assigned relief position of Main Line East End dispatcher from 2 P. M. to 10 P. M. He files claim for the pay of his regular assignment. In support of the claim Employes cite Article 4 (c) of the applicable agreement which reads as follows:

"Loss of time, on account of the hours of service law or on changing positions by direction of proper authority, shall be paid for at the rate of the position in which service was performed immediately prior to such change."

The gist of the Employes' contention is that claimant changed positions by direction of proper authority and therefore lost time on his regular assignment for which he should be paid in addition to the payment he received for working the Side-Line assignment. The Carrier contends that the rule means loss of compensation, in effect, that it is a "make whole" rule and cites a practice of 23 years under the agreement, during which time there were numerous revisions and amendments with no change in practice. From this premise Carrier argues that inasmuch as claimant lost no compensation as a result of working the Side-Lines position the claim should be denied.

Generally speaking, because an employe secures a regular assignment by the exercise of seniority under bulletining rules, it is axiomatic that he has a right to work that assignment and should not be held off thereof and required to work another assignment except in case of an emergency. The evidence here indicates that the reason for shifting of the claimant to the Side-Line assignment was the laying-off of the incumbent of that position due to illness and the unavailability of a qualified extra man to fill the vacancy so arising. We think that an emergency existed under these circumstances (See Award 6686 and Award cited therein).

The Employes contend that Article 4 (c) requires payment to claimant as set forth in the Statement of Claim because of being denied the right to work his regular assignment regardless of any emergency situation. In effect, the contention is founded on the argument that "loss of time" under the rule means loss of time on the employes' regular assignment, not loss of compensation. Generally speaking in the vernacular of railroad labor relations and in the collective bargaining agreement, the expressions "loss of time" and "loss of compensation" are considered as being synonymous. That principle is, of course, consistent with reason. Here the rule itself provides a basis for payment for "loss of time" which is indicative of the fact that in the rule itself the parties are talking of loss of compensation.

Awards of this Board on the interpretation of the same rule as Article 4 (c) in Dispatchers' Agreements with other Carriers have not been consistent. Nor has the Organization been consistent in the affirmations made with respect to the applicability of the rule. In Award 2742 a dispatcher was required to work on his rest day (Sunday) on a third trick position which prevented his working his regular assignment on first trick on the following day. In that case the claim of the employe for the loss of time on his regular assignment on Monday was sustained. In Award 3097 an employe holding a regular relief assignment working first, second and third tricks on varying days was required to fill a temporary vacancy over a ten-day period. Claim was made for the "time lost" on the claimant's regular assignment when the trick worked on the temporary vacancy was different from the trick worked on the regular assignment. But for days when the hours of the trick worked in filling the temporary vacancy coincided with the hours of the regular relief assignment (although not the same assignment), no claim was made. There the employes contended that the plain meaning of "loss of time" in the Article is loss of opportunity to work for a given time, to which the train dispatcher is entitled to work by virtue of holding exclusive right to work a specified time on any day. The claim in Award 3097 was sustained on the authority of Award 2742. In Award 3205 claims were made on behalf of a regularly assigned relief dispatcher as well as a regularly assigned trick dispatcher because they worked on assignments with hours different from their regular assignments. There the claim was founded by the employes on the "Call Rule" asserting that the claimants were called to work not continuous with their regular work periods and were entitled to time and one-half for the hours worked. Inasmuch as it was clear in that case that the regularly assigned trick train dispatcher was placed on the temporary vacancy pursuant to his own request, the disposition of that phase of the

claim is of no significance here. However, the disposition of the relief dispatcher's claim is material because it was clear that he was assigned to perform duties as a dispatcher during an eight hour period of the day different from his regular assignment on four days of the week. In defense of its action in that case, the Carrier cited Rule 6-b in the Agreement which rule was identical with Article 4 (c) in this Agreement. Both claims were denied. The Opinion of the Board held that the "Call Rule" was inapplicable. The writer of the Opinion went on further to say that the employes pointed to no other rule as being in support of the claim and further stated he had endeavored to examine the rules with a view to ascertaining whether a supporting rule was contained therein but such examination did not disclose any such rule. In Award 5899 a regularly assigned relief dispatcher was required to fill a vacancy on a second trick position. While filling the temporary vacancy he was required to take Friday and Saturday as rest days. He filed claim for those two days on account of being held off his regular assignment and for time and one-half instead of pro rata for services performed on Monday and Tuesday, the rest days of his regular assignment. The claim was sustained mainly on the ground that no emergency existed which justified the shifting of the claimant from his regular assignment. It is significant that in that docket the employes made no claim of any violation on the Wednesday and Thursday during that period despite the fact that he worked second trick on those days and his regular assignment worked first trick on said days.

In the instant case, inasmuch as the hours worked by claimant on the Side-Lines assignment were practically identical with those of claimant's regular assignment (the difference of 15 minutes in the starting time we regard as insignificant in these circumstances), it may be said that the claimant did not lose the right to work a "specified" time each day by working the "Side-Lines" assignment. Consequently, even on the basis of the view which the Employes took with respect to a rule identical with 4 (c) in sustaining Award 3097, there would be no basis for a sustaining award here.

The language of the rule as we have analyzed it earlier in this Opinion on the facts presented in this docket, in our opinion clearly supports the Carrier's view with respect to this claim. The practice on the property for 23 years under the rule is consonant with its language. It has been said many times that the re-adoption of a rule generally has the effect of re-adopting the mutual interpretation placed upon it by the parties themselves. The record shows that this rule was re-adopted without change in the current Agreement effective April 8, 1942, and has been unchanged through two subsequent amendments. It follows that there is no basis for a sustaining award.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

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.