

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

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

(a) The Chesapeake and Ohio Railway Company, hereinafter referred to as "the Carrier," acted contrary to the intent and requirements of the current agreement, including Rule 3-(a), between the parties to this dispute, when it failed to use Train Dispatcher J. W. Goodin to perform emergency service on July 31, 1953.

(b) The Chesapeake and Ohio Railway Company shall now compensate in accordance with Rule 3-(b), Claimant J. W. Goodin in the amount of \$32.79 which represents the day's pay he lost by reasons stated in section (a) of this claim.

EMPLOYEES' STATEMENT OF FACTS: There is an agreement between the parties to this dispute effective August 16, 1948, and amendments thereto, including a Memorandum of Agreement dated August 12, 1949, governing working conditions and rates of pay of train dispatchers. A copy of these Agreements are on file with your Honorable Board and by this reference are made a part of this submission the same as though fully incorporated herein.

For the convenience of the Board, the following rules of the current Agreement and Memorandum of Agreement pertinent to this dispute are quoted below:

Memorandum of Agreement dated August 12, 1949:

"RULE 3-(a). Each regularly assigned train dispatcher will be entitled and required to take two (2) regularly assigned days off per week as rest days, **except when unavoidable emergency prevents furnishing relief * * ***" (Emphasis supplied.)

Memorandum of Agreement dated August 12, 1949:

"RULE 3-(b) 1. Regularly assigned train dispatchers who are required to perform service on the rest days assigned to their position will be paid at rate of time and one half for service performed on either or both of such rest days."

It will be seen that such rule is one providing for the assignment of rest days to regularly assigned dispatchers. As shown herein, regularly assigned Dispatcher J. W. Goodin has two assigned rest days—Friday and Saturday. The rule goes further and provides that such regularly assigned train dispatchers will be required to take two rest days off per week except when unavoidable emergency prevents furnishing relief. In the instant case there was no unavoidable emergency and the Carrier was in position to provide relief by using the senior qualified extra dispatcher—O. E. Lowe. The citing of such rule by the Employees lends no support to their contention that Goodin should have been used to work his own rest day, July 31, but, conversely, such rule supports the Carrier in its obligation to provide relief if such relief is available.

Rule 3 (b) cited by the Employees in their Statement of Claim, reads:

“1. Regularly assigned train dispatchers who are required to perform service on the rest days assigned to their position will be paid at rate of time and one-half for service performed on either or both of such rest days.

2. Extra train dispatchers who are required to work as train dispatcher in excess of five (5) consecutive days shall be paid one and one-half times the basic straight-time rate for work on either or both the sixth or seventh days but shall not have the right to claim work on such sixth or seventh days.”

Regularly assigned Train Dispatcher J. W. Goodin was not required to perform service on the rest day or days assigned to his position and therefore, Section 1 of Rule 3 (b) has no application in the instant proceedings.

Section 2 of Rule 3 (b) deals with extra train dispatchers working in excess of five consecutive days. Such question is not herein involved and therefore, Section 2 of Rule 3 (b) likewise has no application in the instant proceedings.

The only rule applicable in this dispute is Rule 4 (e), which is quoted in pertinent part in Carrier's Statement of Facts, above.

Carrier, in conclusion, submits it has shown that:

1. The vacancy on Swing Position No. 1 on July 31, 1953, was clearly a vacancy to be filled by an extra employe if available as provided by Rule 4 (e).
2. An extra employe was available for this extra work as contemplated by Rule 4 (e).
3. As the available extra employe was not called for this extra work, he has been paid the penalty payment as provided by Rule 4 (e).
4. As this was extra work for which an extra employe was available, and who has been paid the penalty payment account not being called, the regular incumbent of the position has no proper claim to the work.

Claim should be denied.

Data included in this submission has been discussed in conference or by correspondence with the Employe representatives involved.

OPINION OF BOARD: The facts in this case are not in dispute. At approximately 4:00 A. M., on Friday, July 31, 1953, Swing Relief Dispatcher

McGuire advised the Assistant Chief Dispatcher on duty that he would be unable to report for work at 7:59 A. M., on that date by reason of illness. The Assistant Chief Dispatcher contacted I. F. Kash, regularly assigned as Swing Train Dispatcher No. 4, who worked McGuire's trick that day. This was one of Kash's days off and Carrier compensated him at time and one-half rate for being required to work on his rest day.

Petitioners contend, in brief, that under Rule 3 (b), Claimant Goodin should be paid in the amount of \$32.79 for the failure to use him on this date. It is the Petitioner's position that when an extra Train Dispatcher, in the absence of a regular Relief Dispatcher, was not used to fill Claimant Goodin's position on the rest day assigned thereto, the right to fill the position accrued to Claimant Goodin and that since Carrier failed to use Goodin, it must pay him what he would have earned if he had been used. Cited in support of this position is Award 6019.

That the filling of Goodin's position on July 31 was unassigned work, since it was already included in a relief assignment and vacancy was due to illness of the Relief Dispatcher. That the fact that Carrier paid Kash for this work has no bearing on this claim, and likewise the payment made to Extra Dispatcher Lowe has no significance as Carrier failed to use Lowe it was Goodin who was entitled to be used. Such payment cannot be construed as a penalty as it was the rate Carrier has agreed to pay for services performed on a rest day. That there were two violations of the Agreement and two penalties are required.

Citing Awards 4562, 5492 and 6749.

On behalf of Respondent Carrier it is stated that the rules provide such a vacancy shall be filled by an extra qualified train dispatcher and that investigation developed there were four extra train dispatchers on the list, the top three not being available, the fourth, O. E. Lowe, was available and should have been called to fill the vacancy. That he was overlooked and Carrier paid him one day's pay at pro rata rate. That the inability of McGuire to report and protect his assignment on Friday, July 31, due to illness, was a situation beyond the control of Carrier; never-the-less, the Carrier was penalized for using Kash instead of Lowe. That the Organization alleges an emergency existed, but fails to produce evidence to that effect. On the contrary, that the record shows there was an extra train dispatcher available and entitled to the work. Cited in support of this position are Rules 3 (a), 3 (b), 3 (e) and 4 (e) of the Agreement.

It would appear from the record that necessary relief positions were established to perform all the work on days off of the regular assigned train dispatchers and that the work here under consideration belonged to an available extra train dispatcher. There was an available extra dispatcher who through oversight was not called, and when this fact was ascertained he was paid for the work. We do not believe the facts here can be construed to have been an emergency as contemplated in above cited rules. Also we do not believe the cited rules make it incumbent on Carrier to use Claimant in a situation as here existed. To adopt the Petitioner's viewpoint in this case would seem to be a technical and strained construction of the rules and one which we doubt was intended by the same.

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 the Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of February, 1955.