Award No. 8812
Docket No. TD-7867

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE GULF, COLORADO AND SANTA FE RAILWAY COMPANY

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

(a) The Gulf, Colorado and Santa Fe Railway Company, hereinafter referred to as "the Carrier," violated the currently effective Agreement between the parties to this dispute, including Article II, Sections 10-b and 14, when on Sunday, July 25, 1954, it failed to use senior unassigned Train Dispatcher R. E. Johnson to fill a vacancy in Assistant Chief Dispatcher position beginning 9:00 P. M., Sunday, July 25, 1954, instead Carrier filled this vacancy with Mr. R. M. Bethune an unassigned train dispatcher junior to Dispatcher R. E. Johnson, and then used unassigned train dispatcher R. E. Johnson to fill a trick train dispatcher vacancy beginning at 11:00 P. M.

(b) Carrier shall now compensate unassigned Train Dispatcher R. E. Johnson the difference between what he was paid and what he would have been paid had he been used to fill the vacancy in the Assistant Chief Dispatcher position beginning at 9:00 P. M., instead of filling the vacancy in the trick dispatcher position beginning at 11:00 P. M., Sunday, July 25, 1954.

EMPLOYES' STATEMENT OF FACTS: On Sunday, July 25, 1954, two unassigned, qualified train dispatchers were available, in Carrier's Galveston, Texas office, to perform train dispatcher service, namely—Mr. R. E. Johnson and Mr. R. M. Bethune. Mr. Johnson was the senior of the two dispatchers.

On Sunday, July 25, 1954, two vacancies occurred in Carrier's Galveston, Texas office. The first vacancy occurred in the Assistant Chief Dispatcher position beginning at 9:00 P. M. The second vacancy occurred in a trick dispatcher position beginning at 11:00 P. M.

Carrier used the junior unassigned train dispatcher, Mr. R. M. Bethune to fill the first or 9:000 P. M. vacancy and used the senior unassigned train dispatcher, Mr. R. E. Johnson to fill the second or 11:00 P. M. vacancy.

(3) Where a practice is widespread and well established the only reasonable inference is that both parties have acquiesced in the practice. See Award No. 6607.

The Carrier has also presented evidence that its practice under the agreement rules relied upon by the Employes has been widespread and well established.

In conclusion, the Carrier respectfully reasserts that the Employes' claim in the instant dispute is entirely without support under the governing agreement rules in effect between the parties hereto and should, for the reasons previously expressed herein, be denied in its entirety.

All that is contained herein is either known or available to the Employes or their reprensentatives.

(Exhibits not Reproduced.)

OPINION OF BOARD: The parties here are agreed that the claim must stand or fall upon the meaning we give to the words "assigned" and "available" as used in the rules, Sections 10 (b) and 14 of Article II of the Agreement.

Employes are contending that unassigned Train Dispatchers are entitled to perform five consecutive days' service, if and when available and "* * * such service is * * * on a day-to-day basis with temporary vacancies to be awarded in the order in which they arise." It will be noted here that "awarded" is used instead of "assigned."

The Carrier says however, that in the circunstances here that when Claimant assumed the temporary vacancy of the Chief Dispatcher he was "assigned" and was not "available" for the 9:00 P. M. assignment on which he bases his claim, because he had to remain on his assignment until completed.

The Organization supports its argument in part by saying that:

"The term 'assigned' or 'regularly assigned'—and they are synonymous terms—has a well understood meaning in the industry, as we recently had occasion to point out. In Award 8762 we said:

'A "regularly assigned employe" may be defined as one who has been assigned to and holds tenure indefinitely (so long as it exists) on a regularly established position with regularly assigned hours and rate of pay. (See Awards 2170 and 2297, Second Division, and Awards 7430 and 7432, Third Division).' "

We adopted the same definition in Award 8778.

The only definition of "regularly assigned" which we find in Award 2170 supra reads:

"The term 'regularly assigned employe' is not a new or novel term which originated in the August 21, 1954 Conference Committee Agreement. The term had been used in prior agreements. The normal and ordinary meaning of the words is well under-

stood and there is nothing in Article II Section 1 of the August 21, 1954 agreement which might be construed as giving to the words a meaning different from their ordinary usage."

Assuming this to be the definition we relied upon when we cited it in Awards 8762, and 8778, the following is what the Labor Members of the Board had to say about it in their dissent to Second Division Award 2170.

> "These awards, if they were accepted as defining 'regularly assigned employe' as used in the Agreement of August 21, 1954, would rob the agreement of much of its substance. The term 'regularly assigned employe' was used in that agreement only to exclude from the holiday pay rule those individuals who might under **the rules of various agreements** be hired from time to time to do extra work not embraced in the positions to which employes were regularly assigned. It had nothing whatever to do with the permanence of an assignment of an employe to fill a regularly established position."

Still quoting:

> "The fact that it is anticipated that the assignment will be terminated upon the return of the usual incumbent is irrelevant. **During the assignment the employe filling the position is nevertheless 'regularly assigned'.**" (Emphasis ours)

So much for Second Division Award 2170.

In Second Division Award 2297 we do find in the Findings of that award the definition quoted by us just as we quoted it in our Awards 8762 and 8778 except "as long as the job exists" is not in parenthesis as indicated in our quote.

However, the claim in Award 2297 was denied and the Labor Members in their dissent said inter alia

> "Since the claimant was a carman subject to the controlling agreement and occupied a regular position within the terms of said agreement on the dates in question, he was a regularly assigned employe within the intent and meaning of Section 1 of Artcile II of the Agreement of August 21, 1954 and therefore eligible to receive the benefits thereof."

So much for Second Division Award 2297.

In our Award 7430 we do not find the definition we quoted in our Awards 8762 and 8778 but there is a discussion about the substance of it ending with

> "* * *A regularly assigned employe, on the other hand, knows that he will work each day on the same job, under similar conditions, and with a stable weekly or monthly income."

Here again the claim was denied, but the Organization there contended as the award indicates that claimants were **"regularly assigned"** even while working on the temporary assignments on which the claims were predicated.

So much for our Award 7430.

Now let us have a look at our Award 7432.

The Opinion of the Board starts out by saying:

> "Claimants were extra employes **assigned** to one of two extra lists maintained on the property by Agreement. According to the Agreement, the number of positions on each extra list is designated by the Division Chairman. These positions are then bulletined and **assigned** in the same manner as **regular** positions. Once on the extra list, however, it appears that the **assigned** employes are in the same position as extra employes generally; i. e., they are **assigned** temporarily to fill such vacancies as may arise due to illness, vacations, etc., and have no guarantee of regular employment." (Emphasis ours)

Then the award goes on to point out that the claimants, even though "assigned" as noted were not "regularly assigned" within the meaning of the rule cited.

It is to be noted that the definition of a "regular assigned employe" with which we started our discussion and which was born in the four awards above analyzed was concerned with interpretation of those words as found in the Forty Hour Week Agreement and the National Agreement of August 21, 1954, and the Organization here contends

> "* * * that we must bear in mind that Awards of this Division which have particular reference to the Forty Hour Week Agreement have little or no application to Train Dispatcher claims, excepting perhaps as to broad general principles fairly applicable to any dispute which my be brought here. * * *"

Be that as it may, the Organization will not now be heard to reject the definition of a "regularly assigned employe" which it itself introduced at the argument, nor will it be allowed to ignore the awards that gave it birth. in all four of which awards the Organization was urging that the employes were "regularly assigned employes" within the meaning of the definition used as controlling in those awards.

This referee was handed the docket in TD-7865 and was asked to study that portion of the "Employes' Oral Submission" having to do with the meeting in Chicago on June 8, 1949, in Room 1041, Railway Exchange Building at which "Article II, Section 10(b) proposed by the Organization was thoroughly discussed." Therein appears this quotation:

> "Mr. Kirkpatrick said a fundamental difference of opinion was involved. He stated that the Santa Fe does **not** assign more than than any one man to one position. He declared that this rule was uniformly followed in respect to all other non-operating crafts."

Whatever may have been the discussion at that meeting, our responsibility here is to interpret Article II, Section 10(b).

The Organization states in its brief

> "* * * the Agreement before us is an unusual one in a number of respects. One of those unusual aspects, also previously noted,

is that the Agreement makes provisions only for 'assigned' and 'unassigned' Train Dispatchers. The typical pattern of Train Dispatcher and other Agreements is to classify employes as 'regularly assigned' and 'extra'. The choice of language in the confronting case is not to be disregarded. On the contrary, the choice of words is significant and it was deliberate."

With this statement we can agree. No doubt it was deliberate on both sides, hence the confusion and the reason the case is before us.

The Organization contends that claimant could not be an "assigned" train dispatcher and unassigned train dispatcher at the same time. We think under the language in this rule he can, and that is the position taken by the Carrier. See Award 7432.

We conclude that claimant was "assigned" at the time this temporary vacancy arose and that he was not "available" to fill the 9 o'clock assignment.

The Carrier did not violate the Agreement.

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 Carrier did not violate the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1959.