

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, 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 Friday, July 23, 1954 and Saturday, July 24, 1954, it failed to use senior unassigned Train Dispatcher R. E. Johnson, to fill a vacancy in trick dispatcher Position No. 39 beginning at 3:00 P. M., July 23 and 24, 1954, and failed to use the junior unassigned Train Dispatcher J. W. Fewell to fill a vacancy in relief Position No. 2 scheduled to work as Assistant Chief Dispatcher Friday, July 23 and Saturday, July 24, 1954, beginning at 9:00 P. M.

(b) Carrier shall now compensate junior unassigned Train Dispatcher J. W. Fewell, the difference between what he was paid and what he would have been paid had he been used to fill the vacancy in Position No. 2 beginning at 9:00 P. M., instead of being used to furnish rest day relief for trick dispatcher Position No. 39, beginning at 3:00 P. M., Friday, July 23 and Saturday, July 24, 1954.

EMPLOYEES' STATEMENT OF FACTS: On Friday, July 23, 1954 and Saturday, July 24, 1954, two vacancies existed in Carrier's Galveston, Texas, train dispatchers' office. Firstly, rest day relief for trick dispatcher Position No. 39 beginning at 3:00 P. M., July 23 and 24, 1954; secondly, a vacancy in relief Position No. 2 scheduled to work as Assistant Chief Dispatcher beginning at 9:00 P. M., on Friday July 23 and Saturday, July 24, 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. J. W. Fewell. Mr. Johnson was the senior of the two dispatchers. Mr. Johnson being the senior unassigned train dispatcher was available for, and ready to perform service, on the first vacancy that would require his

The actions of the Employees and their representatives speak louder than words and clearly denote that they are, through the medium of their claim in the instant dispute, requesting the Board to grant them that which they have, by their own actions, previously recognized is not required or contemplated by the agreement rules.

The Third Division has repeatedly recognized and held that:

(1) The conduct of the parties to an agreement is often as expressive of intention as are the written words of the agreement. See Awards 3603, 4104, 4464, 5079, 6650 and many others.

(2) Long delay by the Employees in asserting a claim is cogent evidence there has been no violation and is clearly relevant in determining the intent of the parties under an agreement. See Awards 1397, 4536, 4751, 5404 and others.

The Carrier has presented evidence of more than four (4) years' delay by the Employees in asserting a claim of the nature involved in the instant dispute.

(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 Employees has been widespread and well established.

In conclusion, the Carrier respectfully reasserts that the Employees' 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.

The Carrier is uninformed as to the argument the Employees will advance in their ex parte submission, and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are necessary in reply to the organization's ex parte submission or any subsequent oral arguments or briefs submitted by the petitioning organization in this dispute.

All that is contained herein is either known or available to the Employees or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Two train dispatchers' positions became vacant for Friday and Saturday, July 23 and 24, 1954; the first was Position No. 39, Trick Dispatcher, from 3 P. M. to 11 P. M., the second was Position No. 50, Assistant Chief Dispatcher, from 9 P. M. to 5 A. M.

Senior unassigned Train Dispatcher Johnson was used to fill the second position, and junior unassigned Train Dispatcher Fewell was used to fill the other. Claimant Fewell claims that Johnson was available to fill the first vacancy, which would have left the second for Claimant, and that he should therefore be paid the difference between the pay rates for the two positions. The first question is whether Johnson was available for the 3 P. M. position.

The record shows that Johnson had worked until 1 A. M. on Friday, July 23, 1954, on Relief Dispatcher Position No. 2. Therefore, under the Federal Hours of Service Law he was not available to fill Position No. 39 at 3 P. M. the same day, which was only 14 hours later. It is clear that the Agreement "must yield to superior authority of the law." Award 6843.

Likewise, having worked on Relief Position No. 2 until 5 A. M. on the 24th, he was not available at 3 P. M. on the same day to fill Position No. 39.

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

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: F. P. Morse
Acting Secretary

Dated at Chicago, Illinois, this 21st day of September, 1959.