Award No. 8984

Docket No. TD-8589

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, 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 current agreement when it refused and continues to refuse to pay Train Dispatcher F. L. Spratt of its Jersey City, New Jersey Office, for loss of the opportunity to perform train dispatcher service on the hours of his regular assigned position on Monday, June 27, 1955, due to the fact that he was required by direction of proper authority to fill another assignment not acquired by him through exercise of seniority provisions of the Agreement and which assignment did not include the hours of his regular assigned position on the day of this claim.

(b) By reason of its action as set forth in the above paragraph (a) of this claim, the Carrier shall now compensate Claimant F. L. Spratt for one day's pay at pro rata rate of trick train dispatcher for loss of opportunity to perform service on his regular assigned position, 2:15 P. M. to 10:15 P. M., Monday, June 27, 1955.

EMPLOYES' STATEMENT OF FACTS: There is in effect an agreement between the parties, bearing the effective date of April 8, 1942, and amendments thereto. A copy of this agreement and revisions thereto 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.

This claim is based on the provisions of Article 4, Section (c), of the agreement, which reads as follows:

"ARTICLE 4. . . . LOSING TIME IN CHANGING POSITIONS.

(c) Loss of time, on account of the hours of service law or on changing positions by direction of proper authority, shall be paid

OPINION OF BOARD: This claim is made under Article 4, Section (c) of the Agreement, which reads as follows:

"ARTICLE 4.

"* * *

"Losing Time in Changing Positions.

(c) 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."

On June 27, 1955, due to the illness of the regular first trick train dispatcher, claimant was required to work that trick instead of his regularly assigned second trick. Since under the Hours of Labor Law he could not work both shifts on the same day, the claim is that he thereby suffered "loss of time" of his regular trick and should be paid for it under Article 4 (c). The claim was denied upon the ground that "loss of time" means "loss of compensation," and that since claimant "lost no compensation and is not entitled to be paid two days for one day's work, Article 4 (c) has no application."

The Employes' Position is stated as follows:

"It is our position that the term 'loss of time' as used in this connection means **minutes and hours and not compensation,** because Claimant Spratt was, at the direction of proper authority, prevented from performing **compensated service during a given time** to which he was entitled by virtue of his exclusive contractual right to work a specified time on the day in question * * *." (Emphasis added.)

Both parties contend that the rule is clear and unambiguous; that its meaning has been definitely settled, and that the principle of stare decisis should prevent further argument. The Employes rely upon Awards 2742, 3097, 6340 and 7403. The Carrier relies upon Awards 6817 and 6818.

Before examining them we should note that the present claim for "loss of time" under Article 4(c) is analogous to suits for time lost because of wrongful injury, or under accident and disability insurance policies. The standard legal encyclopaedic work "Words and Phrases" cites some dozen cases in which the term has been construed. All of them, without exception, hold that "loss of time" means loss of compensation.

Unless shown to have been adopted under a different construction or to have acquired a different construction by custom and practice, a contractual expression must be given its generally accepted meaning. For a contract is a meeting of the minds and must be expressed in words. Unless the words, and therefore the contracts, are to become meaningless, that principle must be followed. The question, therefore, is what, if anything, the precedents cited show in that connection.

The first is Award 2742 in which the claimant Butler worked from midnight to 8:00 A. M. instead of his regular shift from 8:00 A. M. to 4:00 P. M. However, his regular shift was the first Monday trick, and the shift to which he was diverted was the third trick for Sunday, his regular day of rest.

Since the working day was divided into three shifts, the first, second and third tricks, it was apparent that different working days were involved, and the claim was decided on that basis.

The Carrier contended that because he actually worked on Monday and was paid, there was no "loss of time." The Employes argued, as here, that "loss of time" meant "loss of an opportunity to work for a specified time." In the award this Board did not find it necessary to rule directly on either contention. It said:

> "* * * On Sunday, May 30, 1943, it was necessary for him to work the Third Trick, hours 12:00 Midnight to 8:00 A. M., Monday, May 31st, * * *."
>
> "* * *
>
> "* * * He was prevented from working Monday, May 31st, on account of the Hours of Service Law. In other words, on account of the Hours of Service Law, he lost the opportunity of working **that day**, as was his right under his regular assignment. His 'loss of time' of the right to work **that day** was the result of the Hours of Service Law, and, therefore, under Article 4 (f) the claim should be sustained." (Emphasis added.)

It did not hold that "loss of time" meant something other than loss of compensation, but that although he gained compensated Sunday time he still lost compensated Monday time, and under the rule was entitled to be paid for it. We need not consider the correctness of the award or of the reason stated. For it does not apply here, and does not hold that "loss of time" does not mean loss of compensation.

In Award 3097 claimant Mayberry was a regularly assigned relief dispatcher with Thursday as his rest day and regular assignment as follows: Wednesday, third trick; Sunday, Friday and Saturday, first trick; Monday and Tuesday, second trick. During the entire eleven day period, November 22 (Wednesday) to December 2, 1944 (Saturday, inclusive) he was assigned to fill the position of a third trick dispatcher. The claim was made for all his regular assignment days, except for Wednesday when he worked the same trick although in a different position. In that award the claim was sustained on the following ground:

> "* * * It is clear to us that when claimant worked the third trick dispatcher's position, he could not work his regularly assigned relief position because of the Hours of Service Law. * * * This is in accord with Award 2742 which is directly in point. Carrier contends further that as claimant suffered no loss of compensation, he suffered no loss of time within the meaning of the rule. This was also rejected in Award 2742 and we adhere to the conclusions therein reached."

Obviously Award 2742 was not in point, for the reasons noted above. Thus while Award 3097 sustains the Employes' contentions here, it does so on the erroneous impression that Award 2742 was a precedent as to changes of tricks of the same day.

Similarly, in Award 6340 where the claimant was required to work the first trick instead of his newly assigned third trick of the same day, the claim was erroneously sustained on the authority of Awards 2742 and 3097.

In Award 7403 the claimant was required to work the December 31, 1953, third trick (midnight to 8 A. M. on January 1, 1954), instead of his regular January 1, 1954 first trick (8 A. M. to 4 P.M.). Thus, as in Award 2742, the work to which he was assigned for the third trick caused him to lose his regular trick on the following day.

Since both Award 2742 and Award 7403 relate to tricks on different days, neither applies to the instant claim, where the two tricks were of the same day. Awards 3097 and 6340 relate to tricks of the same day and would support this claim if they were not erroneously grounded on Award 2742, which was not analogous.

The Carrier cites Awards 6817 and 6818, which deny claims relating to tricks of the same day. In Award 6817 the Position of Employes was stated as follows:

> "It is the contention of Petitioner that the calendar date on which a train dispatcher performs service has no bearing as to whether or not time was lost; that the controlling factor is the train dispatcher's assignment and that, because of the fact that Mr. Beckwith performed the service required of him, off his regular assignment, on the same calendar date that he would have performed service on his regular assignment, has no bearing on this claim.
>
> " 'Loss of time' refers solely to the time a train dispatcher is entitled to work under the agreement in accordance with his assignment, and is prevented from doing so by direction of proper authority or the Hours of Service Law. The only exception to this is when the train dispatcher exercises his seniority to make a change. The exercise of seniority is not involved in this case."

Award 6817 states:

> "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. * * *"

Award 6817 also noted that the difference in time worked was only fifteen minutes, but did not base the award on that fact. The Award stated in conclusion:

> "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."

That conclusion was based upon the history of Article 4 (c) as set forth in the record of that case by the Carrier and incorporated in this case by reference. It was as follows:

> "The Carrier asserts that from May 16, 1929, date of the first agreement with the Organization, to December 20, 1952, the parties clearly understood the meaning and intent of Article 4 (c), and that this single meaning was applied throughout the entire period. Certainly, if the language of the rule could be construed to give it the meaning they now claim for it, the organization would not have waited twenty-three years to enforce the rule.
>
> "The history of Article 4 (c), and the application thereof on this Carrier clearly shows the manifestations of the parties both prior to and subsequent to its adoption. We have shown that the first agreement between the Organization and the Carrier became effective May 16, 1929. This agreement came into existence after repeated attempts by the Organization to gain representation of Carrier's train dispatchers following the return to corporate control in 1920. The Railroad Administration did not make an agreement with the American Train Dispatcher Association during the period of federal control.
>
> "Under date of May 11, 1921, Mr. C. W. Morrison, who claimed to be the General Chairman representing the train dispatchers, submitted a draft of a proposed schedule of wages, rules and working conditions for train dispatchers. This letter was acknowledged on May 19, 1921, with the advice that date and place for conference would be given later. Under date of July 27, 1921, Mr. Morrison notified the Carrier as follows:
>
> > 'I enclose herewith copy of our submission to the United States Labor Board covering dispute referred to in Decision No. 119 (Dockets 1, 2 and 3) of that tribunal, in regard to rules of working conditions for train dispatchers.
> >
> > 'This submission is, in form and substance, in conformity with the requirements of procedure before the Board and is submitted to your office for your further information.'

"Among the various proposals submitted by the Organization to the U. S. L. B. the following appeared:

'Article VII (c)—Loss of time on account of hours of service law, or in 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.

'ARGUMENT: The dispatchers contend that when they are forced to lose time in changing positions, for the convenience of the company, it is proper that the company rather than the dispatchers stand the loss.'

"* * *

"Under the foregoing rule, the Carrier continued to use regular assigned dispatchers to fill temporary vacancies resulting from sickness or other causes as the need of the service required. There was no claim that Rule 3 (c) had been violated. Although the agreement was revised January 5, 1939, April 8, 1942, and amended March 4, 1944, February 4, 1947, September 1, 1949, and August 1 1952, the language and practice thereunder was carrier forward by the parties without change."

Of the six awards cited by the parties, only Awards 6340 and 6817 involved this Carrier, and the claim in Award 6340 did not arise until 1952, practically twenty-three years after its adoption in 1929.

In Award 6818, claimant had been required to work the second trick instead of his regular first or third trick assignments of the same days. This Board said:

"Practically the same contentions are made by the parties here as were made in Award 6817. The only factual difference in this case and that is that on the date of claim, claimant worked tricks other than those encompassed in his regular assignment. He made more money than he would have made if he had worked his regular assignment by reason of the Assistant Chief rate being higher. Article 7 (d) of the instant Agreement is identical with 4 (c) in the Agreement involved in Award 6817.

"In Award 6817, we pointed out inconsistencies in the holdings of this Board and in the affirmation which the Organization has made with respect to the proper interpretation of the rule. We incline to the view that the rule was designed to protect employes against monetary losses sustained because of shifting positions at the direction of proper authority or because of operation of the Hours of Service Law. If by reason of such a shift an employe suffers monetary loss because of having become unavailable for service on his regular assignment the rule guarantees that he will not suffer loss of compensation. * * *"

In the light of that history of the rule, the reason advanced for its adoption, and its practical construction and application for so many years, we are constrained to follow the precedents of Awards 6817 and 6818.

Opinions may differ whether there has been a loss of compensation under the conditions stated in Awards 2742 and 7403, where the employe has definitely had a "loss of time" on one day, but has worked on another day not in his regular schedule. But we cannot consider that there has been a loss of compensation on the ground that he has worked on trick instead of another of the same day. It is therefore our conclusion that the claim cannot be sustained.

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

That the parties waived hearing on this dispute; and

That the Carrier and the Employe involved in this dispute are respectively carrier and employe 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: F. P. Morse
Acting Secretary

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

DISSENT TO AWARD 8984—DOCKET NO. TD-8589

The Award of the majority herein is so palpably erroneous and the illogical reasoning which constitutes the essence of it so obviously unknowledgeable that it must be the subject of one of the extremely rare dissents by a Labor Member of this Division.

The essence of the holding of the majority is that the previous Awards of this Division which were cited in support of the claim herein are not in point, with special reference to our Awards 2742 and 7403. The majority does not contend that either of those two Awards is in error. On the contrary, the Referee expressly concedes that our findings therein were correct, as indeed they are. The basis of the majority's holding here, however, is that:

> "Since both Award 2742 and Award 7403 relate to **tricks on different days**, neither applies to the instant claim, where the two tricks were of the same day. Awards 3097 and 6340 relate to tricks on the same day and would support this claim if not erroneously grounded on Award 2742, which is not analogous." (Emphasis added.)

The facts are, however—and they were repeatedly pointed out during the panel argument and the reargument of this docket—that both Awards 2742 and 7403 DID involve "tricks of the same day" as was the case herein.

Where the majority lapses into incredible error is in attaching any significance whatever to the term "trick" insofar as the application of Agreement Rules is concerned. In attempting to differentiate between Award 2742 and the instant claim the majority erroneously seizes upon the term "third trick" used in Award 2742 as the prime consideration. The majority erroneously—indeed almost stupidly—states that when the individual claimant in Award 2742 worked from 12:01 A. M. until 8:00 A. M. on Monday, May 31 (an assignment other than his own), he "gained compensated Sunday time" and "lost Monday time." All this despite the fact that the Carrier in that case conceded that the individual claimant performed no Sunday service. Indeed, Sunday was his assigned weekly rest day!

The majority then proceeds to compound its error in an attempt to differentiate between the claim here involved and that asserted in Award 7403, in stating—

> "In Award 7403 the claimant was required to work the December 31, 1953, third trick (midnight to 8 A. M. on January 1, 1954) instead of his regular January 1, 1954 first trick (8 A. M. to 4 P. M.). Thus, as in Award 2742, the work to which he was assigned for the third trick caused him to lose his regular trick **on the following day.**" (Emphasis added.)

Whether a Train Dispatcher position is simply designated by a number or as a "trick" is of no significance whatever. Indeed, the term "trick" is not even to be found in a Train Dispatcher Agreement. **It is the assigned hours of a position and NOT its designation, either by number or as "first, second or third trick", which determines the day of an assignment.** That is so elementary that any elaborating comment upon the point would border upon the ridiculous.

In both Awards 2742 and 7403 the individual claimants were required to perform service from 12 Midnight until 8:00 A. M., instead of on their assigned hours 8:00 A. M. to 4:00 P. M. Here the claimant was required to perform service 6:15 A. M. until 2:15 P. M. instead of on his assigned hours 2:15 P. M. until 10:15 P. M. **In all three cases the service was on the same day as their own assignments.**

Obviously, the situation in all three cases is identical! Not only is the holding of the majority in error, as is clearly apparent from the statements above quoted, it also fails to meet and resolve a very material issue which the record raises, i.e., the exclusive right of an employe to fulfill his assignment, to which Award 2742 refers. The brief submitted on behalf of the Labor Members herein pointed out that the Carrier here involved, in its submissions in Award 6817, about which the majority has much to say, expressly acknowledges that:

> "Under the bulletin and award procedure, Article 5(j), the successful applicant secures to himself unconditional right to the position except to the extent it is not otherwise limited by other parts of the Agreement, such as displacement rights of senior employes. . . ."

No rights of senior employes were here involved. Nor was there any emergency, as referred to in Award 7403, nor was any emergency claimed.

Authority was cited, including our Award 3301, which holds, as there, that:

> ". . . The rights of the employe under the assignments are not satisfied merely by paying the employe the equivalent pay for working other hours at the same job. . . ."

During the reargument of this docket the Referee agreed that an employe has an exclusive contractual right to fulfill the assignment which he acquires under the bulletin rules of an Agreement. Yet, despite the fact that this point was in issue, both in the record and in the brief submitted on behalf of the Labor Members, the holding of the majority is significantly and understandably silent in respect to that issue. For, obviously, if that exclusive right be recognized, as a long line of our Awards hold it must be, then the illogical and erroneous basis of this Award becomes readily apparent. Hence, the majority not only errs, but also fails to meet this material issue.

R. C. Coutts
Labor Member—Third Division
N R A B

Chicago, Illinois
October 1, 1959

COMMENT ON DISSENT TO AWARD 8984

The Dissent is in error in stating that the essence of this Award is that prior Awards cited in support of the Claim are not in point.

The essence of this Award is that historically the reason for the adoption of Article VII (c) was not to provide a penalty for the temporary diversion of a dispatcher from his regular trick, but to make "the company rather than the dispatchers stand the loss," where a loss actually results from the diversion. The dissent does not dispute that historical fact, which is determinative of this Claim.

In analyzing the Awards relied upon by the parties the Award points out that both Awards 2742 and 7403 relate to instances in which by being worked the third shift on one day the claimant was prevented from working his regular first shift on the next day. Award 2742 expressly said without dissent:

> "* * * On Sunday, May 30, 1943, it was necessary for him to work the Third Trick, hours 12:00 Midnight to 8:00 A. M., Monday, May 31st, * * *. He was prevented from working Monday, May 31st, on account of the Hours of Service Law," and therefore "lost the opportunity of working **that day**"; i.e., Monday.

The calendar day runs from midnight to midnight. But the work day adopted by the parties consists of three consecutive tricks, the First, Second and Third, which are not identical with the twenty-four hours of one calendar day, but overlap two calendar days. The first and second Sunday tricks lie within the Sunday calendar day, and the third Sunday trick lies within the Monday calendar day. Obviously the Agreement's working pro-

visions relate to work days rather than to calendar days. Therefore it is quibbling to argue that for purposes of the Agreement the Sunday third trick and the Monday first and second trick are on the same calendar day.

That is clearly what Award 2742 meant in stating that "**on Sunday,** May 30, 1943, it was necessary for him to work the Third Trick," whereby "he was prevented from working **Monday,** May 31st, on account of the Hours of Service Law."

Consequently we cannot agree that the above quotation constitutes stupidity; nor can we agree that it is stupidity to point out that Awards 2742 and 7403 relate to tricks on different work days and therefore are not valid precedents for Awards 3097, 6340, 8984 and 8985, which relate to tricks on the same work days.

In any event, as above stated, those Awards, even if in point, could not outweigh the undisputed historical fact that Article VII (c) was adopted to transfer actual losses from Employe to Carrier, and not as a penalty for a temporary change on Employe's shift without loss.

Howard A. Johnson, Referee