Award No. 9081
Docket No. TD-8157

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—Eastern Lines

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

(a) The Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as "the Carrier," violated the governing provisions of the Dispatchers Agreement, resulting in regularly assigned Dispatcher J. H. Horan losing one day's pay, October 31, 1954, at trick train dispatchers daily rate.

(b) Carrier shall now pay regularly assigned Dispatcher J. H. Horan one day's pay at trick train dispatchers rate for Sunday, October 31, 1954.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties to this dispute bearing an effective date of September 1, 1949. A copy thereof is on file with this Board and the same is made a part of this submission as though fully set out herein.

Article IV, Section 4 of the Agreement provides:

"The combining of territory, duties or responsibilities, for rest day purposes, will not be permitted, except that positions which are not a part of a continuous cycle under Section 2 of Article V, and which may be created for the purpose of assisting in the handling of peak loads, may be combined with continuous cycle positions for rest day purposes."

Article V, Section 2 of the Agreement provides:

"Where three (3) assignments, each of eight (8) consecutive hours, covers a 24-hour period in consecutive order, no one of such three (3) assignments shall have a starting time between 12:00 o'clock midnight and 6:00 A. M."

Day of Week	Day of Month	Posn. No.	Occupation	Rate of Pay	Assigned. Hours
Tuesday	Nov. 2	210	Dispatcher	506.14	800am 400pm
Wednesday	Nov. 3	210	Dispatcher	506.14	800am 400pm
Thursday	Nov. 4	220	Dispatcher	506.14	400pm 1200pm
Friday	Nov. 5		Rest Day		
Saturday	Nov. 6		Rest Day		
Sunday	Nov. 7	215	Dispatcher	506.14	800am 400pm
			(Total 17 days)		

It will be noted from the above tabulation that while the claimant did not perform any service on Sunday, October 31, 1954, due to the Hours-of-Service Law, the fact remains that when you take into consideration the regular work days of both the assignment he actually worked and the one he could have worked had he not exercised his seniority October 21, 1954, the total number of days involved are the same, i. e., 17 days, therefore, the claimant has not actually suffered a monetary loss regardless of the handling involved.

In order for the Organization to find support for the claim it must establish and prove that the action of the Carrier constituted a violation of a right granted by the agreement, which so far it has failed to do. The Employes are on the contrary attempting, through the medium of their claim in the instant dispute, to have the Board either disregard or nullify the clear and unambiguous provisions of the last sentences of Article II, Section 7 and 10-b of the current Dispatchers' Agreement which require a denial of the Employes' claim. The Third Division has repeatedly recognized and held that (1) its statutory authority is limited to the interpretation and application of the agreement rules as written and to which the parties to a dispute have agreed (Award No. 5703 and others), and (2) it is without authority to add to, take from or otherwise amend, revise or write rules for the parties to an agreement (Awards Nos. 4585, 5079, 5897, 6107, 6180, 6271 and many others).

In conclusion, the Carrier respectfully reasserts that the Employes' claim in the instant dispute is entirely without support under the agreement rules and should be denied for the reasons previously advanced herein.

The Carrier is uninformed as to the argument the Employes 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 brief submitted by the petitioning Organization in this dispute.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization here presents claim on behalf of the named employe, and requests compensation for one day at Trick Train Dispatchers rate for October 31, 1954, on the premise the employe was deprived of work by Carrier, brought about by Carrier in violation of Article IV, Section 4, when on June 13, 1954, it made certain changes in rest day assignments at Chillicothe, Illinois. As a result such action by

Carrier, and acknowledged by Carrier, that such changes effective June 13, 1954, were improper, and all employes so affected by such change resulting from combining duties or responsibilities for rest day purposes, were compensated for such improper action by Carrier.

The record further shows that on October 27, 1954, Carrier abolished the assignments and by bulletin they were again re-established and changed to the same status as was in effect prior to June 13, 1954.

Prior to changes made in assignments effective June 13, 1954, the Claimant held a regular assignment described as rest day Relief Position No. 265, working Monday through Friday, with Saturday and Sunday as rest days. On October 21, 1954, Claimant by exercising his seniority rights, as provided by Article II, Section 10(b) of the Agreement, placed himself on Position No. 266, for a temporary vacancy then existing. Rest days on this latter position were Tuesday and Wednesday. When Carrier, on October 27, by bulletin decided to revert the assignments to the same arrangement as was in effect prior to October 13, 1954, Claimant bid on his former regular assignment and was the successful applicant to Position No. 265, having rest days of Saturday and Sunday. Since the new assignment began for Claimant on Sunday, October 31, 1954, he was unable to resume work on that day due to requirements of the Federal Hours of Service Act.

Carrier denies that it in any way has violated the provisions of the Agreement as alleged, that any loss of work suffered by the Claimant was brought about by his action in exercising his seniority rights in changing his assignment, for which no compensation would be due him, as provided by Article II, Section 10(b) of the Agreement. Carrier also relies upon the provisions of Article II, Section 7 to support its contentions.

The Board is of the opinion that the Claimant was deprived of performing service for Carrier on October 31, 1954, Carrier violated the provisions of Article IV, Section 4, of the Agreement ending October 31, 1954. If such violation had not been put in effect by Carrier, the Claimant here would have had no reason to exercise his seniority rights but due to changes brought about by Carrier's violation he was required to exercise his seniority rights on the temporary assignment or forfeit his seniority rights as provided by the Agreement. He would not have been put in such position as to be forced to protect such rights. As a result of Carrier having discontinued the violation on October 31, 1954, Claimant was prohibited under the Federal Hours of Service Act to perform service, which as a result deprived him of service on such date, had Carrier in the first instance not violated the Agreement, bringing about the chain of events which caused Claimant to be deprived of performing service on October 31, a day he would have worked had he continued on his regular assignment.

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 Carrier did violate the Agreement as alleged.

AWARD

Claim sustained as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November, 1959.

DISSENT TO AWARD NO. 9081, DOCKET NO. TD-8157

To analyze this Award, it is necessary to set forth some past history as advanced by the Organization, in order to understand the erroneous interpretation which the Majority placed on the controlling rules.

Beginning June 13, 1954, the Carrier blanked (failed to provide relief) certain positions located in its Chillicothe, Illinois, dispatching office for weekly rest day relief purposes, in violation of Article IV, Section 4, of the Agreement which provides:

> "Section 4. The combining of territory, duties or responsibilities, for rest day purposes, will not be permitted, except that positions which are not a part of a continuous cycle under Section 2 of Article V, and which may be created for the purpose of assisting in the handling of peak loads, may be combined with continuous cycle positions for rest day purposes."

Claim was filed in the usual manner, declined at the lower levels, and handled on appeal with the highest officer designated by the Carrier to handle claims on appeal. Such officer acknowledged error in the action complained of and, on August 22, 1955, authorized payment of $860.99 to five train dispatchers covering the period June 13, 1954, to and including October 24, 1954, on which date the claim ceased. Payment was made to these five train dispatchers on the last half of the September, 1955, payroll. It was understood that such payment was made in full and complete settlement of Carrier's violation of Article IV, Section 4, therefore, this issue is as dead as the proverbial dodo bird. Yet, the Organization came before this Board alleging that the action of the Carrier on June 13, 1954, was responsible for Claimant losing one day's pay on October 31, 1954.

Claimant was the occupant of Relief Position No. 265, which was discontinued on June 13, 1954.

In accordance with its decision to correct the violation of Article IV, Section 4, it became necessary for the Carrier to use an additional train dispatcher on the first and second tricks each Sunday. In order to accomplish this, it became necessary for the Carrier to increase its force of train dispatchers at the point involved. This brings before us Article IV, Section 2, which provides:

> "Section 2. Rest days shall attach to the position and shall be established by the Superintendent, and when so established

will, subsequent to September 1, 1949, be changed only when made necessary by increases or decreases in force, or by agreement between the Superintendent and Office Chairman, in which event all assignments affected shall be abolished and new assignments listed for seniority choice under Section 10-a of Article II of this Agreement."

As required by Article IV, Section 2, the Carrier, on October 27, 1954, issued the necessary bulletin, to become effective October 31, 1954, advertising for bids, among other positions, a new position designated as No. 265.

Dispatcher R. G. Buckingham, regularly assigned to rest day relief position No. 266, was absent on vacation during the period October 21 through October 31, 1954 (9 days), thus creating a **temporary vacancy** in regularly assigned position No. 266.

Under the provisions of Article II, Section 10-b, the temporary vacancy on position No. 266 was made known to all regularly assigned train dispatchers, but none elected to fill that vacancy. In such event, the rule provides that the temporary vacancy will be filled by the senior qualified and available unassigned train dispatcher who will not thereby have claim to work more than five (5) consecutive days.

Claimant Horan, meeting the conditions set forth in Article II, Section 10-b, was assigned to fill this temporary vacancy during the period October 21 through October 31, 1954; and, **being the successful bidder on new position No. 265,** he was assigned to fill that position, effective October 31, 1954. However, because he had worked position No. 266 from 4 P. M. to 12 Midnight Saturday, October 30, 1954, due to the Hours of Service Law he was prohibited from working as a train dispatcher on October 31, 1954. He took over the position on Monday, November 1, 1954.

Claimant, in exercise of his seniority in bidding in new position No. 265, was subject to that portion of Article II, Section 10-b, which provides:

"Time lost in making changes under the provisions of this Section 10-b will not be paid for, * * *."

The misinterpretation of the rules of the Agreement is found in the ultimate paragraph of the Majority Opinion wherein, in order to justify the sustaining of the claim, it is attempted to revitalize Carrier's violation of Article IV, Section 4 (hereinbefore dealt with as a closed issue), in holding:

"* * * If such violation had not been put in effect by Carrier, the Claimant here would have had no reason to exercise his seniority rights **but due to changes brought about by Carrier's violation he was required to exercise his seniority rights on the temporary assignment or forfeit his seniority rights as provided by the Agreement. * * *"** (Emphasis added.)

Section 10-a of Article II deals with **permanent vacancies and new positions established** and provides that in the event no application is received from a regularly assigned train dispatcher, "the senior qualified unassigned train dispatcher will be required to accept the position, or forfeit his seniority as train dispatcher; * * *."

We are not here confronted with such a situation. Claimant was filling a temporary vacancy and when position No. 265 was bulletined, he bid on it and was assigned thereto. Section 10-a of Article II has no application. Section 10-b of Article II controls. Nowhere in Article II, Section 10-b, is there any reference to forfeiture of seniority for any cause.

For the foregoing reasons, the undersigned dissent to the misapplication or ignoring of the clear language of the applicable negotiated Agreement rules with respect to the simple set of factual circumstances here present, as is evidenced by the Award.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ W. H. Castle

/s/ J. F. Mullen