Award No. 10393

Docket No. TD-11139

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Arthur Stark, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(a) The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as "the Carrier" violated the currently effective agreement between the parties to this dispute, particularly Rule 5-(b) when it failed and refused to require or permit First Extra Dispatcher T. E. Bigley to perform extra service on Position No. 48 in its LaCrosse, Wisconsin train dispatching office on Saturday, November 29, 1958.

(b) Carrier shall now compensate First Extra Dispatcher T. E. Bigley one day's pay at pro rata rate for Saturday, November 29, 1958.

EMPLOYES' STATEMENT OF FACTS: There is in effect an agreement between the parties, effective September 16, 1950, on file with your Honorable Board and by this reference is made a part of this submission as though it were fully set out herein.

Rules 3-(d), 3-(e), 5-(b) and 5-(i) which are pertinent to this dispute are quoted here for ready reference:

"RULE 3-(d). RELIEF SERVICE.

Where relief requirements regularly necessitate four (4) or more days of relief service each week, relief train dispatchers shall be employed, regularly assigned, and paid the daily rate of each train dispatcher relieved. When not engaged in train dispatching service such relief dispatchers will be used in other service as directed by proper supervisory officer, and will be paid therefor at the rate applicable to trick train dispatchers in the office.

NOTE: In the application of the last sentence of the above paragraph, on a day when used in other than dispatcher service,

illness, or any other reason, that there is a guarantee by the Carrier that an extra man will be used. This is distinguished from our Award No. 30, which was based upon the interpretation of the added words to Rule 3(d) which compelled the Carrier to fill 7 day positions 7 days a week. Rule 33 does not compel the Carrier to fill the 5 day assignment with extra employes when the regular employe fails to report to work."

The attention of the Board is also directed to what was said in part in the Opinion of the Board in Award 7591, reading:

"The determination of the number of employes needed to perform the work at a given situation is the function of Management, except as it may have limited itself by specific agreement. Award 6184. Under the rules here cited we see no requirement that the Carrier continue to use the same number of employes on all shifts for the full forty hours of each position. Only regularly assigned employes are guaranteed the forty hours per week. If one elects to absent himself for personal reasons, it is for Management to determine whether a full complement of employes is required at the time of the absence of the excused employe. It is not a matter subject to the decision of this Board."

Also, please see NRAB, Third Division, Award 5590, of the same import and effect.

In the absence of service requirements on the date of the claim when the regular occupant of relief assignment No. 48 laid off, that day being a "make work" day on that assignment rather than a day on which the regular occupant performs service relieving a regular train dispatcher on his rest day; and where there is no schedule rule that restricts the right of the Carrier in blanking the position on the day and under the circumstances involved; and where Schedule Rule 5 (b) expressly provides that no guarantee is applicable to first extra train dispatchers (such as the claimant herein); and where the NRAB has held in numerous awards, as have other tribunals, that guarantees flow to the regularly assigned occupant of a position where such guarantee is provided and guarantees do not flow to the extra employes, it is the position of the Carrier that the claim is entirely devoid of merit and should be denied.

OPINION OF BOARD: In November 1958 Mr. N. O. Frizzell occupied the position of Second Trick Relief Dispatcher (Position No. 48) at La Crosse. In this job Frizzell provided rest day relief for the Second-Third Districts on Sunday and Monday and for the First District on Tuesday and Wednesday. His own rest days were Thursday and Friday. On Saturday he did not fill in during anyone's rest day but, in the words of Circular DB-797, performed "service as directed by Chief Dispatcher."

Position No. 48 had been established in accordance with Rule 3-(d), entitled "Relief Service":

"Where relief requirements regularly necessitate four (4) or more days of relief service each week, relief train dispatchers shall be employed, regularly assigned, and paid the daily rate of each train dispatcher relieved. When not engaged in train dispatching service such relief dispatchers will be used in other service as directed by proper supervisory officer, and will be paid therefor at the rate applicable to trick train dispatchers in the office.

"NOTE: In the application of the last sentence of the above paragraph, on a day when used in other than dispatcher service, he may be used, in preference to a first extra dispatcher or extra dispatcher, to fill a vacancy on a dispatcher's position in which case the 'other service' of his regular assignment need not be performed."

On Saturday, November 29, 1958 Frizzell was absent from work and his position was not filled.

On this date T. E. Bigley was serving as First Extra Dispatcher at La Crosse, assigned in accordance with Rule 4-(b) which states in part:

". . . Train dispatchers so assigned will be permitted and required to perform Extra Train Dispatcher service in that office, to the extent they are available for such service. . . ."

It is the A.T.D.A.'s contention that Bigley should have been assigned to Frizzell's position in the latter's absence.

The association argues, in essence, as follows:

1. Position No. 48 was a regular position since it was subject to the conditions of Rule 3-(d).

2. The Carrier is prohibited from changing or abolishing this regular position or parts thereof except as specifically, provided in Rule 5-(i):

'Six (6) days notice of abolishment of regular positions will be posted in the offices affected and a copy furnished the general and office chairmen."

No such notice was posted in the instant case.

3. A regular position cannot be blanked or left unfilled on any day of its schedule (including a "make work" day) except when the regular occupant is absent from his assignment because he is being used to fill a dispatcher's position (Rule 3-(d)). In the case at hand Frizzell was absent for personal reasons—not to fill a dispatcher's job.

This Board has already ruled, in a similar case, that a make work day constitutes an integral part of a regular assignment and cannot be blanked any more than can the remaining days. The Association cites Award 6750:

"The trouble here comes from a contention advanced by Carrier that the facts disclose no vacancy on a regularly assigned dispatcher position due to the fact that the Monday relief assignment of Gipson's regular position was what is referred to as a utility assignment, i.e., that in order to comply with the requirements of Article 3 (e) of the Agreement Carrier made work for such position by creating the job of Assistant to the Chief Dispatcher for one day (Monday) of each week only. Based on this premise it is argued there was no position to relieve on Gipson's assignment on the date in question. We believe the fallaciousness of Carrier's position lies in its erroneous conclusion that the pertinent and previously mentioned Articles of the Agreement have application to the positions filled in relief by a regularly established relief position instead of days blanked **on the regularly assigned relief position itself.** Here it is conceded Carrier had made work on

Gipson's position when it was established. It is our view that thereafter the work assigned to such position was a part of that regular assignment and the days thereof could no more be blanked than could days of other regularly assigned positions of different character. . . ."

The Carrier contends in brief:

1. Under the NOTE proviso of Rule 3-(d), "other service"—or make work—need not be performed when the occupant of the relief assignment is absent.

2. Rule 3-(d) applies exclusively to the regular occupant of a rest day relief position. It does not guarantee to an extra employe service on a "make work" day. Moreover, Rule 5 (b) states in part:

". . . Nothing in this agreement is intended to create any guarantee of any number of days of work per week for First Extra Dispatchers."

3. There were no service requirements on November 29, the day in question.

4. The controlling Agreement does not contain a no-blanking rule. In the absence of such a rule, Management has the right to blank positions. Moreover, prior decisions of this Board have upheld Carriers' basic right to determine whether or not specific work should be performed (Award 8327).

The basic question here is whether, under the given facts and circumstances, Management had the right to leave Frizzell's position unfilled on November 29. These are the crucial facts, in our estimation: (1) Frizzell was out one day for "personal" reasons; (2) He was the incumbent of a five-day relief position; (3) The Agreement does not contain a prohibition against blanking, (4) Extra employes receive no guarantee of employment under the Agreement.

How do these facts compare with those on which Award 6750 is based? We note the following significant differences:

Gipson, the Relief Dispatcher in Award 6750, was on vacation and his entire assignment (including one "make work" day) was taken over by Extra Dispatcher Snively. Because of the absence of a third man, Snively was removed from his assignment to Gipson's position on the "make work" day. In other words, the Relief Dispatcher's position was not blanked by virtue of the Relief Dispatchers absence. Rather, the temporary incumbent—an extra man—was **removed** by Management and given other work. This is quite different from the situation involving Frizzell in the instant case.

2. The Association's claim, in Award 6750, was based primarily on the Carrier's alleged violation of a no-blanking Rule (Rule 3 (f)) which provided:

"Combining or blanking positions for relief purposes shall not be permitted except as agreed to between the Superintendent and Division Chairman, subject to the concurrence of the Management and General Chairman."

The Association argued in part:

"It is the position of the employes that the second relief position held by Relief Train Dispatcher L. F. Gipson, established pursuant to the requirements of Article 3 (e) (supra), was subject to the provisions of Article 3 (f) to the same extent as any other established and regularly assigned train dispatcher position under the agreement.

"It is the position of the employes that the Carrier violated Article 3 (f) when it blanked the position held by Train Dispatcher Gipson on Monday, March 23, 1953, instead of filling that position by using available Train Dispatchers Drake and Short in accordance with the rules of the agreement prohibiting blanking positions and the practice, custom and current instructions establishing the manner for filling vacancies where extra train dispatchers are not available."

The controlling force of this clause was recognized by both the parties and the Referee who stated, in part:

"There is little if any controversy respecting the force and effect to be given applicable rules of the Agreement when a regularly assigned dispatcher position is blanked for one day. As we analyze their respective positions the parties agree that if the involved position be assumed to be a regularly established dispatcher position Article 3 (f) precluded the blanking of such a position and an Agreement, dated January 31, 1940, required that a temporary vacancy on such a position be filled by assigning Drake to fill it and permitting Short to work the rest day of his position."

But the Agreement before us contains no such rule. Rule 2 (h) covers "Combining Positions for Relief Purposes" and makes no reference to blanking. It states in relevant part:

"The combining of positions to avoid using relief or extra train dispatchers to provide relief on rest days for established positions will not be permitted except by agreement between division superintendent and office chairman subject to approval of Carrier and General Chairman."

Does Rule 5-(i) control? Significantly, in our judgment, this rule is entitled "Notice of Force Reduction" and, appropriately, deals with "abolishment" of positions. It would be difficult to establish, in the case at hand, that Frizzell's one day absence for "personal" reasons constituted a force reduction as contemplated in Rule 5-(i) or could be reasonably interpreted as an abolishment of a position.

True, Award 5016 appears to hold otherwise. But there is a major difference in facts between Award 5016 and the present case as revealed in this excerpt from the Board's Opinion:

"On Tuesday, December 21, 1948, Wherland was off duty due to sickness in his family. The extra train dispatcher, assigned to the Elko office, was available but not used on this position. He was held to fill the first trick dispatcher's position, 8 A. M. to 4 P. M., the next day. The claimant, Assistant Chief Train Dispatcher Huckaby, was also available but he was not called to fill it. Instead the Carrier blanked the position for one day between the hours of 10 P. M., Tuesday, December 21, and 6 A. M., Wednesday, December 22, and required the Night Chief Dispatchers to perform its work."

In other words, in Award 5016 there was work to be performed on the disputed day, and that work was assigned to an employe in another position instead of filling the position to which the task (preparing Morning Reports) belonged. In the present case, however, no work or task was assigned to anyone in Frizzell's absence.

There is another distinction between Award 5016 and the present case. The Award in 5016 was based, at least in part, on this finding:

> ". . . The record warrants the conclusion that up until the date on which the involved position was blanked, in fact thereafter, the conduct and action of the parties was such as to definitely indicate that they themselves believed the Agreement required that vacancies in such position should be filled, not blanked."

But in the instant case we have no conclusive evidence of a customary or prevalent contract interpretation. (In 1956 the relief position was blanked on a Saturday when the incumbent was away; in 1959, after this claim was submitted, the position was not blanked when the incumbent went on vacation.)

Under all those circumstances, and since facts and Agreements in the cases relied on by the Association are materially different from those now before us, it is our conclusion that this claim must be denied.

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

That the parties waived oral hearing;

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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 7th day of March, 1962.