

Award No. 10927

Docket No. TD-12601

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ERIE-LACKAWANNA RAILROAD COMPANY

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

(a) The Erie Railroad Company (predecessor of the Erie-Lackawanna Railroad Company), hereinafter referred to as "the Carrier" failed to comply with the provisions of the effective agreement between the parties, Article 5(h) in particular, when on Sunday, August 2, 1959, it failed to use Extra Train Dispatcher A. A. Pivirotto to work a temporary vacancy as train dispatcher on third trick Second District in its Hoboken, New Jersey train dispatching office.

(b) Extra Train Dispatcher A. A. Pivirotto shall now be paid one day at the monthly rate of \$598.91 which he would have been paid if he had been used to perform the service to which he was entitled under the provisions of the agreement.

EMPLOYES' STATEMENT OF FACTS: There was in effect on the date of said violation an Agreement covering the Hours of Service and Working Conditions between the Erie Railroad Company and its train dispatchers represented by the American Train Dispatchers Association, effective April 8, 1942, and subsequently amended at various times.

A copy of this Agreement and Amendments thereto are on file with your Honorable Board and, by this reference, are made a part of this submission as though fully incorporated herein.

For ready reference the provisions of said Agreement particularly pertinent to this dispute are quoted as follows:

"ARTICLE 1

"(a) SCOPE (EFFECTIVE FEBRUARY 4, 1947).

The term "Train Dispatcher" as herein used shall include Chief, Assistant Chief, Trick, Relief, and Extra Train Dispatcher. . . ."

IV. CONCLUSION

Carrier has hertofore shown that no rule of agreement has been violated by Carrier in the instant dispute. This in and of itself would negate any possibility of a claim on the part of the claimant. Award 8851 Referee Bakke.

Carrier has then shown that the the claimant very definitely "begged off" working this assignment when called by Assistant Chief Dispatcher Appeld at 6:30 P. M. That this is a fact and not mere assertion is proven by the statement of Mr. Appeld and by the fact that Carrier was required to pay time and one-half to regular dispatcher H. VonderHyde who covered the position on his relief day.

Carrier submits that the claimant should not be allowed to make a claim for work which he requested not to have to perform. Such a claim does not meet with the dictates of common sense or logic or with the dictates of labor-management relationship.

Based upon the facts and authorities cited, Carrier submits that this claim is most emphatically without merit and should be denied.

All data contained herein have been discussed with or are known to the Employees.

OPINION OF BOARD: On Sunday, August 2, 1959, the Claimant was a regularly assigned Agent at Verona and, in addition, he was the senior extra train dispatcher in the Carrier's Hoboken, New Jersey, train dispatching office. A train dispatcher vacancy existed on the third trick which was scheduled to begin at 11:00 P. M. on August 2 and which normally would end at 7:00 A. M. on August 3, 1959.

The Carrier admits that the Claimant was entitled to fill this temporary vacancy. There is no disagreement that Chief Train Dispatcher, Hansen called the Claimant about 11:00 A. M. on August 2 and advised him of the vacancy. He also told Claimant that it would be necessary to determine if a substitute for Claimant's position as Agent could be secured. The Claimant was called again at 6:30 P. M. and told to report for work as a train dispatcher at 11:00 P. M.

There is no dispute that the Claimant was entitled to the assignment. The conflict revolves around the 6:30 P. M. telephone conversation. The Chief Dispatcher states that he told the Claimant to report for work, but that the Claimant replied that he had made arrangements to go out and that he would rather cover his own assignment as Agent at Verona. The Claimant denies that he made such a statement. The denial, however, is contained in the correspondence between the Organization and the Carrier. The Carrier's position is supported by the written statement of Assistant Chief Dispatcher Appeld, who called Claimant at 6:30 P. M. and who wrote in his report that the Claimant "begged off" the assignment as train dispatcher.

It is a well established principle of this Board that the burden of proof is upon the Claimant. Mere assertions by this Claimant that he did not "beg off" is not sufficient to overcome the evidence of the Assistant Chief Train Dispatcher that he did. Awards 10390 (Dugan), 10610 (Dolnick), 10601 (Dolnick), and 10323 McDermott). The Carrier's position is further

supported by the fact that it was obliged to assign another employe and pay him at the rate of time and one-half his regular rate in order to cover the assignment. The premium pay would have been unnecessary had the Claimant accepted the assignment.

The language of the applicable Rules cited by the Organization is clear and the meaning is undisputed. There is no attempt here to change or modify the Agreement. But there is no reason or rule which prevents the parties from waiving the enforcement of a contract provision. Award 3407 (Tipton), cited by the Organization, is not in conflict with this principle and is, therefore, not applicable.

For the reasons herein stated, the Board is of the opinion that the claim is without merit.

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 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 Agreement has not been violated.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1962.