

Award No. 14177

Docket No. TD-15510

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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

(a) The St. Louis-San Francisco Railway Company, (hereinafter referred to as "the Carrier"), violated the effective Schedule Agreement between the parties, Article IV(f) thereof in particular when on June 12 and 13, 1964, it deprived the individual Claimant herein of service which he was contractually entitled to perform.

(b) The Carrier be required to compensate Extra Train Dispatcher E. Fyfe at pro rata rate of trick train dispatcher for June 12 and 13, 1964 because of the violation of the Agreement as referred to in paragraph (a) hereof.

EMPLOYEES' STATEMENT OF FACTS: There is an Agreement between the parties, copy of which is on file with this Board. Said Agreement is by reference incorporated into this submission the same as though fully set out herein. For ready reference, Article IV(f) is quoted here in full:

Article IV, Seniority:

(f) In filling vacancies in positions of train dispatchers seniority, fitness and ability shall govern. Fitness and ability being equal, seniority shall prevail."

The instant claim arises from Carrier's failure to call and use the senior extra train dispatcher to fill a vacancy in its Springfield, Missouri train dispatching office on June 12 and 13, 1964.

On those dates there existed a temporary vacancy in the Carrier's train dispatching office at Springfield, Missouri. Carrier called and used an extra train dispatcher junior in seniority to Claimant Fyfe and the latter asserted claim for two days' compensation at the pro rata daily rate of trick train dispatcher for the reason that he had been "held off job by Chief Dispatcher and younger man worked."

The claim was declined at the Division level on June 26, 1964 whereupon the matter was referred to General Chairman W. N. Edson. Under date of July 25, 1964 the General Chairman wrote the Superintendent, citing Article

in earnings is proper payment in a claim of this kind, but the Organization has repeatedly claimed before this Board that the difference in earnings should be allowed. For example, in the dispute that was decided by Award 2942 (Carter) the claimant telegrapher made application for a temporary dispatching vacancy, but because of an "unavoidable emergency condition" Carrier was unable to provide a relief telegrapher for Claimant, and claim was filed for the difference between the telegrapher's rate, which Claimant was paid, and the dispatcher's rate. The Claimant was allowed the difference between the telegrapher's rate and the dispatcher's rate for service performed on the claim dates.

In Award No. 4150 (Robertson) the Carrier utilized the services of a junior extra train dispatcher to fill a vacancy on the position of assistant chief dispatcher. The claimant held a regular telegrapher assignment and filed claims for the daily rate of the assistant chief dispatcher position—"less any amount earned by him on said days for service performed on his regular assignment as telegrapher." The claim was sustained.

In Award No. 4263 (Shake) the question was whether the Carrier was justified, by reason of an unavoidable emergency, in working its regularly assigned train dispatchers at their overtime rate on their rest days specified in the claim to the exclusion of the claimant who was a regularly assigned telegrapher and, at the same time, the senior extra dispatcher. The claim was sustained for the difference between the claimant's telegrapher rate and the applicable dispatcher's rate for the days enumerated in the formal statement of the demand.

In Award No. 5003 (Begley) the claimant was an extra train dispatcher holding a regular assignment as a first trick telegrapher and was off duty on his assigned rest day, and was available to be called to work as extra train dispatcher. Instead of calling claimant, the Carrier called a regularly assigned relief dispatcher to fill a vacancy. The Carrier claimed a shortage of telegraphers to relieve the claimant. The claim for the difference between what he was paid as telegrapher and what he would have received had he been used to perform dispatcher service was sustained.

If the Claimant is entitled to any additional compensation, and the Carrier denies that he is, the Board should find that he is entitled to no more than the difference in his earnings as a telegrapher and what he would have earned as train dispatcher on the claim dates.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant was an Extra Train Dispatcher assigned to a regular Agent-Telegrapher position at Holcomb, Missouri. On June 12 and 13, 1964, Carrier filled the third trick train dispatcher's position at Springfield, Missouri, with an extra train dispatcher who was junior in seniority to the Claimant.

Employees contend that Carrier violated Article IV(f) of the Agreement which reads:

"(f) In filling vacancies in positions of train dispatchers seniority, fitness and ability shall govern. Fitness and ability being equal, seniority shall prevail."

There is no denial that Claimant was the senior extra train dispatcher. In reply to a letter from the Employees, Carrier's Director of Labor Relations

wrote to the General Chairman on October 21, 1964, in part, as follows:

"In view of the facts and circumstances involved in this particular claim, I cannot agree to allow the claim as appealed, but if it will enable us to adjust the dispute, I would be willing to allow him the difference between what the claimant earned on each of the claim dates and what he would have earned had he been used as trick train dispatcher."

This was the Carrier's position on the property. There is no evidence that the special reasons for declining of the claim, set out in Carrier's Ex Parte Submission, were ever discussed or presented on the property. It is a fundamental rule of this Board that evidence raised for the first time before the Board may not be considered.

Carrier argues that while it is true that Claimant was the senior extra train dispatcher he was not available because there were no telegrapher employees to replace Claimant as Agent-Telegrapher on those dates. The fact that Claimant occupied the Agent-Telegrapher position does not make him unavailable per se for a train dispatcher position. It is incumbent upon the Carrier to show his unavailability. There is no probative evidence in the record wherein Carrier ever claimed, on the property, that Claimant was so unavailable.

It is not uncommon for an employee to hold seniority both as a telegrapher and as a train dispatcher with the same carrier under two separate collective bargaining agreements. Assignment to a position as a train dispatcher is considered a promotion with supervisory responsibilities and increased earnings. An employee frequently remains as an extra train dispatcher for a long time before he is permanently assigned to such a position. It is to his interest that the Carrier be required to assign him to train dispatcher vacancies when they arise, consistent with contract obligations. Otherwise, he could be consistently unavailable if there were no telegraphers who could replace him in his telegrapher's position. The Carrier has the duty to have sufficient employees available to replace such employees when the need arises. Claimant should not be penalized because no telegraphers were available to replace him. There is a clear violation of the Agreement.

The claim is for a full day's pay at the extra train dispatcher's rate for each of the two days with no reduction of earnings for work performed as Agent-Telegrapher. Employees rejected the offer of compromise because Carrier has persisted in violating the Agreement. There were apparently many similar violations in the past which were compromised and the Employees are now unwilling to perpetuate a continuing violation.

Employees have cited Awards purporting to sustain its position that the Claimant was entitled to recover eight hours at the pro-rata rate for each of the days, in addition to earnings by Claimant for work as Agent-Telegrapher. Most of them have no relevancy. In Award 13738 we sustained the Claim of damages only because it involved overtime pay. We said:

"The loss suffered by an employee as a result of a violation of a collective bargaining contract by an employer, it has been judicially held, is the amount the employee would have earned absent the contract violation. Where this amount is overtime rate an arbitrary reduction by this Board is ultra vires. Therefore, we will sustain the claim for damages as prayed for in paragraph (2) of the Claim."

There is no claim made for overtime pay in the dispute at hand. The facts and circumstances are clearly distinguishable.

Punitive damages may be assessed when it is shown that the Carrier has deliberately and maliciously persisted in violating the Agreement, in spite of protests from employes and their representatives. Here, the Employes had compromised similar claims by accepting the difference in earnings. While the reasons for such compromise agreements are not fully stated, it is reasonable to assume that the Employes were convinced that there was no malice in Carrier's action. There is no evidence that Claimant has suffered irreparable damage or that the violation of the Agreement has prejudiced his seniority rights as an extra train dispatcher. While we do not condone Carrier's violation of the Agreement, we are convinced that Claimant is entitled to recover only the difference between what he would have earned as a train dispatcher on June 12 and 13, 1964, less what he actually earned as Agent-Telegrapher on those dates.

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 Carrier violated the Agreement.

AWARD

Claim sustained in accordance with the Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION
ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February, 1966.