Award No. 15614
Docket No. TD-16281

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

FORT WORTH AND DENVER RAILWAY COMPANY

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

(a) The Fort Worth & Denver Railway Company, (hereinafter referred to as "the Carrier"), violated the existing agreement between the parties, Rule 18 thereof in particular, and agreed-upon interpretation relating thereto, by its action in failing to give notice of temporary vacancy, permitting exercise of seniority rights and awarding the said temporary vacancy to Train Dispatcher C. N. Parker.

(b) That because of said violation Carrier shall be required to compensate Claimant C. N. Parker one day's compensation at the pro rata rate applicable to the temporarily vacant position for each of the following specified dates: October 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26 and 27, 1963.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties, copy of which is on file with this Board. Said agreement is incorporated into and made a part of this submission the same as though fully set out. For ready reference Rule 18 of the Agreement, captioned "Temporary Vacancies," is here quoted in full:

"Vacancies and new positions of more than ten days and not to exceed six months will be considered temporary positions, will not be advertised, and may be filled by senior qualified train dispatcher making application therefore within five days following announcement of such position by Superintendent.

A regularly assigned train dispatcher filling a temporary vacancy will, upon termination of such temporary assignment, return to his regular position or he may displace any junior train dispatcher filling another temporary assignment before returning to his regular assignment."

The agreed upon understanding of the parties with respect to the application of Rule 18 is evidenced by exchange of correspondence appended to and incorporated herein as Exhibits TD-1 and TD-2. (Other exhibits, to be referred to subsequently, are likewise incorporated.)

CARRIER'S STATEMENT OF FACTS: On September 18, 1963, the incumbent of Relief Position No. 6, Mr. J. H. Lowder, advised the Carrier's Chief Dispatcher by memorandum that he desired to be off duty to attend an organizational function in Chicago, Illinois. The memorandum read as follows:

> "This has further reference to my request to be off to attend ATDA general assembly in Chicago beginning Saturday, October 12, through October 18. This confirms our conversation it now develops will be necessary for me to be absent through Saturday, October 19th and, if satisfactory, would like to remain off and not resume work until Saturday, October 26. In other words after working second trick Wednesday, October 9th, return to work Saturday, October 26th applying first 7 working days on my vacation. Please advise if satisfactory. This will finish my vacation for this year."

When the vacancy occurred, it was filled by using the senior extra train dispatcher under Rule 21.

Upon Mr. Lowder's return from Chicago, he telephoned the Chief Dispatcher on October 19 and requested extension of his absence through October 28. The extra employe continued on the vacancy until Mr. Lowder's return to work on October 29.

During the period October 12 through 28, the claimant, C. N. Parker, was regularly assigned to a dispatcher position working Thursdays through Mondays with Tuesdays and Wednesdays as rest days, and worked each day with the exception of October 14 and 27 when he was absent from duty for reasons of his own, laying off on his own free will and accord.

The claimant's position was assigned to work as follows:

Thursday	3:30 PM–11:30 PM
Friday	9:00 PM– 6:00 AM
Saturday	9:00 PM– 6:00 AM
Sunday	11:30 PM– 7:30 AM
Monday	11:30 PM– 7:30 AM

The position on which the claimant contends he should have been used worked:

Saturday	7:30 AM– 3:30 PM	
Sunday	7:30 AM– 3:30 PM	
Monday	7:30 AM– 3:30 PM	
Tuesday	8:00 AM– 5:00 PM	— 1 hour lunch.
Wednesday	3:30 PM–11:30 PM	

A copy of the currently effective collective agreement between the parties to this dispute, effective May 1, 1950, is on file with the Board and by this reference is made a part of this submission.

OPINION OF BOARD: The issue here involved is the amount of damages or compensation to be awarded a Claimant for an admitted violation of contract.

Argument in defense of Carrier here is predicated on prior Awards of this Board which held that a Claimant who suffered no monetary loss as a result of Carrier's contract violations was not entitled, under the applicable Agreement, to compensation for Carrier's breach of contract.

Heretofore, many Awards of this Division have followed the original decision of the Tenth Circuit Court of Appeals in the Brotherhood of Railroad Trainmen v. Denver and Rio Grande Railroad case dated November 19, 1964, which held that where no actual wage loss was sustained only "nominal damages" were in order.

Award 13237 of this Division, noting the wide range of this Board's Awards on the subject stated "we must look to and be bound by judicial pronouncements in cases where the issue has been raised."

That Award also noted:

> "Accepting the Tenth Circuit's decision as the law, unless and until reversed or modified by the Supreme Court, we find our power is limited to awarding Claimants nominal damages which we set in the amount of ten ($10) each."

Argument here in behalf of the Organization's position states:

> "The 1964 decision has since been nullified by the same Court which rendered it. Two of the same members of the three-judge court (Chief Judge Murrah and Circuit Judge Lewis) participated in the November 19, 1964 decision and the subsequent decision, rendered on December 28, 1966 . . ."

That decision holds, argument in behalf of the Organization states,

> "that the Denver and Rio Grande Western Railroad must comply with the Award and Order of the First Division Award out of which the protracted litigation arose."

Organization states the Board ordered that the individual Claimants be compensated one full day's pay for each of the specific breaches of the collective agreement involved.

Carrier there involved (D&RG Western) appealed the Circuit Court's decision of December 28, 1966 to the United States Supreme Court on March 13, 1967.

On April 20, 1967 the Supreme Court denied certiorari. This leaves the Circuit Court's decision of December 28, 1966 stand.

The claim of the Organization here will be sustained as made.

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 was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June, 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15614, DOCKET TD-16281

In sustaining this claim it is apparent that the Majority misunderstood the status of the law, as concerns damages, where, as here, the Claimant suffered no wage loss and the Agreement contains no penalty provision.

From a reading of the Opinion in this award one would gain the impression that the Court of Appeals, Tenth Circuit, overruled its prior decision, which overruling decision the Supreme Court let stand by the denial of certiorari. That is not the case at all.

There were two, not one, Rio Grande cases. The first was covered by the citation Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Co., 338 F. 2d 407, cert. den. 85 S. Ct. 1330. There is no authoritative judicial pronouncement on the law of damages in the industry contrary to that found in this case and followed in our Award 13237 and others.

The second, and different, Rio Grande case is covered by the citation Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Co., 370 F. 2d 833, cert. den. 87 S. Ct. 1375. While this case was pending on appeal before the Tenth Circuit the Railway Labor Act was amended to limit judicial review of awards of this Board. **The Tenth Circuit, in this case, did not change, modify or overrule the law of damages as found in the first case.** Rather, it only held that the change in the Railway Labor Act precluded review of such an award.

It is also apparent that the Majority misunderstands the import of denial of certiorari by the Supreme Court. The Supreme Court has let it be known on numerous occasions that the denial of certiorari imports no expression of opinion on the merits of a case, e.g., United States v. Carver, 260 U. S. 482; Brown v. Allen, 344 U. S. 443; Ohio ex rel. Eaton v. Price, 360 U. S. 246. In short, the Supreme Court has not ruled on the law of damages contrary to the Tenth Circuit's decision in the first Rio Grande case and the Tenth Circuit did not, in the second Rio Grande case, overrule its holding with respect to the law of damages in the first Rio Grande case.

This award is in serious error and for these and other reasons, we dissent.

R. E. Black
P. C. Carter
G. L. Naylor
T. F. Strunck
G. C. White

LABOR MEMBERS' RESPONSE TO CARRIER MEMBERS' DISSENT AWARD 15614, DOCKET TD 16281

The Carrier Members' dissent herein warrants comment upon what the dissent attempts to ignore rather than for what the dissenters have to say.

This Respondent understands the dissent to be premised upon the demonstrably erroneous theory that the decision of the Court of Appeals in Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad, rendered on November 19, 1964, reported in 338 F. 2d 407, is controlling. This notwithstanding the later decision involving the same parties and dispute by the same court. The U. S. Supreme Court denied certiorari in both instances. That action on the part of the Supreme Court does not pass upon the merits. In both instances the Supreme Court denied review — that and nothing more.

The dissenters understandably elect to completely ignore both material decisions of the United States Supreme Court which were rendered subsequent to the decision upon which the dissenters premise their position. More specifically, the dissenters carefully avoid even an allusion to the decision in Gunther v. San Diego & Arizona Eastern Railway Company, (382 U. S. 257) handed down by the Supreme Court on December 8, 1965, and that rendered by the same Court on December 5, 1966, in Transportation-Communication Employes v. Union Pacific Railroad Company. (385 U. S. 157.) The dissenters further, and understandably, would ignore the provisions of Public Law 89-456, which became effective on June 20, 1966, amending the Railway Labor Act.

The two Supreme Court decisions and legislation just alluded to, all of which antedate Award 15614, are material to and clearly support the holding of the majority therein.

The dissenters allege that:

> ". . . There is no authoritative judicial pronouncement on the law of damages in the industry contrary to that found in this case and followed in our Award 13237 and others."

This Respondent disagrees and directs attention to what the Supreme Court said in the T-CEU v. U. P. case, just cited. There the Court pointed out, with citation of authority, that:

> ". . . A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, **nor is it governed by the same old common law concepts which control such private contracts . . .**" (Emphasis ours.)

The Carrier Members' dissent also ignores other material decisions of the Federal Courts and Awards of this Division, all rendered prior to the date the dissent here the subject of comment was filed of record. Particular attention is directed to Award 15689, adopted by this Division on June 30, 1967 — the same date the Carrier Members' dissent was filed. That well-reasoned Award reviews the decisions of the Courts and Awards of this Division. It notes pertinent excerpts from the decision rendered by the Court of Appeals, Fourth Circuit, on May 1, 1967, in Brotherhood of Railroad Signalmen v. Southern Railway Company (reported in 65 LRRM at page 2543). The Respondent respectfully directs the attention of the Carrier Members to that Award and the last cited decision.

See also Transportation-Communication Employes Union v. Norfolk & Western Railway (65 LRRM 2139) wherein it is said and held:

> "The award of a day's pay for each violation is asserted to be a penalty assessment. A similar award was entered in Brotherhood of Railroad Trainmen v. Denver & RG R Co., 370 F.2d 833, 64 LRRM 2153 (1967) and was held to be beyond the court's review on the basis that the new legislation repealed the district court's jurisdiction to review money awards. For the same reason, this court is without jurisdiction to reassess the amount here involved."

Further, see Transportation-Communication Employes' Union v. Harriman and Northeastern Railroad Company, decided March 30, 1967, reported in 65 LRRM at page 2141.

Contrary to the clearly erroneous views which the dissenters would fob off upon the Board and which would ignore the authority herein cited, Award 15614 is both correct and in conformity with applicable law, decisions of the courts and Awards of this Division.

George P. Kasamis
Labor Member

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