Award Number 17852

Docket Number TD-18188

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Ellis, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOO LINE RAILROAD COMPANY

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

(a) The Soo Line Railroad Company, (hereinafter "the Carrier"), violated the existing Agreement between the parties, Rule 4(a) and Rule 5(b) thereof in particular, when, on December 22, 1966, Train Dispatcher W. G. Johnson was deprived of service to which he was contractually entitled.

(b) Carrier shall now be required to compensate Claimant Johnson one day's pay at punitive rate of train dispatcher, the amount he would have earned had not the above described violation occurred.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, copy of which is on file with this Board, and same is made a part hereof the same as though fully set forth herein.

For ready referenced, applicable portions of said Agreement rules pertinent to this dispute are quoted below:

"RULE 4—REST DAY

(a) Each regularly assigned train dispatcher will be entitled and required to take two (2) regularly assigned days off per week as rest days, except when unavoidable emergency prevents furnishing relief. Such assigned rest days shall be consecutive to the fullest extent possible. Non-consecutive rest days may be assigned only in instances where consecutive rest days would necessitate working any train dispatcher in excess of five (5) days per week.

Regularly assigned train dispatchers who are required to perform service on the rest days assigned to their position will be paid at rate of time and one-half for service performed on either or both of such rest days.

Extra train dispatchers who are required to work as train dispatcher in excess of five (5) consecutive days shall be paid one and one-half times the basic straight-time rate for work on either or both the sixth or seventh days but shall not have the right to claim work on such sixth or seventh days."

(Balance of Rule 4 not pertinent hereto.)

On June 5, 1967, the General Chairman advised the Director of Personnel that the proposed settlement was not acceptable and requested that the matter be further discussed in conference.

The claim was then duly discussed in conference on June 21, 1967, at which time Carrier advised that the matter would be given further consideration and would advise further in writing at a later date. When the promised communication did not appear, the General Chairman some three and a half months later, on October 6, 1967, again wrote Mr. Borchert, referring to the conference understanding and stated:

> "As we have not heard from you in this regard, we must consider that you have elected to decline payment of this claim."

A copy of this letter, which concluded with the advice that the claim was being referred to the President of the American Train Dispatchers Association for further handling under the Railway Labor Act, as amended, is attached hereto as Exhibit TD-4.

Therefore, the claim, having been handled in the customary and required manner, up to and including the Carrier's highest designated officer, and by him declined, the dispute is properly before this Board for adjudication.

All facts, data and contentions set forth herein have been the subject of discussion or correspondence by the parties, or are known and available to the Carrier.

(Exhibits Not Reproduced)

CARRIER'S STATEMENT OF FACTS: Claimant W. G. Johnson, senior extra dispatcher in the Stevens Point, Wisconsin, dispatching office, filled a five-day vacancy on relief position #4, Saturday, December 17, through Wednesday, December 21, 1966. Thursday, December 22, 1966, was an unassigned or tag-end rest day of the third trick, 7th through 12th subdivisions, assignment held by P. M. McNamara. On the assumption that the regular incumbent had preference to rest day relief service on his own position over an extra dispatcher who had already worked five consecutive days, Mr. McNamara was worked the tag-end day rather than Mr. Johnson.

Claim was instituted on Mr. Johnson's behalf for 8 hours' pay at time and one-half rates. When the dispute was appealed to Carrier's highest office of appeal, Mr. Johnson was allowed 8 hours' pay, but at pro rata rates.

Upon completion of his relief service as an extra dispatcher, Mr. Johnson returned to his regular position and worked as 1st trick operator and wire chief on December 22, 1966. Due to this fact, the Superintendent arranged for payment of the difference between his actual earnings for this day and 8 hours' pay at the dispatcher's pro rata rate.

Copies of March 20, 1961 rules and working conditions agreement between the parties, as amended, are on file with the Board and are made a part of this submission by reference.

OPINION OF BOARD: On December 22, 1966, a vacancy occurred in the position of Third Trick Train Dispatcher, Seventh through Twelfth Subdivisions, in Carrier Stevens Point Wisconsin Train Dispatching Office. The regular incumbent of the position, Train Dispatcher P. M. McNamara was called to fill the vacancy on a regularly assigned rest day and was compensated for this rate at punitive rate of pay. Claimant W. G. Johnson,

who had completed five consecutive days of extra train dispatching service was working his regular assignment in other service as operator-wire chief and could have been made available for the days service herein question. There were no other extra dispatchers available.

Carrier concedes that Claimant should have been called for the dispatching assignment but allows compensation only at the pro rata rate and offsets the wages Claimant actually earned on the day in question as operator-wire chief against the amount he would have earned as dispatcher for one day at the pro rata rate.

Organization protest both the payment of the pro rata rate in lieu of the punitive rate and the offsetting of what was actually earned as against what should have been earned. The parties agree that the issues are as follows:

> 1. Is it proper for Carrier to compute Mr. Johnson's loss of earnings as a dispatcher at pro rata rather than punitive rates, and
>
> 2. Is it proper to reduce the amount, otherwise due Claimant, by the amount he actually earned on this day.

As to issue No. 1 the Organization claims that Claimants recovery should be at the punitive rate. Had Carrier not have violated the agreement, Claimant would have worked for a sixth consecutive day under which circumstances he would have recovered time and one-half for the time worked. Had the agreement not been violated the provisions of the third paragraph of Rule 4(a) would have controlled i.e.:

> Extra train dispatchers who are required to work as train dispatcher in excess of five (5) consecutive days shall be paid one and one-half times the basic straight-time rate for work on either or both the sixth or seventh days but shall not have the right to claim work on such sixth or seventh days.

A letter of understanding between the parties dated February 2, 1962, enlarging and clarifying the meaning of Rule 4(a) provides as follows:

> Should a situation arise where an assigned train dispatcher has worked 5 consecutive days, the relief dispatcher is not available and no junior extra dispatcher is available; the extra train dispatcher who has worked five consecutive days **is to be used** in preference to the assigned train dispatcher for the reason the vacancy is extra work as defined by Rule 10(b). (Emphasis ours.)

The combined effect of these provisions makes it mandatory upon the Carrier to use Claimant on the dispatcher assignment on the day in question; it was also mandatory on Carrier to pay Claimant the punitive rate.

Carrier can take no comfort in the fact that the work was not actually "performed" or "rendered" since it was due to Carrier's own default and Carrier cannot have the advantages of its own default.

On Issue No. 2, Carrier seeks to deduct those wages earned by Claimant while working for Carrier as an operator wire-chief under the terms of another and different agreement as against those wages which he should have been paid as a dispatcher under the subject agreement.

Organization urges that, in effect, Claimant should be treated as two employees. One working under the agreement covering the operator-wire

chief position and one working under the subject dispatchers agreement; and that reference should not be made to the prior employment relationship to determine wages to be offset against the wages which should have been paid pursuant to latter employment relationship.

Such a strained view of the employment relationship is unwarranted. The wages, hours, and working conditions provided for in this agreement are for the benefit of the individual employee and not for the benefit of the position that the employee fills. Once the employee has received what is due him from the employer under the most favorable of two contracts under which terms he has performed work, then the employer's contractual obligation to the employee has been discharged.

To compel the employer to pay the full rate to each of two positions for work on the same day, such pay to be collected by the same employee, would be a windfall to the employee and a penalty to the employer. Neither is justified. (Award 17709-Ellis).

The Second Division Award 3967 (Johnson) holds that no claim for such penalty can be sustained and gives his reasons to-wit:

> Similarly, for this Board to construe an agreement as imposing a penalty where none is expressed, would be to amend the contract, first, by authorizing a penalty and second, by deciding how severe it shall be. Not only are the parties in better position than the Board to decide these matters; they are the only ones entitled to decide them. * * *

We find that Award 16009 (Ives) is distinguishable to the subject case because in that case scope work which could have been reserved for claimants to be performed at a later date was contracted to outside forces, notwithstanding. Although claimants were, at the time the work was performed by outside forces, fully employed, they were later that year furloughed on account of lack of work. The referee said that "*** Carrier might have extended the period of time during which the disputed work could have been completed to include (the furlough) ***." The referee held that there was a loss of work opportunity in that case.

Award No. 14392 (Zumas) Award No. 14304 (Stark) and Award No. 14317 (Rohman) are likewise distinguishable from this case.

We, therefore, hold that Carrier was entitled to offset the amount actually earned by Claimant against the amount due him under the dispatchers agreement.

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; an

That the Carrier violated the Agreement to the extent as set forth in the Opinion.