

Award No. 18547
Docket No. TD-19027

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION
LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(a) The Louisville & Nashville Railroad Company (hereinafter referred to as "the Carrier"), violated the effective Agreement between the parties, Articles III(a) and III(b), III(f), and IV(h) thereof in particular, by its failure to assign the senior available extra Train Dispatcher to perform extra train dispatcher's work in its Louisville, Kentucky train dispatching office on November 18, December 2, 9, 16, 23, and 30, 1969, and January 20, 1970.

(b) For the violations referred to in paragraph (a) hereof, the Carrier shall now compensate Claimant G. E. Owen seven (7) days' pay at the straight time trick train dispatcher's rate, in addition to Claimant's earnings in other service.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, copy of which is on file with this Board, and the same is incorporated into this Submission as a part thereof as though fully set out.

For the ready reference of the Board, Articles III(a), III(b), III(f) and IV(h), which provide the particular basis of this claim, are quoted here in full:

"ARTICLE III
REST DAYS

(a) Rest Days:

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.

Unless prevented by the requirements of the service, extra train dispatchers will be relieved from train dispatcher service for a period of two (2) days for rest day purposes after they have performed five (5) consecutive days' work as train dispatcher.

OPINION OF BOARD: The record shows that the Claimant herein was an extra train dispatcher and held a regular position of Agent-Operator at Greensburg, Kentucky.

On the dates involved in the claim a regularly assigned train dispatcher in Carrier's Louisville dispatching office worked his assigned rest days. In the handling of the dispute on the property, the Carrier acknowledged that Claimant did stand for work as extra dispatcher on the dates involved, and should have been used, and it states that Claimant was paid for each day at the train dispatcher's rate as though he worked as dispatcher. On the dates involved he worked his regular position of Agent-Operator at Greensburg. The claim demands a day's pay at train dispatcher's rate for each date involved, in addition to Claimant's earnings as Agent-Operator.

The Carrier contended in the handling of the dispute on the property and continues its assertion before the Board that the payment made herein of making the Claimant whole was in accordance with past practice. The Petitioner does not deny such practice, but contends this is the first claim filed by Employees since the current Agreement was negotiated and took effect on November 1, 1969, and contends that the prior settlements were under the prior Agreement. The Carrier responds that the Agreement effective November 1, 1969, was the combining of two prior existing Agreements.

In recent Award 17772 involving a somewhat similar dispute, the Division held:

"Although Claimant did not work as a train dispatcher on those dates, he was paid at the train dispatcher rate. And the Carrier advised him that he was so paid because there was no extra telegrapher to replace him as Clerk-Operator. Is then the Claimant entitled to eight additional pay at the train dispatcher's rate for each of the dates in the claim? Employees' claim is in the nature of a penalty.

There are many awards of this and other Divisions which have sustained penalty claims for the violation of rules in the schedule agreement. And there are other awards which limited damages to actual monetary loss resulting directly from such a breach. The former sustained penalty damages on the theory that without such a penalty the Carrier is given a license to violate the agreement with impunity. The rights and privileges provided for in the collective bargaining agreement must be protected and if no damages are assessed the rules in the agreement could become meaningless. This is a valid principle frequently followed by the neutral member of this Board.

But not every contract violation per se justifies a penalty. In Award No. 14177 the Board, with this Referee, said that '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 employees and their representatives.' There is no showing here that Carrier 'has deliberately and maliciously persisted in violating the Agreement.' There is no showing that the Employees ever complained or protested Carrier's handling of similar situations. On the contrary, one claim was settled on the property by paying the employee the difference between the dispatcher rate and

the telegrapher rate. Here, also, the Carrier did not profit from the failure to assign Claimant to the temporary dispatcher vacancy. There is also no evidence of arbitrariness of favoritism in making the assignments. Under these circumstances the assessment of punitive damages is improper. Since Claimant was paid at the dispatcher's rate, he is entitled to no further compensation."

The foregoing holding is sound and we adopt it herein. See also Awards 17773, 18063, 17709, 14177, among others.

As the Claimant has been paid at train dispatcher's rate for each date involved in the claim, no further compensation is due.

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 Employee involved in this dispute are respectively Carrier and Employee 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 to extent shown in Opinion, but Claimant is not entitled to any additional compensation.

AWARD

Part (a) of claim sustained to extent shown in Opinion and Findings; part (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 13th day of May 1971.

DISSENT TO AWARD 18547 DOCKET TD-19027

Award 18547 is ludicrous. The majority seeks support in Award 17772 wherein it is stated:

"* * * in spite of protests from employees and their representatives, there is no showing here that Carrier 'has deliberately and maliciously persisted in violating the Agreement.' There is no showing that the Employees ever complained or protested Carrier's handling of similar situations."

In the instant dispute time claims were submitted. Surely this is protest and complaint, and Carrier continued the practice after the claims were submitted. That is persistence on Carrier's part in violating the Agreement.

This award gives the Carrier license to violate the Agreement with impunity. There were seven distinct violations of the same rule and Carrier agrees the violation did occur. One occurred thirteen days after protest and complaint.

The Board adopted, with the same Neutral Member, Awards 16520, 16521, 16608, 17100, and 17319. To quote from Award 16520:

"Argument has also been made by and on behalf of the Carrier that as Claimants suffered no loss they are not entitled to damages. There have been numerous Awards 'pro' and 'con' on this feature involving the same parties. We will follow the line of Awards (15888, 15874, 15689, 15497, 16376 among others) that have allowed pay at pro rata rate. We will, therefore, sustain the claim."

For this and other reasons this dissent is registered.

G. P. Kasamis
Labor Member