NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19549
THIRD DIVISION Docket Number TD-19708

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Chicago and North Western Railway Company

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

(a) The Chicago and North Western Railway Company hereinafter referred to as "the Carrier" violated the Agreement in effect between the parties, Rule 5 (a) thereof in particular, when it failed to compensate Extra Train Dispatcher R. D. Burt eight (8) hours at rate of one and one-half times the basic straight-time rate for service performed on June 19, 1971 which was work on his seventh day after working five (5) consecutive days as a train dispatcher.

(b) The Carrier shall now compensate the individual claimant for the amount of the difference between the pro rata rate allowed and the time and one-half rate of trick dispatcher's position for eight (8) hours to which he is entitled under the terms of the Agreement.

OPINION OF BOARD: This dispute arises under Agreement effective September 16, 1950. The record we will consider may not contain all of the evidence that could have a bearing on the herein issues. Nonetheless, it is possible to reach a decision on the merits on the basis of the record before us and we shall do so.

FACTS

Claimant, an extra train dispatcher, worked on June 13, 14, 15, 16, and 17, 1971, thus completing five consecutive days work as extra train dispatcher. He did not work on June 18, but did work on June 19, 1971. Petitioner contends that claimant is entitled to time and one-half for June 19, 1971 under the third paragraph of Rule 5 (a) of the Agreement. Rule 5 (a) reads as follows:

"REST DAYS - WORK ON REST DAYS

5. (a) Each regularly assigned train dispatcher will be entitled and required to take two 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 days per week.

A regularly assigned train dispatcher who is required to perform service on the rest days assigned to his 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 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."

The course of this claim on the property is indicated in correspondence between Mr. W. J. Fremon, Director of Labor Relations, and Mr. J. R. Brummeier, General Chairman.

In denying the claim in a October 29, 1971 letter, Mr. Fremon stated:

"The rule on which you base this claim provides in part as follows:

'Extra train dispatchers who ... work ... in excess of five consecutive days shall be paid one and one-half times ...' (Emphasis supplied)

Claimant Burt did not work in excess of five consecutive days as he did not perform service on June 18, 1971.

Inasmuch as the rule requires service in excess of five consecutive days in order to be eligible for the one and one-half time rate and Mr. Burt's sixth day of service was not consecutive with the previous five days, the rule does not support the claim.

While the train dispatchers' agreement apparently does not spell out the work week of extra employes, in other collective bargaining agreements on the property it is definitely indicated that the work week of an extra employe is seven consecutive days commencing with Monday. Using this same 'rule of thumb' to the circumstances in the instant case, June 14, 1971 was a Monday and Mr. Burt worked on that day, on the 15, 16, 17 and the 19th. This would have provided him with five days of work in the work week commencing on Monday, all of which service would under the cited rules be at straight time rate."

On November 24, 1971, Mr. Brunmeier stated:

> "This is to advise that June 13, 14, 15, 16 and 17 were five consecutive days and that June 19, 1971 was certainly in excess of five consecutive days in the seven day period beginning June 13, 1971."

After a December 10, 1971 conference, Mr. Fremon wrote the following in a letter dated December 13, 1971:

> "... it is our position that in order to be entitled to compensation at one and one-half times the straight time rate an extra train dispatcher must meet all requirements of the third paragraph of Rule 5 (a) of the collective bargaining agreement; i.e., he must perform service in excess of five consecutive days. While in the circumstances in this claim claimant Burt did work 5 consecutive days, he did not work six consecutive days and therefore does not qualify for the time and one-half compensation for service performed on June 19, 1971."

In a letter dated December 23, 1971, Mr. Brunmeier stated that:

> "... the third paragraph of our schedule rule 5 (a) most certainly was violated by the carrier in that it plainly states that an extra train dispatcher after having worked in excess of five 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."

Both parties concede that Rule 5 (a) has its genesis in the National Agreement of March 25, 1949. Article III, Section 1 thereof, reads as follows:

"ARTICLE III - THE FIVE DAYS WEEK

Section 1. Rest Days

> All existing agreements providing for one (1) rest day per week shall be revised so that effective September 1, 1949, they shall provide for two (2) regularly assigned rest days per week. Such assigned

"rest days shall be consecutive to the fullest extent possible. The carrier may assign non-consecutive rest days only in instances where consecutive rest days would necessitate working any train dispatcher in excess of five (5) days per week. Also, to provide that any regularly assigned train dispatcher who is required to perform service on the rest days assigned to his 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 a 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.

Existing assignments reduced to a five (5) days basis under this agreement shall not be considered new jobs under bulletin rules and employes will not be permitted to exercise displacement privileges as a result of such reductions. However, employes will be notified of their assigned rest days by the posting of notices."

CONTENTIONS OF PARTIES

Petitioner contends that the third paragraph of Rule 5 (a) has as its basic purpose the establishment of rest days for an extra train dispatcher. In order to provide two rest days per week for the extra dispatcher, five consecutive days was established as a normal work week.

Carrier's position before the Board is that the paragraph requires an extra dispatcher to perform service "in excess of five (5) consecutive days" to qualify for time and one-half, and, since claimant did not work six consecutive days, he did not qualify for time and one-half for working on June 19, 1971, the seventh day.

RESOLUTION

The purport of Petitioner's argument is that the work week of an extra train dispatcher has been fulfilled when he has completed five consecutive days work as a train dispatcher. Thus, whenever such a work week occurs, the sixth and seventh days accrue to an extra dispatcher as rest days; he does not have the right to claim work on such sixth or seventh day, but if he works on either or both days, he shall be paid time and one-half for such work.

The essence of Carrier's argument is that the controlling rule speaks in terms of consecutive service and not in terms of a work week, and, hence, a train dispatcher is entitled to time and one-half only for the sixth and seventh day of consecutive service. In work week terms, this means that an extra train dispatcher's work week is not fulfilled until he has worked seven consecutive days so, in effect, an extra train dispatcher begins a new work week whenever he works less than seven consecutive days.

Both arguments are based upon the third paragraph of Rule 5 (a) which reads as follows:

> "Extra train dispatchers who are required to work as train dispatcher in excess of five 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."

The term "in excess of five consecutive days" tends to support Carrier's view that the language refers to at least one day of work in addition to "five consecutive days". Further, since the language is couched in terms of consecutive service, this further suggest that the text requires six days of consecutive service to be fulfilled. And it is also true that the text does not read "in excess of five consecutive days in the seven day period", which is one way of stating Petitioner's position. Thus, the meaning given the third paragraph by Carrier is plausible enough, so far as it goes.

On the other hand,when the third paragraph of Rule 5 (a) first appeared in the National Agreement of March 25, 1949, Article III, it was under a format which positioned such third paragraph as the second of three paragraphs having the topical heading "THE FIVE DAY WEEK". This format is consistent with Petitioner's contention that the third paragraph of Rule 5 (a) established a five day work week for extra train dispatchers. Moreover, if the parties had intended six days of consecutive service, as the qualifying period for time and one-half, it would have been simple enough to use that terminology rather than the less clear term "in excess of five consecutive days". In addition, under Carrier's postion, the part of the third paragraph reading "shall be paid one and one-half times the basic straight time rate <u>for work on either or both the sixth and seventh days</u>" (emphasis supplied) would have to be read as meaning "for work on the sixth day and also for the seventh day if both days are worked". However, the word "either" means one <u>or</u> the other, so the plain meaning of the terminology is to require time and one-half for work on the sixth day or for work on the seventh day.

Furthermore, Carrier's position does not harmonize with the third paragraph requirement that an extra dispatcher "shall not have the right to claim work on such sixth or seventh days". It is a fatal flaw, we think, that, under Carrier's position, the extra dispatcher in the instant dispute could have claimed the work he performed on June 19, the seventh day, but could not have claimed work on June 18, the sixth day.

Award 15407 (Lynch) involved different parties but the agreement therein contained a provision identical with the third paragraph of Rule 5 (a) herein. In that Award this Board ruled that an extra dispatcher could not claim work on the sixth day. Carrier's position herein would also bar an extra dispatcher from claiming work on the sixth day, so to that extent Award 15407 is not inconsistent with this Carrier's position. However, since the Carrier in Award 15407 had paid the claimant extra dispatcher time and one-half for the seventh day of work, prior to the dispute, we believe that Award stands for the principle that an extra dispatcher could not claim work on either the sixth or seventh day.

The extra train dispatcher in Award 15407 worked five consecutive days, did not work the sixth, and then worked the seventh for which he received time and one-half pay. His claim of a right to work on the sixth day, and pay of time and one-half therefor, was denied by Carrier and sustained by this Board.

The Employes' Statement of Facts in Award 15407 contains the following:

> "... In declining the claim in a memo dated September 16, 1965, the Chief Dispatcher stated:
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> > 'Attached time card claiming 8 hours' punitive for August 26, 1965, is being returned account no basis for claim. Extra Dispatchers can not claim the 6th or 7th day, but if used on either 6th or 7th day, they will be paid time and one half. You were used on the 7th day and was paid time and one half for this day. Claim for time on August 26th is hereby declined.'"

The Opinion of the Award states the following:

> "Article 3 (b) of the applicable agreement states clearly, in its pertinent parts, that:
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> > 'Extra train dispatchers who are <u>required</u> to work as train dispatcher in excess of five (5) consecutive days shall be paid ... but shall not have the right to claim work on such <u>sixth</u> or <u>seventh</u> days. (Emphasis ours.)'"

This Board then stated:

> "The agreement makes no exceptions on this point. Neither can we."

Though we have noted that the sixth day was involved in Award 15407, we do not perceive how the Award would have differed if the seventh day instead of the sixth had been involved. We also note that the above quoted statement of the Chief Dispatcher coincides with Petitioners view in the instant dispute.

In Award 12232 (Engelstein) this Board sustained a claim arising from circumstances somewhat similar to the instant dispute. There, the extra dispatcher worked five consecutive days; he then worked the sixth and seventh days (July 16 and 17) for which he received straight time pay. In sustaining the claim for time and one-half pay for the sixth and seventh day, this Board said:

> "Consideration, however, must be given to the additional clause which completes this sentence of the rule, ... 'but shall not have the right to claim work on such sixth or seventh days.' It is apparent from this entire sentence that Extra Train Dispatchers do not have the prerogative to make the choice which Carrier maintains Claimant exercised by seniority on July 16 and 17. Extra Dispatchers are not entitled to rest days unless they work five consecutive days. The decision to work on the sixth and seventh consecutive days rests not with the employee but with Carrier. If Carrier requires this employe's services on those days, the rule provides that he be awarded payment at time and one-half rate for his work."

We recognize that this Award, too, is not directly in point with the instant dispute. Nonetheless, the rulings in Awards 15407 and 12232 were made in the same broad general context as our dispute and we believe we should treat them as authority for Petitioner's position.

For the reasons indicated above, and on the basis of Awards 15407 and 12232, we shall sustain the claim.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of January 1973.