

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20017
Docket Number TD-19984

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Burlington Northern Inc.

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

CLAIM #1

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(b) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher E. C. Bush for June 6, 1970 for service performed on his assigned rest day in Carrier's McCook, Nebraska train dispatching office.

(b) For the above violation, the Carrier shall now compensate Claimant E. C. Bush eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatchers for June 6, 1970.

CLAIM #2

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(b) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher L. E. Bath for October 4, 1970 for service performed on his assigned rest day in Carrier's McCook, Nebraska train dispatching office.

(b) For the above violation, the Carrier shall now compensate Claimant L. E. Bath eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatchers for October 4, 1970.

CLAIM #3

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(b) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher M. D. Pothoff for October 25, 1970 for service performed on his assigned rest day in Carrier's McCook, Nebraska train dispatching office.

(b) For the above violation, the Carrier shall now compensate Claimant M. D. Pothoff eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatchers for October 25, 1970.

CLAIM #4

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(b) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher J. E. Roten for October 25, and November 15, 1970, respectively, for service performed on his assigned rest days in Carrier's Alliance, Nebraska train dispatching office.

(b) For the above violations, the Carrier shall now compensate Claimant J. E. Roten eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatchers for October 25 and November 15, 1970, respectively.

CLAIM #5

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(b) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher L. R. Bentley for November 1, 8, 22 and 29, 1970, respectively, for service performed on his assigned rest days in Carrier's Alliance, Nebraska train dispatching office.

(b) For the above violations, the Carrier shall now compensate Claimant L. R. Bentley eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatchers for the respective dates named in paragraph (a) above.

CLAIM #6

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(b) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher L. E. Bath for December 11, 1970 for service performed on his assigned rest day in Carrier's McCook, Nebraska train dispatching office.

(b) For the above violation, the Carrier shall now compensate Claimant L. E. Bath eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatchers for December 11, 1970.

CLAIM #7

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(b) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher M. D. Pothoff for December 27, 1970 for service performed on his assigned rest day in Carrier's McCook, Nebraska train dispatching office.

(b) For the above violation, the Carrier shall now compensate Claimant M. D. Pothoff eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatchers for December 27, 1970.

CLAIM #8

(a) Burlington Northern Inc, (hereinafter referred to as "the Carrier") violated the Agreement in effect between the parties, Article 3(h) thereof in particular, when it refused to properly compensate Claimant Train Dispatcher V. G. Nylander for January 21, and January 27, 1971, Claimant Train Dispatcher E. C. Bush for January 22, 1971, and Claimant Train Dispatcher L. E. Bath for January 23, 1971 for service performed on their respective assigned rest days in Carrier's McCook, Nebraska train dispatching office,

(b) For the above violations, the Carrier shall now compensate the respective Claimants named in paragraph (a) above, eight (8) hours at the punitive rate of pay then applicable to assistant chief dispatching for the respective dates also named in paragraph (a) above.

OPINION OF BOARD: This dispute involves eight separate claims in which the regularly assigned Train Dispatchers were required by the Carrier to work as Chief Train Dispatchers on Claimants assigned rest days. In each instance, Claimants were compensated at the Chief Train Dispatcher's regular rate of pay but were not paid at the punitive rate. Petitioner claims is appropriate. The facts are not in dispute.

Carrier first alleges that 'five of the claims should not be allowed since they were presented on the property and appealed for the punitive rate applicable to a Train Dispatcher and then brought to the Board for the punitive rate applicable to Assistant Chief Dispatcher, a higher rate. Thus, Carrier claims, these particular claims were amended and hence may not be allowed. The record indicates that all the claims on the property were handled by almost identical correspondence, and in fact by correspondence referring to the first claims in the group which were processed, for both the arguments and positions by both sides. As Carrier points out, we have consistently held that where there is a substantial variance between the claim handled on the property and that presented to the Board, we cannot resolve the dispute (Award 16607 and others). We do not find there was "substantial variance" between the claims in this case; we do not believe that Carrier's position was prejudiced in any way by the variance. In our judgment the case before us involves the question of punitive versus pro-rata pay for the claimants, which was clearly set forth in all the claims both on the property and before us. Our rules and procedures should be construed, with due regard for the parties' rights, to permit resolution of controversies on their merits, rather than on technicalities, whenever possible. (Award 2622) We also reject Carrier's contention that the Organization has not met its burden of proof since Carrier failed to substantiate this charge and also did not raise this issue on the property.

Two Rules are relevant to the principal issue herein:

"ARTICLE 2

(e) SERVICE ON POSITIONS OTHER THAN SENIORITY CHOICE.

An assigned train dispatcher required to work a position other than the one he obtained in the exercise of his seniority, **except** an assigned train dispatcher who is used on the position of chief dispatcher, or assistant chief dispatcher, shall be compensated **therefor** at the overtime rate of the position worked; however, except as provided in Article 18, no additional payment shall be made to such train dispatcher due to not having worked his **regular** assignment.

"ARTICLE 3

(b) SERVICE ON REST DAYS.

A regularly assigned **train** dispatcher 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.

Carrier argues that Rule 2 (e) in its exceptions "clearly exclude **compensation** at the **overtime** rate on any basis on positions of chief **dispatche**. Further it is argued that Rule 2(e) must prevail over Rule 3(b) and that when Claimants were used in relief of the excepted Chief Dispatchers they were not subject to the punitive provisions of Rule 3 (b).

As we said recently in Award **19961**, involving the same parties, Rule 2(e) qualifies the application of seniority as is indicated by its title; **it is** clear and totally unambiguous. **However, we** deem it equally clear that **Rule 2 (e)** was not intended to remove Train Dispatchers required to serve as Chief Dispatchers from the coverage of all other provisions of the Agreement.

Carrier's interpretation of the rule would permit the regular requirement of five days of work as a Train Dispatcher and then two days **relieving** a Chief Train Dispatcher **all** at pro-rata pay. This construction is contrary to the provisions of Article 3 of the Agreement as well as to the clear intent of national agreements on the five day week issue. We do not find that prior Awards cited by Carrier are controlling in this case. In Award 19845, in a closely related factual circumstance, we held that a Claimant relieving in the position of a Chief Train Dispatcher "...had an absolute vested right to compensation at time and one-half rate for service which Carrier required him to perform on one of his regularly assigned rest days." To accept Carrier's argument would mean that this Board is modifying the provisions of Rule 3 (b) by defacto adding the phrase **to** the first paragraph **"...Except** when serving **as Chief** Train Dispatcher". We obviously have no authority to re-write the rules and we do not find that Rule 2(e) supercedes and negates **Rule 3 (b)**; both rules are clear and unambiguous. For these reasons we must sustain the claims .

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:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this **31st** day of **October 1973**.