

CORRECTED

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26682
Docket Number TD-26410

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Missouri Pacific Railroad Company

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

(a) The Missouri Pacific Railroad Company (hereinafter referred to as the 'Carrier'), violated its Train Dispatchers schedule working 'Agreement', including Article 4 (d) & (e). Extra Dispatcher I. E. Chatman had been previously instructed to work this position but due to sickness could not protect the third trick Assistant Chief Dispatcher positions vacancy (that had been incorrectly assigned to Mr. J. E. McVey) on March 5, 1983. Therefore the necessity for the 'Carrier' to fill this position on that date is evident by their attempt to do so with Mr. Chatman. With no other 'Extra' Dispatchers available, the next person in line should have been the senior qualified regular assigned Dispatcher available, in this case Mr. K. R. Bartlett.

(b) Because of said violation, the Carrier shall now compensate claimant Mr. K. R. Bartlett one day's pay at the Assistant Chief Dispatchers rate for not being used on the above position on March 5, 1983."

OPINION OF BOARD: On March 5, 1983, the incumbent was not available to fill his regular Night Assistant Chief Train Dispatcher position. Carrier called on Extra Dispatcher Chatman to fill the vacancy, but he was unavailable due to illness. Carrier thereafter blanked the position, triggering this dispute. The record indicates that no other extra dispatchers were available and further that normal train activity continued on the shift in question. Claimant herein was the senior available regular Dispatcher and was qualified to fill the position; he was on one of his rest days.

Article 4 (d) and (e) of the Agreement provide as follows:

"(d) Extra Work

The senior qualified extra dispatcher in each seniority district as defined in Section (c) of this Article 4 will be called to perform extra train dispatching service when he is available, except as otherwise provided in Article 10. He will be considered available if he can fill the vacancy without violating the Hours of Service Act and is so situated that he can arrive at the dispatching office and begin work at the assigned starting time of the vacant shift.

When extra train dispatchers are called from their regular assignments in other service of the Carrier to perform service as a train dispatcher, they will be paid the rate of the position filled by them in dispatching service; but if the change from one service to the other requires them to lose time, their compensation will be not less than it would have been if they had continued on their regular assignment in other service.

The foregoing is not intended to in any way conflict with Article 3 (b) of this Agreement and it is understood that when no extra train dispatcher is available to fill the vacancy in the seniority district where vacancy exists, such vacancy may be filled by an extra dispatcher holding seniority in another seniority district.

(e) Filling Positions

In filling positions of train dispatchers, ability being sufficient, seniority as train dispatcher shall govern."

Article 5 in relevant part states:

"(a) Bulletining Vacancies

1. Except as provided in paragraph 2 of this section, vacancies or new positions which may be created shall be bulletined to all regularly assigned train dispatchers on the seniority district involved...Positions in such territory not filled in accordance with this provision will be bulletined to all train dispatchers on the system.

2. Vacancies or new positions of an indefinite duration will be filled in accordance with the provisions of Article 5(c) for a period not in excess of ninety (90) calendar days;....

(b) Bulletins

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In the event there are no qualified applicants for a position bulletined, the position shall then be filled by assignment of the senior extra train dispatcher on the seniority district; if there be none, the position may then be filled by other available methods.

(c) Temporary Vacancies

Temporary vacancies or new positions of ninety (90) days' duration, or less, may be filled under the provisions of paragraph (c)...." [underlining added]

The Organization insists that there is nothing in the Agreement which permits the Carrier to blank the position, but rather the Agreement provides for "filling positions" in several of its rules (such as Article 4 (e)). It is argued further that the blanking of a position amounts to its abolishment, even for one day. In that context the Organization notes that a minimum of three days notice is required by Rule 5 (g) if Carrier contemplates abolishing a position. It is also argued that if Carrier had the unilateral right to blank positions at will, nearly every Agreement rule could be nullified or perverted. It is also asserted that Carrier has in the past paid Claims for similar violations. The Organization cites numerous Awards holding that Train Dispatcher positions, being seven day positions, may not be blanked.

Carrier take the position that it has the right to determine whether or not a vacancy will be filled and in this instance had the prerogative of blanking the position in question. Carrier notes that there is nothing in the Agreement requiring it to fill a Train Dispatcher position in the absence of the regular incumbent. Carrier cites a number of closely related awards, namely, Third Division Awards 10393, 11131, and 17704 in support of its position.

The crux of this dispute is whether Carrier has the right to blank a Train Dispatcher's position. The Board believes that if Carrier's position is sustained, it would nullify a number of critical provisions of the Agreement such as Rule 5(g). It is not believed that this was the intent of the drafters of the Agreement.

The Board has carefully studied and evaluated the reasoning in the conflicting series of Awards on this subject and has concluded that the better reasoned Awards support the Organization's position. For example, in Third Division Award 25811, this Board stated:

"The issue at the core of this Claim is whether the Carrier has the unilateral right to blank an Assistant Chief Train Dispatcher position in the absence of the regularly assigned employee. The National Agreement of May 30, 1979 does not directly address the question.... The inclusion in the National Agreement of the Jury Duty Rule, which specifically grants Carrier the right to blank Dispatcher positions in one limited circumstance, suggests by clear implication that the Carrier lacked an unconditional right to blank positions in other circumstances. The Carrier's unsuccessful attempt to obtain similar language for absences due to bereavement leave suggests a similar lack of general authority...."

Particularly in view of the apparent recognition in the 1979 National Agreement negotiations that Carriers do not possess the right to blank Dispatcher positions (as indicated in Third Division Award 25811, supra), the Board is convinced that in this dispute Carrier did not have the right to blank the disputed position. The Claim must be sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 23rd day of November 1987.