Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26820
THIRD DIVISION Docket No. TD-26631
88-3-85-3-501

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim on behalf of Train Dispatcher J. M. Munoz for payment of seven (7) hours at time and one half pro-rata for services required and performed on Tuesday December 14, 1982, and payment of seven and one half (7 1/2) hours at time and one half pro-rata for services required and performed on Wednesday December 15, 1982."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant is a Train Dispatcher assigned to hours of 7:30 a.m. to 3:30 p.m., with Monday and Tuesday as rest days, at Fort Madison, Iowa. On Tuesday, December 14, 1982, his rest day, the Claimant was required by the Carrier to travel to Jefferson City, Missouri, in connection with an Investigative Hearing (in which he was not a principal) on the following day. He arrived at Jefferson City at 5 p.m., and was paid time and one-half for hours traveling up to this point. He remained overnight in Jefferson City, attended the Hearing on December 15, and returned to Fort Madison, arriving at 5 p.m. For this day, he received his regular pay from 7:30 a.m. to 3:30 p.m. and overtime until 5 p.m.

The dispute here concerns whether or not the Claimant is entitled to compensation from 5 p.m. to midnight on December 14 and from midnight to 7:30 a.m. on December 15. The Claim as presented to the Board seeks time and one-half pay for these hours, although the Claimant's original request to the Carrier, as noted on his time tickets, was for time and one-half on December 14 and straight time on December 15.

The Organization relies on that portion of Article III which reads as follows:

"Basic Day

section 1. Eight (8) consecutive hours shall constitute a day's work.

Overtime

section 2. Time worked under this Agreement in excess of eight (8) hours, continuous with, before or after, regular assigned hours will be considered overtime and paid for on the actual minute basis at the rate of time and one-half. Time required to make transfer shall not be considered as overtime or paid for under this section."

Also directly in point is Article VII, Section 10, which reads as follows:

"Section 10. Individuals acting as representatives of train dispatchers under Section 2 of this Article VII, and train dispatchers acting as witnesses at investigations for and/or at request of train dispatchers covered by this agreement, will not be compensated by the Company for time lost and/or expense incurred by reason thereof. Train dispatchers acting as witnesses in investigations for and at the request of the Company will suffer no deduction in pay for actual time lost from regular assignments by reason thereof. If so used outside of their assigned hours, they shall be paid at the pro rata rate for actual time required to be in attendance; if on their rest days, payment for actual time shall be at rate of time and one-half."

As a threshold matter, the Carrier contends that the Claim should be dismissed on the basis that no conference, as required by the Railway Labor Act, was held prior to submission of the Claim to the Board. The record shows, however, that such conference was held in 1983, at which time the matter was deferred because of the pendency of several other Claims. Apparently, a second conference was to be arranged in 1985, and this did not occur. The Board finds that the initial conference, as acknowledged by the Carrier, was sufficient as a preliminary step to bring the matter to the Board for resolution.

Briefly stated, the Carrier relies on Article VII, Section 10 as dispositive of all compensation to be granted in cases where a Train Dispatcher acts as a" Investigation witness at the Carrier's request. This provision

calls for "no deduction in pay for actual time lost from regular assignments" and pay (at the pro rata rate or time and one-half rate, as appropriate) for "actual time required to be in attendance." The Carrier argues that, in paying for these periods, the Carrier has met its full obligation. It is noted that the Carrier also paid the Claimant for travel time which exceeded his regular hours.

The issue, then, is whether the Claimant should be paid for hours after arrival at Jefferson City and prior to the start of his regular hours the following day. Such hours admittedly ware not actual travel or attendance at the Investigation.

The Organization argues that Article VII, Section 10 simply does not contemplate such circumstance. The Organization points out that, in its view, this was resolved some time previously, following the issuance of two sustaining Awards and the distribution by the Carrier on June 28, 1955 of its "Ruling No. D-3.," which reads as follows:

> "In the absence of a rule in the Dispatcher's Agreement, effective September 1, 1949, covering the attendance at investigations of train dispatchers, please be governed by what follows:
>
> Effective June 1, 1955, train dispatchers should be paid in accordance with Article III, Sections 1 and 2 of the Train Dispatchers' Agreement, effective September 1, 1949, for time spent in waiting and traveling outside regularly assigned hours in attending investigations as a witness for the Company.
>
> Train Dispatchers should not be instructed to attend investigations as witnesses for the Company if it necessitates traveling and waiting outside the dispatcher's assigned hours, except when it is absolutely necessary."

The Organization also points to a Carrier ruling in 1973 -- some 12 years later -- to pay an employee "for time spent in waiting and traveling outside of regularly assigned hours in attending investigation as a witness for the company" (emphasis added).

The Carrier further relies on Third Division Award 25306, issued in 1985, considering Claims closely similar to the one here under review. In denying the Claims, the Award states as follows:

> "The strongest support for the Organization's case is the presentation of Ruling No. D-3 and its subsequent use on December 17, 1973. This Board notes that such evidence does lay weight to the claim. However,

> in the mind of this Board there has been entirely too much time elapsed with no evidence of record of the same situation having arisen since 1954 or after 1973 to provide substantiation that, barring Agreement support the employes had come to count on this action being other than gratuitous. While it had some stature, being reduced to written Rule, it lacked support, in that there is insufficient evidence of record to substantiate that it was other than a unilateral position or to document that the application of Ruling No. D-3 had become an established practice of a constant response to a recurring set of circumstances.
>
> It is the determination of this Board that Article VII, Section 10 is the Rule germane to attendance at investigations. That Rule is silent on the issue at bar. Neither past Awards nor Ruling No. D-3 have strong enough support in the record to establish a firm practice to which Carrier would be restrained from abandoning. As such, this Board finds that the Carrier did not violate the Agreement and as we are not permitted to expand upon the Agreement negotiated by the parties, we must assume that the absence of language covering this issue is intended."

The Board here has carefully considered Third Division Award 25306 and, with reluctance as to disturbing previous Awards where circumstances are identical, must reach a different conclusion. The Board agrees that Article VII, Section 10 "is silent on the issue" (i.e., waiting time). However, the Board disagrees with the assumption "that the absence of language covering this issue is intended." Were this so, there would be no basis for the Carrier to issue its Ruling No. D-3 in 1955 and continue to adhere to such in 1973. Ruling No. D-3 was indeed "unilateral." But there is no contention that the ruling was contrary to the provisions of Article VII, Section 10. (If it were contrary to a mutually agreed rule, the Carrier could rightly contend at any time that the rule must prevail, but such is not the case here.) Being "unilateral- and possibly "gratuitous", Ruling No. D-3 could presumably have been withdrawn upon notice by the Carrier. Such, however, was not done up to the time of the Claim here under review.

Put simply, the Carrier issued its determination of appropriate pay, apparently with reliance on some previous Awards, to cover a situation not otherwise specifically covered in Article VII, Section 10. Since such ruling is not claimed to be in conflict with any other rule, employees could properly rely on its application, until or unless it is withdrawn or superseded by some new rule (which the Board is advised occurred some time after the instance reviewed here).

Thus, a sustaining Award is required. As to the rate of pay, the Board is guided by Article VII, Section 10 -- time and one-half pay for time claimed on the Claimant's rest day, and straight time for time claimed on the following regular work day.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1988.