

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Duluth, Missabe and Iron Range Railway Company

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

CLAIM #1

(a) The Duluth Missabe and Iron Range Railway Company (hereinafter referred to as 'the Carrier'), violated the effective Agreement (effective December 1, 1972) between the parties, including but not limited to Rule 8 in particular when it failed to relieve the Chief Train Dispatcher, during a temporary period of absence, on Monday, March 25, 1985.

(b) For the above violation, the Carrier shall now compensate Claimant Train Dispatcher A. W. Suikonen one days' pay (eight hours) at the rate of pay established for the position of relief of Excepted Chief Dispatcher.

CLAIM #2

(a) The Duluth Missabe and Iron Range Railway Company (hereinafter referred to as 'the Carrier'), violated the effective Agreement (effective December 1, 1972) between the parties, including but not limited to Rule 8 in particular when it failed to relieve the Chief Train Dispatcher, during a temporary period of absence, on Wednesday, April 10, 1985.

(b) For the above violation, the Carrier shall now compensate Claimant Train Dispatcher A. C. Hanson one days' pay (eight hours) at the rate of pay established for the position of relief of Excepted Chief Dispatcher.

CLAIM #3

(a) The Duluth Missabe and Iron Range Railway Company (hereinafter referred to as 'the Carrier'), violated the effective Agreement (effective December 1, 1972) between the parties, including but not limited to Rule 8 in particular when it failed to relieve the Chief Train Dispatcher, during a temporary period of absence, on Thursday, April 18, 1985.

(b) For the above violation, the Carrier shall now compensate Claimant Train Dispatcher M. H. Burm one days' pay (eight hours) at the rate of pay established for the position of relief of Excepted Chief Dispatcher.

CLAIM #4

(a) The Duluth Missabe and Iron Range Railway Company (hereinafter referred to as 'the Carrier'), violated the effective Agreement (effective December 1, 1972) between the parties including but not limited to Rule 8 in particular when it failed to relieve the Chief Train Dispatcher, during a temporary period of absence, on Thursday, August 1, 1985.

(b) For the above violation, the Carrier shall now compensate Claimant Train Dispatcher M. H. Burm one days pay (eight hours) at the rate of pay established for the position of relief of Excepted Chief Dispatcher."

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 basic facts are not disputed. On each of the claim dates the chief dispatcher left in the middle of his shift to attend meetings and did not return. No relief train dispatcher was assigned to the position or performed any of the chief's duties.

The argument of the Parties can also be succinctly stated. The Organization contends that Rule 8 mandates that the Carrier assign a dispatcher to the chief's position during his absence. The Carrier contends that the rule simply requires that the position be filled by a qualified dispatcher from the seniority district involved if they elect to fill the position. Rule 8 states:

"Chief Dispatcher Relief

A weekly rest day shall be assigned to each excepted chief train dispatcher position as a part of the weekly schedule of work for any train dispatcher assignment.

Relief of excepted chief train dispatchers for their annual vacation, and other temporary periods of absence from their positions, shall be made by qualified train dispatchers from the seniority district involved.

Any permanent appointment to the position of excepted chief train dispatcher shall be made for train dispatchers holding seniority as such. The Carrier shall be the sole judge as to the selection.

An employee who relieves the Chief Dispatcher for any reason shall be compensated at a flat rate of \$65.58 per day as of October 1, 1971, subject to any future general wage increase or decrease applicable to train dispatchers."

The relevant portion of Rule 8 is the second paragraph. The Board believes both Parties offer plausible interpretations of the rule but the Carrier's interpretation is more correct based on the construction of the rule. The rule as written simply states how relief will be made, not that it must be made. The direction of the work force is a basic management right and is altered only to the specific extent of the agreement. In this case, the mandatory flavor of the rule relates to source of relief, i.e., that "it shall be made by qualified train dispatchers from the seniority district involved." The fact the verb "shall be made" is followed by the prepositional phrase "by" dictates that the prepositional phrase is the subject of the directive. The Organization reads the sentence as if it were constructed without the very important prepositional phrase "by" and all that follows. This important word cannot be ignored or treated as if it doesn't exist. They also read the clause as if the phrase "shall be made" referred to the relief. The sentence does not end after the verb "shall be made" and the word "by" sets up the whole purpose of this sentence as describing who shall provide the relief, not necessarily whether they will. Thus, whether any one will be assigned to relieve the chief during absences of this unique nature is a managerial prerogative left unaltered by the rule. The rule comes into play after it is determined if the job is filled or if someone actually performed the chief's duties (which is not the case here).

Accordingly, under these circumstances, the agreement, under the interpretation of the rule, isn't violated unless someone other than a qualified train dispatcher from the seniority district involved is assigned the chief's duties in his absence.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of September 1989.

LABOR MEMBER'S DISSENT
to
Award 28133 - Docket TD-26982
Referee Vernon

We believe the authors of this Award seriously erred when they adopted the Carrier's argument that Rule 8 merely states how relief on the excepted Chief Train Dispatcher's position shall be made, not that relief must be made in his absence.

The majority has attempted to make the Rule of no effect, since their construction admittedly would never require relief. Therefore, those who wrote the Rule did a vain act. This Board, however, never assumes that an agreed-upon rule is vain or useless.

The decision does not follow the pattern set in antecedent Awards. For example, Third Division Award 10618, which addressed a rule almost identically worded, sustained the Employees' position.

As this Award 28133 demonstrates, the majority has rewritten the Rule. They state, "Carrier's interpretation is more correct based on the construction of the rule." What is the Carrier's interpretation? "The Carrier contends that the rule simply requires that the position be filled by a qualified dispatcher from the seniority district if they elect to fill the position." Therefore, by concurrence with the Carrier's position, the majority has effectively rewritten the second paragraph of Rule 8 to read as follows:

"Relief of excepted chief train dispatchers for their annual vacation, and other temporary periods of absence from their positions, shall be made by qualified train dispatchers from the seniority district involved, if the Carrier elects to fill the position."

(The majority's "amendment" is underscored). But, of course, the Board has no authority to rewrite a rule.

Therefore, the mandatory sense of the verb "shall" is utterly perverted by the majority in this tortured interpretation of Rule 8.

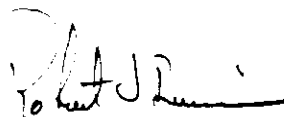
The Award says the "mandatory" flavor of the Rule relates to the relief, and that it "shall be made" by "qualified train dispatchers". Yet, the Award goes on to state that "qualified train dispatchers" is the subject of the directive.

Labor Member's Dissent to Award 28133 - Continued

The Award errs, for the single use of the verb "shall be made" does not have both a mandatory and directory meaning within the same sentence. See: Sands, Sutherland Statutory Const. Ch. 37, "Mandatory and Directory Construction" (4th ed. 1984). The word "shall" is the language of command, and is mandatory unless clearly intended to be directory. See: Planned Parenthood Fed. of America v. Heckler, 712 F.2d 650, 656 (D.C. Cir. 1983); Sierra Club v. Train, 557 F.2d 485, 489 (D.C. Cir. 1977).

The phrase "by qualified train dispatchers" certainly applies to "shall be made". This is the rule of the last antecedent. Sands, supra, Section 47.33; People of State of Ill. v. Consolidated Rail Corp., 589 F.2d 1327, 1330-31 (7th Cir. 1978). However, the subject of "shall be made" is the "relief", and it is the relief which is mandatory. Likewise mandatory is the phrase "by qualified train dispatchers". The mandatory "shall" is mandatory throughout the sentence, and in no way is it directory, in whole or in part.

This Award does not draw its essence from the Agreement and is without basis in reason. It is thus outside the scope of the Division's jurisdiction. Bro. of Railroad Trainmen v. Central of Georgia Rwy., USCA (5), 1969, 415 F.2d 403; 71 LRRM 3042. Therefore, I must dissent.



Robert J. Irvin
Labor Member