

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"CSX Transportation Inc. (Carrier) violated Article 10 page (17) (Sickness Benefits Agreement) when it failed to allow one day pay for train dispatcher V. W. Outlaw on Wednesday January 17, 1990 when Train Dispatcher Outlaw became ill and was unable to perform service this date and marked off sick to CSX Transportation.

. . . .

Because of said violation the Carrier shall now allow one (1) days pay at the rate of \$165.00 and be shown as sick pay allowance to Train Dispatcher V. W. Outlaw for Wednesday January 17, 1990."

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.

On Wednesday, January 17, 1990, Claimant was employed by Carrier as a Guaranteed Assigned Train Dispatcher in the Jacksonville Centralized Train Dispatching Center. On that day, he informed the Chief Train Dispatcher he would be unavailable for service due to illness. Upon his return to work, Claimant filed a Claim for one day's pay as sickness benefit pursuant to Article 10 of the Agreement. This Claim was denied and Claimant was informed the day would be considered one of his two rest days during that workweek. Claimant had performed service on Saturday, Sunday, Monday and Tuesday. He worked again on Thursday, and was compensated for five days of service during the workweek.

The relevant portion of Article 10 - Sick Leave and Supplemental Sickness Benefits, reads as follows:

"(a) Regularly assigned train dispatchers will be allowed, during each calendar year, sick leave pay; and supplemental sickness benefits (within the meaning of Section 1(j) of the Railroad Unemployment Insurance Act) for each work day when sick in such amounts as, when added to the benefits payable with respect to days of sickness under the Railroad Unemployment Insurance Act, will produce total combined benefits in accordance with the following schedule:"

* * *

Appendix 6 of the Agreement, which covers Guaranteed Assigned Train Dispatchers, reads, in pertinent part, as follows:

"1. Incumbents of 'Guaranteed Assigned Train Dispatchers' positions will be paid a minimum of five (5) days' pay for each workweek, Saturday through Friday, in which they are fully available for service. Compensation paid the incumbents of these positions for service performed will be at the rate of pay of the position worked. For days not worked in a workweek less than five, they will be paid at the minimum trick dispatcher's rate in the office assigned for those days necessary to make a total of five days' pay in the workweek, less time lost account voluntary absences.

* * *

2. The workweek for each position will be Saturday through Friday and rest days need not be consecutive. However, if consistent, Carrier will attempt to relieve the incumbents for two (2) consecutive rest days."

The thrust of the Organization's argument is that the day Claimant was ill was a workday, and that Carrier was not privileged to change it to a rest day after the fact. Carrier has responded that it tries to advise incumbents in advance if a day is to be considered a rest day, but it is not required to do so. This is the central issue of the dispute, for if the day was a workday, Claimant would be entitled to sick pay, regardless of how many days he worked during the week. Article 10 contains no exceptions which would allow us to conclude otherwise.

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92-3-91-3-117

The burden of proving a Rule violation falls upon the Organization. To prevail, it must show the Agreement requires the Carrier to designate rest days in advance. We find no such restriction in the Agreement. Accordingly, we conclude the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Meyer - Executive Secretary

Dated at Chicago, Illinois, this 25th day of August 1992.

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THIRD DIVISION
(CORRECTED)

LABOR MEMBER'S DISSENT

TO

AWARD NO. 29346 - DOCKET TD-29771

The majority holding of this award has effectively redefined the term "rest day" for the Carrier's Guaranteed Assigned Dispatchers.

In doing so, this Board has exceeded its authority. The Board should never directly or indirectly act to alter the Agreement that is before it. Third Division Awards 16799, 16835, 16489, 16441, 16373, 15937, 21426, and 23433 are just a few examples of the multitude of Awards upholding this principle. In order for the reader to clearly understand the change effected by this Award, relative to Guaranteed Assigned Dispatcher's rest days, an explanation of the circumstances surrounding the dispute is required.

The Claimant, an employee assigned to the Guaranteed Assigned Dispatcher's list, was advised by the Chief Dispatcher to be available to perform service on Wednesday, January 17, 1990. According to questions and answers that accompany the Schedule Agreement, to be "fully available for service" an incumbent Guaranteed Assigned Dispatcher must "be at the normal place of calling which he has on record...". Some time after receiving these instructions from the Chief Dispatcher, the Claimant became ill and found it necessary to report off duty. Because the Claimant

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was notified to remain available for duty, and not told otherwise prior to reporting off due to his illness, the claim date, Wednesday, January 17, 1990 cannot reasonably be considered anything other than a "workday" for the claimant.

"ARTICLE 10
SICK LEAVE AND SUPPLEMENTAL
SICKNESS BENEFITS

(a) Regularly assigned train dispatchers will be allowed, during each calendar year, sick leave pay; and supplemental sickness benefits (within the meaning of Section 1(j) of the Railroad Unemployment Insurance Act) for each work day when sick..." (emphasis added)

As spelled out in the Employees' submission to the Board, "There are three basic requirements, in order to be eligible for sick leave pay...One must be a regularly assigned Train Dispatcher, and be sick, and the days for which sick leave is payable must be work days." (emphasis added). There is no question that the Claimant satisfied all three of these requirements. "Agreement[s] must be applied and interpreted as written and as negotiated between the principles" [Third Division Award No. 20956]. "It is a fundamental rule of contract construction that we must ascertain and give effect to the intention of the parties from the language employed in the written Agreement. We cannot look beyond the language and supply something that is not there" (emphasis added) [Third Division Award No. 18466]. Also, see Third Division Award 26262.

Labor Member's Dissent
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However, according to the Carrier, and validated by the findings of this erroneous Award, before this workday was compensable as a sick day, the Carrier retained the right to wait until the Claimant's work week was complete, and then decide if the claim date was a payable sick day or would be considered a rest day. The fact that the Carrier determined Claimant's sick day was a rest day, post-facto, not only deprived him of the compensation claimed, but, also the right to enjoy a day of rest.

The future impact of this Award on Guaranteed Assigned Dispatchers could be that they may never again enjoy the benefits negotiated on their behalf, relative to a true day of rest or compensation for workdays when they are too ill to perform service. Surely, the Carrier will now view this Award as license to manipulate the Guaranteed Assigned Dispatchers workweek so that these benefits are never again available to these employees.

This claim should have been sustained in accordance with the clear, unambiguous terms of Article 10. The majority holding of this Award has allowed the Carrier an exception to the Agreement Article 10, not envisioned by the framers thereof.

For the reasons set forth above, I dissent.


L. A. Parmelee
Labor Member

August 27, 1992

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 29346, DOCKET TD-29771
(Referee Fletcher)

The Labor Member's Dissent to the decision of the Majority in Award 29346 clearly emphasizes the underlying motives of the Organization in progressing this issue.

It stands un rebutted that Appendix 6 to the Agreement clearly provides that Guaranteed Assigned (Extra) Train Dispatchers are assigned to work ANY five days within a 7-day workweek that commences on Saturday.

It also stands un rebutted that Article 10 of the Agreement provides sick leave payments when employees are unable to work because of illness.

Finally, it also stands un rebutted that the Claimant involved in this dispute lost no compensation whatsoever during the 7-day workweek that commenced on Saturday, in that he did perform service on five of the days within that workweek, notwithstanding the fact that he was absent account of illness.

Knowing full well the provisions of the Agreement in this respect, the Organization attempted to have this Board determine that the day the Claimant was absent account illness was an ASSIGNED workday for which he should be allowed sick pay. It would then follow, according to the Organization, that the Claimant would have had an ASSIGNED rest day later in that workweek in lieu of having to perform service to make his five days.

To further emphasize the ridiculousness of the Organization's contentions, it would have this Board believe that if the incumbent of a Guaranteed Assigned (Extra) Board Position is not available for work account illness during a particular workweek, that employee suddenly has acquired an ASSIGNED workday (the day he was absent account illness) and an ASSIGNED rest day (sometime later in the same workweek). In other words, the Organization attempted to infer that Guaranteed Assigned (Extra) Train Dispatchers had "assigned" workdays and "assigned" rest days where no such Agreement provision granting them existed.

The Majority holding in favor of this Award clearly saw through this attempt on the part of the Organization and pointed out in the Board's denial Award that the Organization's claim found no support whatsoever in any provision of the Agreement.

Michael C. Lesnik
M. C. LESNIK

Robert L. Hicks
R. L. HICKS

James E. Yost
J. E. YOST

M. W. Fingerhut
M. W. FINGERHUT

P. V. Varga
P. V. VARGA

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT

(CORRECTED)

AWARD NO. 29346 - DOCKET TD-29771

The second page of the Carrier Members' dissent incorrectly states the Organization's position. Contrary to the Carrier Members' understanding, the Organization never contended "...that if the incumbent of a Guaranteed Assigned (Extra) Board Position is not available for work account illness during a particular workweek, that employee suddenly has acquired an ASSIGNED workday...". The Organization's position has been consistent in this regard, so, the Carrier Member's apparent confusion at this late date is perplexing. Correctly stated, the Claimant was entitled to sick leave compensation on the claim date only because it was workday. Factor that variable out of this dispute, and the Claimant would no longer satisfy the three essential qualifying requirements enumerated in the Labor Member's Dissent.

It seems the Carrier Members have found solace and reassurance in the illusioned belief that the claim date was not a workday. Exactly, why the claim date would not be an assigned workday for the Claimant remains unclear. After all, the Claimant was told by the Carrier's Chief Dispatcher to remain available for call that day. Of course, that fact also "stands unrebutted" in the record, but, I guess they just forgot to mention that.


L. A. Parmelee
Labor Member