

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30789
Docket No. TD-31153
95-3-93-3-146

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

- "(a) Carrier violated the effective Schedule Agreement, Article 3(b) and 8(e), when on Friday May 15, 1992 it required B. J. Hosp, the senior extra train dispatcher who was assigned a temporary vacancy, to fill the position of West Belt 1st shift on his rest day. In doing so B. J. Hosp was not available to fill his regular assignment of Merchants Dispatcher 3rd shift account the Hours of Service Law. This temporary vacancy created by the scheduled vacation of trick train dispatcher J. H. Ward.
- (b) Because of said violation, Carrier now be required to compensate B. J. Hosp,
- (1) One days pay at the punitive rate applicable to the West Belt train dispatcher.
 - (2) One days pay at the pro-rata rate applicable to the Merchants train 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 employee or employees involved in this dispute are respectively carrier and employee 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 in this case was an Extra Train Dispatcher. Beginning on Friday, May 8, 1992, Claimant was assigned under the provisions of Article 5(c) of the Schedule Agreement to the third shift Merchant Dispatcher position to fill the two-week vacation vacancy of the regular incumbent of that position. The Merchant Dispatcher position had a scheduled work-week of Friday through Tuesday with Wednesday and Thursday as assigned rest days. Claimant performed service as assigned on the position from Friday to and including the following Tuesday. He observed the assigned rest day on Wednesday, May 13, 1992. On Friday, May 15, 1992, Claimant was utilized by Carrier to fill a first shift vacancy on the West Belt Train Dispatcher position. For service performed on this first shift position, Claimant was allowed payment of eight hours at the straight time rate of pay at the West Belt Dispatcher daily rate. As a result of this use of Claimant on the first shift position, he was not available under the Hours of Service Law to perform service on the third shift Merchant Dispatcher temporary vacancy to which he had been previously assigned. On May 16, 1992, Claimant resumed work on the temporary vacancy and concluded the temporary assignment on Tuesday, May 19, 1992. Because of Carrier's use of Claimant on May 15th as described above, the Organization presented the claim as outlined in the Statement of Claim supra.

During the on-property handling of this dispute, the Organization argued that inasmuch as Claimant had been assigned to the temporary vacancy caused by the vacation of the incumbent of the Merchant Dispatcher position, Claimant was entitled to the benefits and advantages and schedule rule applications which were attendant with his assignment to the temporary vacancy. They contended that the assigned rest days of the temporary vacancy were, in fact, Claimant's rest days and entitled him to the payment of the punitive rate for service performed on one of those rest days. They further argued that Claimant's use on the first shift position on May 15th prevented him from performing on his assigned third shift position because of a conflict with the Hours of Service Law. The Organization argued that the first shift hours of May 15th were, in fact, a time - part of the assigned rest day of the third shift position under the provisions of Article 3(c) of the rules agreement.

Carrier, on the other hand, argued that Claimant did not lose any time because of his use on the first shift position on May 15th and that Claimant was, in fact, working from the extra board and therefore was not a regularly assigned dispatcher as

officials. To have an Organization President intervene in an on-property handling of a claim is unusual. However, in this case, Carrier does not challenge the Organization President's intervention, per se, rather Carrier challenges only the timeliness of such intervention.

The Board has read the Organization President's letter of January 29, 1993, and does not find any new argument, evidence or rule references which were not previously made part of the case record by on-property argument advanced by the other involved Organization representatives. Rather, the Board finds this letter to be merely a summary of the cogent points which are involved in this case. As for the timeliness of the President's letter, the Board would remind both parties that any document, letter, etc. which is presented on the property prior to the date of the notice of intent to file a submission to a section 3, RLA Board of Adjustment is proper material for consideration by the Board. Of course, the Board has held that:

"The timing of the submission of certain documents may have significant bearing on the credibility, or weight to be attached, especially if the timing suggests that the other party did not have reasonable opportunity to respond prior to submission to this Board." (Third Division Award 20773)

In this case, the communication from the Organization President did not advance any new or altered position or argument. In this case, Carrier did, in fact, respond to the communication. In this case, the January 29, 1993, letter from the Organization President may not have been proper under the "usual handling" procedures on this property, but it was not untimely. The Board would recommend that the parties clarify their position and understanding on what constitutes "usual handling" on this property. This issue, however, is not dispositive of the claim in the instant case.

The fact situation in this case is clear and basically unchallenged. To make an evaluation and determination on the merits of the claim, the Board must review and consider the following rules of the negotiated agreement:

"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 the rate of time and one-half for service performed on either or both of such rest days."

"ARTICLE 3(c) - REST DAY DURATION

The term 'rest days' as used in Section (a) means that for a regularly assigned train dispatcher seventy-two (72) hours and for a relief dispatcher (who performs five [5] consecutive days' service as train dispatcher) fifty-six (56) hours shall elapse between the time required to report on the day preceding the 'rest days' and the time required to report on the day following the 'rest days.' These definitions of the term 'rest day' will not apply in cases of transfers account train dispatchers exercising seniority."

"ARTICLE 4(f) - EXTRA WORK

Except as provided in the second paragraph of Article 3(b) and the last paragraph of this Article 4(f), when an extra dispatcher is needed, the senior extra train dispatcher who is not performing train dispatcher service, and who can be called and used without violating the Hours of Service Law, shall be called and required to perform the service unless prevented by physical disability, leave of absence, or other justifiable reasons, which reasons must be given to the supervisory officer in writing, and a copy will be furnished to the Office Chairman on request.

When an extra train dispatcher is called from his regular assignment in other service to perform train dispatcher service, he will be paid at the rate of the position filled in train dispatcher service, but if the change from one service to another requires him to lose time on account of the Hours of Service Law, his compensation shall not be less than it would have been had he continued on his regular assignment in other service.

The Carrier is not obligated to use the senior extra train dispatcher if the vacancy is known to be less than three (3) days' duration, and by reason of the Hours of Service Law, his compensation would be less than if he continued on his regular assignment."

"ARTICLE 5(c) - TEMPORARY VACANCIES

Temporary vacancies resulting from physical disability (exclusive of disability retirement), vacations, or leave of absence, known to be of more than four (4) days and less than ninety (90) days' duration; or new positions of ninety (90) days' duration or less, will be filled under the provisions of this paragraph (c). Regular assigned train dispatchers will be entitled to temporarily transfer to such vacancies and new positions, or to positions made vacant by such temporary transfer, in accordance with their respective seniority; the position finally made vacant by such rearrangement of force will then be assigned to the senior qualified extra train dispatcher on the seniority roster.

A successful applicant for a temporary vacancy will remain thereon for its duration, or until displaced by a senior man. If, while on such vacancy, he bids in another regular position, he may elect to be placed thereon or to remain on the temporary vacancy for its duration, after which he will go to his regular assignment or to another temporary vacancy to which he is entitled. If displaced from his regular assignment while occupying a temporary vacancy, he must exercise displacement rights in accordance with Article 4(d). After exercising displacement rights, he may elect to be placed on that new assignment, or to remain on the temporary vacancy for its duration, after which he will go to his regular assignment, or to another temporary vacancy to which he is entitled.

A train dispatcher who moves up on a temporary vacancy pursuant to this Section (c) will not be permitted to return to his regular assignment, or to move up on another assignment, on either of the two (2) rest days of the assignment from which he moves, except that if he lost one (1) day due to the Hours of Service Law in moving from his regular assignment to the temporary assignment, he may return to his regular assignment, or move to another temporary assignment on the second rest day of the assignment from which he moves, in order to make up the day lost.

A train dispatcher will not be permitted to move from his regular assignment to fill a temporary vacancy under the provisions of Article 5(c) unless it is known such vacancy will be for more than four (4) days. If the duration of a temporary vacancy is unknown at the time it occurs, the position will be filled by an extra dispatcher for the first four (4) days, and will continue to be so filled unless a regular assigned dispatcher transfers to the position.

A temporary vacancy is not completed until the regularly assigned incumbent resumes duty with at least sixteen (16) hours' advance notice (exclusive of rest days) on his position, or until the temporary occupant is displaced therefrom by a senior train dispatcher and that train dispatcher begins service on the position.

Any changes made in accordance with this Section (c) are to be without expense to the company."

**"ARTICLE 8(e) - LOSS OF TIME ON ACCOUNT OF THE HOURS
OF SERVICE LAW OR CHANGING POSITIONS**

Loss of time on account of the Hours of Service Law, or in changing positions by direction of property authority, except as provided in Article 2(d) and Article 4(f), shall be paid for at the straight-time rate of the position on which service was performed immediately prior to such change. Except as provided in Article 5(g), time lost in exercising seniority rights shall not be paid for."

From the record, it is clear that Claimant was assigned to fill the vacation vacancy in accordance with the provisions of ARTICLE 5(c). Therefore, he was assigned thereto for the duration of the vacancy. The single exception to this would have occurred if he had been displaced by a senior employee, which did not take place. Inasmuch as he was assigned to the temporary vacancy for the duration of the vacancy, the intervening rest days of the position were Claimant's assigned rest days. As such, the provisions of ARTICLES 3(b) and 3(c) were applicable to the Claimant. ARTICLE 3(c) by its agreed upon language encompasses the time period during which Claimant was required by Carrier to perform service on the West Belt Dispatchers position. Therefore, as required by ARTICLE 3(b), Claimant is entitled to payment at the time and one-half rate for the service he performed on the second rest day of the position to which he had been temporarily assigned.

The remaining issue in this case concerns Claimant's inability to perform service on the first day of the second work-week of the temporary assignment because of an application of the Hours of Service Law. In this regard, the parties have agreed in ARTICLE 8(e) that such loss of time "shall be paid for at the straight-time rate of the position on which service was performed immediately prior to such change." This ARTICLE 8(e) identifies three exceptions to the application of its provisions. Based upon the fact situation which exists in this case, none of the identified exception ARTICLES are applicable here. Therefore, it is the Board's conclusion that Claimant is entitled under the provisions of this ARTICLE 8(e) to eight hours at the straight time rate of the Merchant Dispatcher position on May 15, 1993, because he was precluded from working that position due to an application of the Hours of Service Law.

As previously noted herein, Claimant has already been paid at the straight time rate of the West Belt Dispatcher position for the service performed thereon. This decision by the Board entitles Claimant to the difference between the straight time rate and the punitive rate for the eight hours of service performed on the West Belt position plus eight hours at the straight time rate of the Merchants Dispatcher position because of being precluded from working that position as assigned due to the Hours of Service Law. Any other claim either expressed or implied by the language of the Statement of Claim in this case is denied.

Form 1
Page 9

Award No. 30789
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95-3-93-3-146

AWARD

Claim sustained of in accordance with Findings.

O R D E R

The Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.