

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Mart J. O'Malley, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE DENVER AND RIO GRANDE WESTERN RAILROAD CO.

(WILSON MCCARTHY AND HENRY SWAN, TRUSTEES)

STATEMENT OF CLAIM: (1) Claim of the American Train Dispatchers Association that the Denver & Rio Grande Western Railroad Company failed to comply with the requirements of Article 2 (b) of the Dispatchers' Agreement effective January 1, 1943, when it failed and refused to pay Train Dispatcher W. L. Gaddis, Salt Lake City office, at rate of time and one-half for overtime work performed on December 23, 24, 25, 26, 27, 28, 29, 30 and 31, 1943; Carrier also failed to comply with the requirements of Article 3 (a) when it failed and refused to pay Train Dispatcher Gaddis at rate of time and one-half for service performed from 8:00 A. M. to 4:00 P. M., on December 26, 1943, in accordance with Rule 3 (a) of the Agreement.

(2) Dispatcher Gaddis shall now be paid at rate of time and one-half for the service performed as shown in Item (1), to which he is entitled under the provisions of Article 2 (b) and Article 3 (a).

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the Denver & Rio Grande Western Railroad Company, Wilson McCarthy and Henry Swan, Trustees, and the American Train Dispatchers Association, governing the hours of service, working conditions and rates of pay of Train Dispatchers, effective January 1, 1943.

Rule 1-(a) SCOPE, reads as follows:

"The rules contained in this agreement apply to assistant and/or night chief, trick, relief and extra train dispatchers, but do not apply to chief train dispatchers other than as specified in Rules 3 (e) and 4."

Rule 1-(b) DEFINITION OF CHIEF, NIGHT CHIEF, AND ASSISTANT CHIEF DISPATCHERS POSITION, reads as follows:

"These classes shall include positions in which the duties of incumbents are to be responsible for the movement of trains on a division or other assigned territory, involving the supervision of train dispatchers and other employes; to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work."

Rule 2-(b) reads as follows:

"Time worked in excess of eight (8) hours on any day, exclusive of the time required to make transfer, will be considered overtime and shall be paid for at the rate of time and one-half on the minute basis."

(b) A Chief Train Dispatcher who is regularly assigned to a shift performing trick train dispatcher's work will be regarded as within the rules of this agreement."

An analysis of Rules 3 (e) and 4 (a) show they have application only to the question of relieving chief train dispatchers one day in seven and filling of the chief train dispatchers position when the regular occupant is on his annual vacation or absent from work for other causes. Neither of these rules are or can be considered as working rules for chief train dispatchers. The beneficiary under these rules are the relief and trick train dispatcher and not the chief train dispatcher.

With respect to Rule 4 (b) we have no chief train dispatcher on this property who is regularly assigned to a shift performing trick dispatcher's work. It is obvious, therefore, that neither of these rules place chief train dispatchers within the scope of the current agreement with the train dispatchers. As set forth in Carrier's Statement of Facts, Mr. Gaddis on dates involved in claim was working as, under the conditions of, and compensated as chief train dispatcher.

Chief train dispatchers on this property are paid a monthly rate of pay to cover all services rendered. They are not represented by any labor organization, neither are they covered by or included in the scope of any working agreement.

Mr. Gaddis knew when he took the position of chief train dispatcher, the rate of which was \$13.23 per day as against the rate of \$11.60 per day for trick train dispatcher, that it would be necessary for him to accept the conditions of the job, one of which was that he would not be compensated for any overtime worked.

That Mr. Gaddis considered himself as the chief train dispatcher while working in excess of 8 hours per day on the dates involved is proven by the fact that his claim for overtime was made at one and one-half times the chief train dispatcher's rate. To substantiate this statement there is submitted copy of Mr. Gaddis' time report to the General Auditor for the period ending December 31, 1943, from which it will be observed that Mr. Gaddis made claim for the chief dispatcher's rate for all time worked December 23rd to 31st inclusive, 1943.

The Carrier holds it has the right, by reason of the fact the chief train dispatchers rate of pay covers all services rendered to hold a chief train dispatcher, or any one holding that position temporarily who is being paid and claims the rate of the job, on duty to supervise the trick train dispatchers, and contends there are no rules of the current agreement with the American Train Dispatchers Association under which a chief train dispatcher, either regularly or temporarily assigned, can consistently present claims.

In conclusion, the Carrier contends the claims should be denied for the following reasons:

1. Chief train dispatchers do not come within the provisions of the Agreement of January 1, 1943, with the American Train Dispatchers Association.

2. The rate of pay for Chief Train Dispatchers covers all services rendered and Mr. Gaddis considered himself as chief train dispatcher on the dates involved, by reason of the fact he claimed overtime at one and one-half times the chief train dispatchers rate.

3. Your Board should not entertain or assume jurisdiction of a claim covering the position of chief train dispatcher when such position is not covered by or included in the agreement with the American Train Dispatcher Association or any other working agreement.

OPINION OF BOARD: There is no dispute as to the facts in this matter. The Claimant was a Train Dispatcher who was assigned to fill the position of the Chief Dispatcher during the illness of the occupant, C. J. Graff, in the Carrier's Salt Lake City, Utah, office.

While performing the duties of the Chief Train Dispatcher this relief man did not thereby cease to be controlled by the terms of the contract. He was, in effect, fulfilling its terms.

On December 23, 24, 25, 26, 27, 28, 29, 30 and 31, 1943, he not only worked in place of the Chief Dispatcher, but also worked all or part of the regularly assigned time of the First Assistant Chief Dispatcher. Under the over-time Rule, 2 (b), he was entitled to pay for each hour at the rate of time and one-half for each hour worked in the position of the Assistant Chief Dispatcher, based on the rate of such position.

On December 26, he worked on his rest day and while the position worked was an excepted one, his assignment was under the terms of the contract and for that day he must be paid at the penalty rate, Rule 3 (a). The rate for over-time pay should be that of the position worked and not that of the position which was worked immediately prior thereto.

We feel that this case is governed by three recent awards of this Board, to-wit: Awards Nos. 2905, 2943 and 2944.

The reasoning used in each of the above awards is sound and convincing, and by them we feel bound.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Carrier violated Rules 2 (b) and 3 (a) of the Contract as indicated.

AWARD

Claims (1) and (2) sustained, but with the understanding that the rate to be applied shall be in conformity with the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 26th day of November, 1945.