

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION
SOUTHERN RAILWAY SYSTEM

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association—

- (a) That the Southern Railway System did not comply with the requirements of the rule established by Section 2-(a) of the Mediation Agreement of March 14, 1942 (NMB Case A-1122-B) when it failed to pay Train Dispatcher P. P. Cash, Sr., at the rate of time and one-half, instead of at the pro rata rate, for the four (4) hours service he performed in excess of eight (8) hours, i. e., from 9:00 A. M. until 1:00 P. M., on Monday, December 11, 1944.
- (b) That Train Dispatcher P. P. Cash, Sr. now be paid the difference between the pro rata rate which he was paid, and the time and one-half rate required by above referred to Section 2-(a), for the four (4) hours overtime he worked in excess of eight (8) hours, on December 11, 1944.

EMPLOYEES' STATEMENT OF FACTS: The Southern Railway System is signatory to a Mediation Agreement by and on behalf of each carrier party thereto and its employees represented by the American Train Dispatchers Association, dated March 14, 1942 and identified as NMB Case A-1122-B, hereinafter referred to as the Mediation Agreement. Trick, Relief and Extra Train Dispatchers employed by the Southern Railway System are represented by the American Train Dispatchers Association by virtue of an agreement effective September 1, 1929.

Sections 2-(a), 3-(a) and 3-(b) of the Mediation Agreement are pertinent to the instant case and read as follows:

"2-(a). Effective April 1, 1942, 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."

"3-(a). Effective April 1, 1942, each regularly assigned train dispatcher (and extra train dispatchers who perform six consecutive days' dispatching service) will be entitled and required to take one regularly assigned day off per week as a rest day, except when unavoidable emergency prevents furnishing relief. A regularly assigned train dispatcher required to perform service on the rest day assigned to his position will be paid at rate of time and one-half. An extra train dispatcher required to work seven consecutive days

asserted in notice of President of American Train Dispatchers Association of July 9, 1945, without authorization, in legally sufficient form, by the purported claimant, as set forth in (a) next above.

For all or any of the reasons above recited, respondent carrier contends the Third Division, National Railroad Adjustment Board, must reject the submission proposed to be filed by the President of the American Train Dispatchers Association, or if such submission is not rejected, the case must be dismissed.

If the carrier is wrong with respect to the above reasons why this submission should be rejected or the case dismissed, which is not admitted, then, for yet another reason, the case must be dismissed, namely, that the petitioner, American Train Dispatchers Association, is attempting to split the cause of action. That this is true is plainly evidenced by the case covered by this Board's Award No. 2622, Docket TD-2567. The circumstances in that case were identical in every particular with the instant case. The name of claimant, place of employment and date were different. The petitioner was the same, American Train Dispatchers Association. The respondent in that case, as in the instant case, was one of the lines of railroads associated together and, for convenience of reference, identified as "Southern Railway System."

The claim as handled with the carrier in the case covered by Award 2622 covered not only the claim as submitted to the Board and disposed of by Award 2622, but also a further claim, identical in every respect to the claim presented in the instant case. See Carrier's submission in Docket TD-2567, Item 1, Page 2, and Carrier's Exhibit 2. See also Carrier's answer to employes' oral statement, dated February 16, 1944, beginning with Item No. 2 on Page 1, and running through Pages 2 and 3, all of which references are hereby made a part hereof, the same as though incorporated herein.

It is made clear by the references that, at all times, the petitioner in the instant case had in mind, and mentally in reserve, the case now proposed to be filed with this Board, and it is clearly an effort, therefore, to split the cause of action, such as was fully dealt with and rejected by your Board in its Award 1215.

If Third Division, National Railroad Adjustment Board, does not reject or dismiss the ex parte submission, proposed to be filed, on this petition, then respondent carrier requests that an oral hearing be conducted and respondent afforded an opportunity to argue the issues herein presented.

OPINION OF BOARD: Claimant was employed as a Trick Train Dispatcher with regularly assigned hours 5:00 A. M. until 1:00 P. M. daily except Sunday, Sunday being his regularly assigned rest day. On Monday, December 11, 1944, Claimant was required to report for duty at 1:00 A. M., four hours prior to the expiration of the weekly rest day assigned to his position. He thereupon worked four hours on his rest day for which he was compensated at time and one-half rate, and the eight hours immediately following constituting his regular assignment for which he was paid at the pro rata rate. It is the contention of the Claimant that he is entitled to compensation at the time and one-half rate for the last four hours worked under Rule 2 (a) of the Mediation Agreement dated March 14, 1942, providing for such penalty pay for "time worked in excess of eight (8) hours on any day."

We do not agree with the interpretation which the Claimant puts upon the Agreement. The rules do not require the payment of punitive rates for work performed during the regularly assigned hours of a dispatcher on his regularly assigned days. The applicable Agreement provides that the employee be compensated at the pro rata rate for such service. Claimant's regularly assigned hours on December 11, 1944, were from 5:00 A. M. to 1:00 P. M. for which he should be compensated at the pro rata rate stipulated in the Agreement.

The purpose of providing penalty rates of pay is to deter the employer from whimsically ignoring the rights of the employee under the agreement

and an interpretation which would penalize the employer for using an employe on his regularly assigned tour of duty would lead us to the absurd conclusion that the carrier be penalized for complying with his contract with the employe. No such result was contemplated.

The violation of the Agreement on the part of the Carrier occurred when it called the Claimant to work for four hours immediately preceding his regular eight hour assignment. It violated the Agreement for one of two reasons: first, because the four hours constituted a part of Claimant's assigned rest day or, second, that it constituted time worked in excess of eight hours. If it was the former, by the very nature of things it could not be the latter because no one could seriously argue that if the four hours were a part of Claimant's rest day, they could be no part of the day commencing with his regularly assigned tour of duty. If they were not claimed as a part of his rest day, they could be considered as part of the day to which his regular tour of duty was assigned and would constitute time worked in excess of eight hours on any day. Time worked in excess of eight hours, where it is done in connection with a regular eight hour assignment on any day, means work in excess of eight hours whether before or after such regular assignment. We conclude that the first four hours worked by this Claimant on December 11, 1944, was either work performed on his rest day or work performed in excess of eight hours on any day. It may be either but not both.

In this connection, it might be well to state that Claimant was paid for the first four hours of service at the time and one-half rate as work performed on his rest day. He cannot now say that it was work performed on the day of his regular eight hour assignment and, therefore, not work performed on his rest day, in order to bring himself within some other rule that would permit the collection of an additional penalty. Time worked cannot be in one twenty-four hour period for the purpose of collecting a penalty under one rule and in another twenty-four period for the purpose of collecting an additional penalty under a different rule. Award 3094. Claimant having been compensated for the first four hours worked immediately ahead of his regular eight hour assignment at the time and one-half rate as work performed on his rest day, he is in no position to assert that he worked twelve hours on the day of his regularly assigned eight hours and no basis exists for an affirmative award on his present claim.

The result at which we have arrived makes it unnecessary for us to pass upon the contentions of the Carrier that the claim has been previously adjudicated; that it is improperly before the Board because of a failure to handle in conference on the property; and that it constitutes a split cause of action.

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 Agreement was not violated as alleged in the present claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1946.