

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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

The Southern Pacific Company (Pacific Lines) shall now compensate L. W. Loveday in the amount representing the difference between that paid him for service performed as telegrapher-clerk-towerman, and the amount he would have earned had the carrier used him as train dispatcher on November 19, and 28, and on December 3, and 15, 1946, in accordance with the intent of Article 5-(b), (e) and (j) of the Agreement dated October 1, 1937 which was in effect on the dates here in question.

EMPLOYES' STATEMENT OF FACTS: An agreement on rules governing working conditions of train dispatchers was entered into between the parties hereto which became effective October 1, 1937, and which was in effect at the time the dispute set out in the above Statement of Claim arose. The following rules are cited in support of the claim.

ARTICLE 5

(b) Exercising seniority

In filling positions covered by this agreement, ability being sufficient, seniority will govern. Seniority cannot be exercised except as provided for in this agreement.

(e) Extra and Temporary Positions (In part)

A vacancy or new position of six (6) days or less will constitute extra work . . .

(j) Allotting Extra Work (In part)

Except in emergencies, extra train dispatchers will be allotted the extra work on division where seniority is held, in the order of their division seniority . . .

In addition to the above quoted rules the Department of Personnel of the Carrier in a letter of October-November 1938, File DISPR. 94-28 promulgated the following:

ment as telegrapher-clerk-towerman and the amount of compensation that he would have earned on said dates had he been used on train dispatcher positions. The incongruousness of this claim is found in the fact that on one date, by applying the claim as submitted, the claimant would receive less compensation than he actually received by working his regular assignment as telegrapher-clerk-towerman on such date. On November 28, 1946, the claimant worked his assigned rest day on the position of telegrapher-clerk-towerman and was allowed compensation on that date at the rate of time and one-half, which amounted to compensation in the amount of \$14.58. Had he been used to fill the position of trick train dispatcher on said date, he would have received the amount of \$14.13. In other words, if the claim as presented by the petitioner were sustained, the claimant would actually lose an amount of forty-five cents for that date. For the Division's information in this connection it is a fact that the claimant at no time submitted a claim to the carrier in connection with not being used on the dates involved as a train dispatcher. The reason he did not present a claim was that he was entirely satisfied to have been permitted to remain on his regular assignment as telegrapher-clerk-towerman on the dates involved rather than journey from Fresno to Bakersfield (a distance of 111.1 miles) and return for merely one day's service as train dispatcher.

CONCLUSION: The carrier submits that it has established that the claim in this docket is without basis or merit, and therefore respectfully submits that it should be denied.

OPINION OF BOARD: L. W. Loveday held a regular assignment as telegrapher-clerk-towerman at the Fresno, California yard of the Carrier. The position was a 365 day position with three tricks which consumed the 24 hours of each day. Loveday's daily assignment was from 12:01 A.M. to 3:00 A.M. His rights to and seniority in the position were protected by the Telegraphers' Agreement with the Carrier.

Loveday also held seniority on the roster of the Train Dispatchers as an extra train dispatcher and was protected as such by Train Dispatchers' Agreement with the Carrier.

Extra dispatchers were under the Train Dispatcher's Agreement entitled to extra work on their respective divisions in the order of their division seniority except in emergencies.

Article 5 (j) contains the following which is applicable:

"Except in emergencies, extra train dispatchers will be allotted the extra work on division where division seniority is held, in the order of their division seniority."

The Department of Personnel of the Carrier in October 1938 issued a letter of clarification of the seniority rule the pertinent part of which is the following:

"Item 1. Extra train dispatchers must protect all extra work on the division where seniority is held, in the order of their division seniority except as provided in Item 3."

"Item 2. Except in emergencies, extra train dispatchers shall be allotted the extra work on division where seniority is held, in the order of their division seniority."

"Item 3. Train dispatchers can only be released from the provisions of Item 1 by requesting and obtaining leave of absence under the provisions of Article 5 (s), Train Dispatchers' Agreement, (except in case of physical disability.)"

With regard to the extra dispatcher's work at Bakersfield at the times for which claim was made it appears that Loveday was the senior extra dispatcher.

The hours for which it is claimed that Loveday should have been called were November 19, 1946, 8:00 A.M. to 4:00 P.M., November 23, 1946, 12:00 midnight to 8:00 A.M. and December 15, 1946, 8:00 A.M. to 4:00 P.M.

Under the Agreement as is shown by the quoted portion and the quoted interpretation and the facts, Loveday was entitled to calls for these dates and he was bound to respond thereto under penalty of loss of seniority for failure to do so. These reciprocal duties of the Carrier and the employe were subject however to certain contingencies.

The named contingencies which would relieve Loveday from the consequences of failure to respond were emergency, physical disability and leave of absence.

The named contingencies which would have excused the Carrier from extending the call were emergency and of course physical disability of Loveday or his leave of absence.

We think there are also contractually unnamed contingencies which the Carrier could rely upon to excuse extension of call or that Loveday could rely on to justify unwillingness to respond without penalty of loss of seniority under the Agreement. Those contingencies are inability to get him there in time to perform the duties and the prohibition contained in the following provisions of The Federal Hours of Service Act:

"That no operator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period of not exceeding three days in any week: Provided, further, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

A reasonable statement in this connection is that agreements must be construed with reference to validly enacted laws under the police power for the protection of the safety of the public.

Loveday was not on leave of absence. He was not physically disabled within the meaning of the Agreement. Was there an emergency within the meaning of the Agreement? There can be little doubt that the Carrier was confronted with an emergency at Fresno, the situs of the assignment of Loveday as a telegrapher-clerk-towerman, but we cannot think that an emergency in a position covered by an entirely separate agreement could have been in the minds of the parties when the Dispatchers' Agreement was entered into. It seems fair to say that what was in contemplation was an emergency which would prevent a call to this service and not one which would be calculated to prevent a call from some other service. This reasoning becomes clear when the matter is considered as if the regular assignment was not with the Carrier but was outside. In such circumstances emergency conditions surrounding the outside employment could not be allowed to deter a call and would not save seniority in the event of a refusal to respond.

We think therefore that if the Carrier may be excused from its failure to make these calls such excuse must be found in an application of the prohibitory provisions of The Federal Hours of Service Act to the facts and circumstances disclosed, or to failure to have knowledge, without regard to The Federal Hours of Service Act, of the situation at Bakersfield in time to have sent Loveday there for this extra work.

Of course the Carrier knew the assigned hours of Loveday in his position of telegrapher-clerk-towerman. It knew also that if he worked his regular assignment on the days in question that it was prevented from permitting him to work more than one more hour on those days on his assigned position or at Bakersfield as extra dispatcher. It could not be reasonably required that the Carrier should knowingly disregard the prohibition of the statute and exact a seven hour violation at Bakersfield.

The decision here then appears to depend on the question of whether or not the Carrier became informed of the situation at Bakersfield in sufficient time so as to be able to relieve Loveday at Fresno before his tours of duty began on those days and in time to permit travel to Bakersfield to take over the work for the designated periods at that point without violation of The Federal Hours of Service Act. If it did on any or all of the days then on such day or days Loveday was entitled to the assignment, otherwise not.

Whether or not there was sufficient time for this notice on any day is a fact not clearly demonstrated by the submissions. The more reasonable inference to be drawn is that there was not sufficient time and we so conclude.

The record fails to sustain the position taken by the Organization.

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

The claim has not been sustained.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of April, 1948.