

Award No. 4263

Docket No. TD-4219

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

**DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY**

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

(a) The Delaware, Lackawanna & Western Railroad Company failed to properly apply the terms of the Mediation Agreement in N. M. B. Case A-1122, to which said Railroad Company is party, when it failed to assign Extra Dispatcher E. R. Polly, Binghamton, New York office to effect relief service on May 19, 21, 26 and 28; June 9, 11, 15, 16, 23, 25 and 30; and July 2, 7, 9, 14, 16, 21, 23, 28 and 30, 1947, on all of which days regularly assigned trick train dispatchers were required to perform service on the rest days assigned to their positions when no unavoidable emergency existed.

(b) Extra Train Dispatcher E. R. Polly shall now be paid the difference between the telegrapher's rate, which he was paid, and the dispatcher's rate for service performed on the dates mentioned in Paragraph (a) hereof and that he be credited with 20 days' vacation credits for the year 1947 because of carrier's failure to comply with the requirements of said Mediation Agreement.

EMPLOYEES' STATEMENT OF FACTS: An agreement between the Delaware, Lackawanna & Western Railroad and its train dispatchers, represented by the American Train Dispatchers Association, effective August 1, 1937, copy of which is on file with this Board, is by this reference made a part of this submission.

This carrier is party to a Mediation Agreement effective April 1, 1942, in Case A-1122, copy of which Agreement is also on file with this Board and which, by this reference, is made a part of this submission.

E. R. Polly, Claimant herein, is an employe of this carrier. Mr. Polly holds a regular assignment as telegrapher on Carrier's Scranton Division. Mr. Polly also holds seniority as train dispatcher on the same division and on the dates mentioned in Paragraph (a) of the claim, had the status of senior extra train dispatcher.

The Delaware, Lackawanna & Western Railroad maintains a train dispatching office on the Scranton Division at Binghamton, New York, in which are employed three trick train dispatchers. During the months of May, June and July, 1947, Dispatcher J. J. Gilbride was regularly assigned to the first trick dispatching position at Binghamton from 8:00 A.M. to 4:00 P.M.

for days not actually worked do not require the allowance of vacation credits."

And in **Award 3849** (April 1948) the Board made it very plain that no operator has the right to a dispatcher's assignment where a violation of the Hours of Service Law is involved.

In **Award 3849** the Board said:

"We think that there are also contractually unnamed contingencies which the Carrier could rely upon. * * * Those contingencies are inability to get him there in time to perform the duties and the prohibition contained in the Federal Hours of Service Act."

OPINION OF BOARD: The question here is whether the Carrier was justified, by reason of an unavoidable emergency, in working its regularly assigned train dispatchers at their overtime rates on their rest days specified in the claim, to the exclusion of the Claimant, who was a regularly assigned telegrapher and, at the same time, the senior extra dispatcher.

The pertinent rules provide that each regularly assigned train dispatcher 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. It is further enjoined upon the Carrier to designate an established rest day for the aforementioned positions and to give reasonable notice of changes in the assignment of such rest days. Seniority extends to and governs all dispatcher positions in the territory involved.

It seems clear that the claim is well founded unless the Carrier has met the burden of establishing that it was prevented from assigning the Claimant to the dispatchers' positions on the rest days of the regular occupants thereof because of an unavoidable emergency. In defense of its conduct, the Carrier points out that the Claimant was a regularly assigned telegrapher, with Sunday as his rest day; that the employee who regularly relieved Claimant on Sundays was not available on other days because of outside employment; and that the acute shortage of properly qualified telegraphers required it to accept the limited service that the Claimant's relief worker would perform. As evidence of its good faith the Carrier calls attention to the fact it compensated its regularly assigned dispatchers at their overtime rate for services performed on the days in question, whereas, the Claimant would only have received the regular rate applicable to the positions, if he had worked as an extra dispatcher.

Two separate and distinct, though related, facts must affirmatively be made to appear before the Carrier is authorized to work its regularly assigned dispatchers on their rest days, to the exclusion of its senior extra dispatcher, viz: The confronting situation must have been in the nature of an emergency, and it must also have been unavoidable. We cannot bring ourselves to hold that a situation that continued regularly from May 9th to July 30th, during which Claimant was relieved on his regular telegrapher's position on six days, exclusive of Sundays, confronted the Carrier with such an unavoidable emergency as is contemplated by the rules. "A party cannot ordinarily assert his own negligence or want of foresight as an unavoidable emergency" (**Award 2942**.)

The claim will be sustained for the difference between the Claimant's telegrapher's rate and the applicable dispatcher's rate for the days enumerated in the formal statement of the demand. That part of the claim demanding vacation credits has been abandoned.

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 the Agreement.

AWARD

Claim sustained to the extent indicated by the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of January, 1949.