

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Jay S. Parker, Referee

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**PARTIES TO DISPUTE:**

**AMERICAN TRAIN DISPATCHERS ASSOCIATION**

**THE WESTERN PACIFIC RAILROAD COMPANY**

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

(a) The Western Pacific Railroad Company violated the provisions of Rule 9-(a) of the current agreement between the parties to this dispute when on December 21, 1948 it abolished the position of assistant dispatcher in its Elko, Nevada office for one day and caused other train dispatchers in that office to absorb the work of that assistant dispatcher's position when another train dispatcher was available to perform the duties thereof.

(b) By reason of the Carrier having violated the requirements of Rule 9-(a), Assistant Chief Train Dispatcher P. L. Huckaby, who was available to perform service as assistant train dispatcher in the Elko, Nevada office on December 21, 1948, but whom the Carrier failed to use to fill that position, shall be paid in accordance with the provisions of Rule 3 and Rule 18 of the agreement in effect, between the parties to this dispute, on the date involved.

**EMPLOYEES' STATEMENT OF FACT:** On the Western Pacific Railroad Company, hereinafter referred to as the Carrier, in its Elko, Nevada train dispatching office, prior and subsequent to December 21, 1948, it maintained a regularly assigned position of assistant train dispatcher with working hours of 10:00 P.M. to 6:00 A.M. daily except one regularly assigned rest day off per week. P. L. Huckaby, hereinafter referred to as the Claimant, was the regularly assigned assistant chief train dispatcher with hours 4:00 P.M. to 12:00 Midnight, daily except Monday, the regularly assigned rest day of his position.

On Tuesday, December 21, 1948, J. A. Wherland, regularly assigned incumbent of the assistant train dispatcher position above referred to, was on leave of absence and not available for service. Extra Train Dispatcher Reed Shaw was available to relieve Assistant Dispatcher Wherland when the latter was granted leave of absence but was later instructed to relieve another train dispatcher who became unexpectedly ill, leaving only Train Dispatcher P. L. Huckaby, available to fill the assistant dispatcher position. Claimant was available for service on the assistant train dispatcher position because he was off duty on his regularly assigned rest day between the hours of 12:00 Midnight Monday, December 20, and 4:00 P.M. Tuesday, December 22, 1948.

The Carrier provided service on the regularly established assistant train dispatcher position between the hours of 10:00 P.M. Tuesday, December 21 and 6:00 A.M. Wednesday, December 22, 1948, by blanking or abolishing the

lowing Rule 4(b) is accordingly as specific in stating that the filling of positions and the exercise of seniority thereon are covered in their entirety in Rule 4.

The position was not abolished and the blanking of it on December 21, 1948, was perfectly permissible under the schedule, and you are urged to deny the claim of the employees.

(Exhibits not reproduced.)

**OPINION OF BOARD:** Prior and subsequent to December 1948 the Carrier maintained a regularly assigned position of Assistant Train Dispatcher in its Elko, Nevada, dispatching office. J. A. Wherland was the regularly assigned incumbent of the position with hours 10 p.m. to 6 a.m.

On Tuesday, December 21, 1948, Wherland was off duty due to sickness in his family. The extra train dispatcher, assigned to the Elko office, was available but not used on this position. He was held to fill the first trick dispatcher's position, 8 A.M. to 4 P.M., the next day. The claimant, Assistant Chief Train Dispatcher Huckaby, was also available but he was not called to fill it. Instead the Carrier blanked the position for one day between the hours of 10 P.M., Tuesday, December 21, and 6 A.M., Wednesday, December 22, and required the Night Chief Dispatchers to perform its work.

Provisions of the current Agreement, effective August 1, 1942, having particular application to the rights of the parties, had just as well be quoted at this point.

Rule 1 (a) of the Scope Rule reads:

"The term 'train dispatcher' as herein used shall include all train dispatchers and 'assistant train dispatchers,' excepting only one chief train dispatcher, in each office, who does not perform trick train dispatcher service."

Immediately following the rule just quoted Note 2 appears. It reads:

"The classification 'assistant train dispatcher' is established for the purpose indicated by the title, viz: to assist chief, assistant and/or night chief and trick train dispatchers in the performance of their duties, as defined in Rule 1 (b) and (c), when such assistance is needed, and to enable incumbents of such positions to qualify as trick train dispatchers."

Rule 9 (a) provides:

"Six days' notice shall be given the general chairman and office chairmen of intended abolishment of a regularly assigned position. However, before such change is made, conference shall be granted, upon written request, to consider the adequacy of the force should contemplated reduction be made effective."

Rule 4 (a) reads:

"Incumbents of positions of 'assistant train dispatcher' will be appointed by the Management. Employees from other departments so appointed will forfeit such positions unless they qualify for position of trick train dispatcher within six (6) months from date of appointment, except when by concurrence of the Management and General Chairman, train dispatchers' committee, this qualification period is extended."

A Note follows the foregoing rule and is to be considered as a part thereof. It reads:

"It is understood that the filling of positions of 'assistant train dispatcher' and the exercise of seniority thereon are covered in their entirety in this rule. It is also understood that Rule 3 (a) and (c) does not apply to these positions."

At this point it should be stated that by agreement of the parties, effective August 1, 1946, the last sentence of the rule just quoted was eliminated and is no longer a part of the contract. However, it is to be noted both sides agree the subsequently negotiated provision was intended to exclude the position from the provisions of Rule 6, relating to the filling of positions in case of vacancies.

Likewise it should be added that under provisions of the quoted Scope Rule there can be no question but what the term "train dispatcher" as used throughout the Agreement includes "assistant train dispatchers."

The respective positions of the parties can be briefly summarized. The Carrier contends that under the provisions of Rule 4 (a) and the Note appended thereto it has the right to fill or blank regularly assigned assistant train dispatcher positions as it sees fit, for one day or indefinitely. The Organization contends that under the Agreement all regularly assigned positions must be filled each day and that the Carrier violated the contract when, in effect, it abolished the position of assistant train dispatcher for one day, hence the employee available is entitled to be compensated the same as if he had worked the position.

Inasmuch as the position of assistant train dispatcher is covered by the terms of the Scope Rule, it cannot be disputed that all rules of the Agreement govern its hours of service and working conditions unless specifically excepted.

The Carrier argues the provisions of the Note to Rule 4 are sufficiently inclusive to require the sustaining of its position. It cannot, we believe, be seriously questioned that under the existing conditions and circumstances the blanking of the involved position, even for one day, amounted to its abolishment for that period of time. This must be true for, carried to the extreme, the repeated and continuous blanking thereof would abolish it just as effectively as formal action. Therefore, Rule 9 (a) must be given consideration, as the Organization contends, unless the provisions of the Note to Rule 4 preclude its application. The question whether it has that effect is not easily determined.

It must be remembered that in construing a contract each and all of its provisions must be given force and effect, if possible. Inconsistencies and ambiguities are to be harmonized even though in order to attain that end it becomes necessary to give consideration to the intention of the parties as evidenced by the construction they themselves have given its terms by subsequent conduct and action.

Rule 9 (a) in plain and unequivocal terms states that six days' notice should be given employees of intended abolishment of a regularly assigned position. Rule 4 (a) provides that incumbents of positions of assistant train dispatcher will be appointed by the Management. The appended Note states it is understood the filling of positions of assistant train dispatcher are covered in their entirety in the rule. We believe there is ambiguity in the Note for the reason it is not clear as to what the parties had in mind in their use of the phrase "filling of positions of assistant train dispatcher". When the two rules are read together they are inconsistent if such phrase is construed as the Carrier construes it because, as we have seen, the blanking of the position for one day results in its temporary abolishment without compliance with the requirements of Rule 9 (a).

In a situation such as has been heretofore outlined, without anything else, we think the proper construction to be given the phrase "filling of posi-

tions" is that it has application to the selection of the incumbent for the position of assistant train dispatcher when it was first established. Certainly the parties never intended that, once the position was established and filled by a regularly assigned incumbent, temporary vacancies in such position could be filled by employees not covered by the Scope Rule. To hold as we have indicated harmonizes and makes both of the foregoing rules effective.

But that is not all. There is nothing in the Note to Rule 4 authorizing the blanking or abolishment of positions. It relates solely to the filling of positions. Under well established definitions "to fill" means to supply with an incumbent. Thus, since it did not provide the involved position with an incumbent on the date in question, the conclusion the Carrier violated the rule seems unavoidable.

We are not disposed to labor the point although it should perhaps be mentioned. The record warrants the conclusion that up until the date on which the involved position was blanked, in fact thereafter, the conduct and action of the parties was such as to definitely indicate that they themselves believed the Agreement required that vacancies in such position should be filled, not blanked.

Claimant's recovery is limited to the pro rata rate. Under well established precedents of this Division of the Board the penalty rate for work lost because it was not given to one entitled to it is the rate the regular occupant of the position would have received had he worked his regular assignment (Awards 4962, 4646, 4244).

**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 at pro rata rate per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. I. Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 10th day of August, 1950.