# Award No. 5713
# Docket No. TD-5672

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Livingston Smith, Referee**

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## PARTIES TO DISPUTE:

## AMERICAN TRAIN DISPATCHERS ASSOCIATION

## THE COLORADO AND SOUTHERN RAILWAY COMPANY

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

(a) The Colorado and Southern Railway Company has refused and continues to refuse to comply with the intent of currently effective Rule 8 (b), regardless of the carrier having agreed to apply the intent of that rule to situations here involved in a letter-agreement between the parties, dated January 18, 1945, when it failed to compensate in accordance therewith those train dispatchers who relieved chief train dispatchers subsequent to September 1, 1949, and

(b) The Colorado and Southern Railway Company shall now compensate in accordance with the requirements of current Rule 8 (b) of the agreement, those train dispatchers who have relieved and who may henceforth relieve chief train dispatchers.

**EMPLOYES' STATEMENT OF FACTS:** There exists an agreement between the parties to this dispute, effective February 1, 1945, and last revised as of September 1, 1949, governing compensation, hours of service and working conditions. A copy of that agreement is on file with your Honorable Board and is, by this reference, made a part of this submission as though fully incorporated herein. The contract rules thereof, pertinent to this dispute, are as follows:

"**Rule 6 (a).** Where relief requirements (including position of Chief Train Dispatcher) regularly necessitate four (4) or more days of relief service per week, a relief train dispatcher shall be employed and regularly assigned, and shall be compensated at rate applicable to position worked. On days when not engaged in 'train dispatcher' service, he will be assigned to such other service as may be directed by the proper supervisory officer and shall be paid for such service at the rate applicable to trick train dispatchers."

"**Rule 6 (d).** Qualified train dispatchers on the division seniority roster will be used to effect relief of Chief Train Dispatchers for their weekly rest days, vacations, and other periods of leave of absence."

"**Rule 8 (a)**, revised July 1, 1949, effective September 1, 1949. Regularly assigned train dispatchers (except assigned relief train dispatchers) will be compensated on a monthly basis. Relief and extra train dispatchers will be compensated on a daily basis."

"**Rule 8 (b)**, revised July 1, 1949, effective September 1, 1949. To determine the straight time hourly rate, divide the monthly rate by 174. To determine the daily rate multiply the monthly rate by 12 and divide the result by 261."

There also is in effect a letter agreement dated January 18, 1945, which was executed concurrently with the agreement effective February 1, 1945, that recites the mechanics to be employed in determining the rate of pay to be allowed train dispatchers who are to be used to effect relief of chief train dispatchers, pursuant to the requirements of Rule 6 (d). This letter agreement is presented here as Exhibit TD-1.

Formal claim was filed by Office Chairman, American Train Dispatchers Association, Mr. A. H. Wendt, under date of May 23, 1950, for the difference in the amount received by train dispatchers who relieved the chief dispatchers and the amount they should have been paid, had Rule 8 (b) been complied with. The instant claim was handled on the property pursuant to the provisions of the Railway Labor Act, as amended, ending with Mr. J. D. Walker's declination letter addressed to Mr. A. H. Wendt, Acting General Chairman, dated November 13, 1950, (see Exhibit TD-2).

**POSITION OF EMPLOYES:** It is the position of the employes that, by reason of the letter-agreement dated January 18, 1945 (See Exhibit TD-1), those train dispatchers who have relieved and continue to relieve chief train dispatchers of this Carrier, are entitled to be compensated in accordance with the provisions of Rule 8-(b), supra.

It is hereby affirmed that all data herein submitted have been discussed in substance with the Carrier.

**CARRIER'S STATEMENT OF FACTS AND POSITION:** Chief train dispatchers are not covered by the agreement between the American Train Dispatchers Association and the Colorado and Southern Railway Company. Chief dispatchers are, by arrangement with the Company, granted one day off per week. An understanding with the American Train Dispatchers Association was reached that when a chief dispatcher was granted a day off that his position would be filled on his rest day or during periods that he was off on vacation or otherwise, by one of the trick train dispatchers holding seniority on the Division and that the train dispatcher relieving the chief train dispatcher would be paid the chief train dispatcher's rate of pay divided by the days the chief train dispatcher was assigned to work, that is, by multiplying the chief dispatcher's rate by 12 and dividing by 313. This arrangement was made in the agreement effective as of February 1, 1945, and it being definitely understood at that time that the chief dispatcher's rate would be determined by multiplying his monthly rate by 12 and dividing the result by 313.

Rule 8 of the Agreement was modified since that time when the trick dispatchers were granted two days off, but did not modify the principle originally agreed to that the dispatchers relieving chief dispatchers would be paid at chief dispatcher rates. It, of course, would be entirely improper to pay a train dispatcher relieving a chief train dispatcher a higher rate than is paid the chief dispatcher.

In view of the understanding reached at the time it was agreed that the Carrier would use train dispatchers to relieve the chief dispatcher and agreeing to pay the chief dispatcher's rate to the trick dispatcher so relieving him, we request that this claim be declined.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The issue presented here is whether train dispatchers when relieving chief train dispatchers shall be compensated therefor

at the pro rata daily rate established for their position, or at the pro rata daily rate established for chief train dispatchers. Putting the question another way. Should the daily compensation of train dispatchers relieving chief train dispatchers be computed on the basis of 1/261 of the annual pay rather than 1/313 thereof, as contended by the Carrier.

The two relief days granted train dispatchers under the Five Day Week Agreement, while chief train dispatchers remained on a 6 day week, have produced the differences between the parties hereto.

The effective Agreement between the parties bears date of February 1, 1945, as amended on September 1, 1949, supplemented by a Letter of Agreement dated January 18, 1945.

It is asserted by the Organization that a train dispatcher, when relieving a chief train dispatcher, continues to perform service within the Scope of Rule 1, of the effective Agreement; and that such service does not constitute grounds for classifying him as an "excepted employe"; and deny him the right to be compensated under Rule 8 (b) of said effective Agreement.

The Organization relies on Rule 6 (a), 6 (d) and 8 (b) of the Agreement as well as the Letter of Agreement above mentioned.

The Carrier's position is that the Letter of Agreement of January 18, 1945, applied only to the Rules of the February 1, 1945 Agreement, and as such constituted a separate and distinct Agreement when considered in light of the amendments of September 1, 1949, and are not pertinent to the amended Agreement, but continue to be effective and binding on the Organization, controlling the method of computing pay for service of the nature here involved.

The position of the Carrier that the Letter of Agreement dated January 18, 1945 is presently effective to the extent of a separate agreement, and as such, binds the Organization to the method of computing pay, as it was computed under Rule 8 (b) of the February 1, 1945 Agreement, is without merit.

The Carrier in not modifying or limiting the Scope of application of the aforesaid Letter of Agreement at, or a reasonable time after the modification of Rule 8 (b) in the 1949 Agreement, did by its silent acquiescence agree that the same should be likewise considered as applying to Rule 8 (b) of the amended Agreement.

Rule 8 (b) of the Agreement effective February 1, 1949 is clear in its intent.

Claimant herein when occupying and performing the duties of Chief Train Dispatcher was entitled to be compensated under Rule 8 (b) as amended, that is by multiplying the monthly rate by 12 and dividing the same by 261 to arrive at the proper daily rate.

**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 Employes involved in this dispute are respectively Carrier and Employes 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 Agreemment has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of April, 1952.

**DISSENT TO AWARD 5713, DOCKET TD-5672**

There was involved in this case the application of a Letter Agreement, dated January 18, 1945, which, by its terms, incorporated therein and as a part thereof Rule 8 (b) of the Schedule Agreement of April 1, 1945.

The "Opinion" states in part:

> "The position of the Carrier that the Letter of Agreement dated January 18, 1945 is presently effective to the extent of a separate agreement, and as such, binds the Organization to the method of computing pay, as it was computed under Rule 8 (b) of the February 1, 1945 Agreement, is without merit."

Why is it without merit? Both parties in the record agree that the Letter Agreement is still in effect. Rule 8 (b) of the Schedule Agreement, which became effective February 1, 1945, was a part thereof. This Letter Agreement was a separate, special agreement between the parties and was made for a specific purpose. The thing which the parties did not do and which they alone could do, was to incorporate into this Letter Agreement the provisions of Rule 8 (b) of the Schedule Agreement of September 1, 1949. This the Board, without authority, has now proceeded to do by fiat, by dicta.

The award is clearly erroneous and should be so regarded.

/s/ J. E. Kemp
/s/ C. P. Dugan
/s/ R. M. Butler
/s/ W. H. Castle
/s/ A. H. Jones