Award No. 5897
Docket No. TD-5804

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

FORT WORTH AND DENVER RAILWAY COMPANY

THE WICHITA VALLEY RAILWAY COMPANY

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

(a) The Fort Worth and Denver City Railway Company; Wichita Valley Railway Company failed to comply with the provisions of Rules 5 (a) and (b) of the current agreement when it failed and refused to compensate Train Dispatcher J. H. Lowder at time and one-half rate for service on Monday, November 27, and Tuesday, November 28, 1950; and failed and refused to compensate Train Dispatcher W. J. Hamilton at time and one-half rate for service on Tuesday, January 2, 1951.

(b) The Fort Worth and Denver City Railway Company; Wichita Valley Railway Company shall now pay Train Dispatchers J. H. Lowder and W. J. Hamilton the difference between the straight-time or pro rata rate which they were paid and time and one-half rate to which they were entitled on the dates and in accordance with the rules cited in paragraph (a) hereof.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the Fort Worth and Denver City Railway Company; the Wichita Valley Railway Company and the American Train Dispatchers Association covering hours of service and working conditions governing train dispatchers, effective May 1, 1950, is on file with your Honorable Board and, by this reference, is made a part of this submission as though fully incorporated herein. Said Agreement will, hereafter, be referred to as the "Agreement".

The Scope of the Agreement—Rule 1, provides as follows:

"This agreement shall govern the hours of service and working conditions of train dispatchers.

The term 'train dispatcher' as herein used shall include all train dispatchers except one Chief Train Dispatcher in each dispatching office.

A Chief Dispatcher who is regularly assigned to a shift performing train dispatcher work will be regarded as within the rules of this agreement."

tantamount to adding a new clause to the contract. It is elemental that the Board has no authority to do this. The adoption of a practice of broadening or extending the terms of contract by a tribunal vested with the power to decide a dispute arising thereunder will inevitably lead to confusion and uncertainty, and ultimately to injustice to both parties.

The claim in this case cannot be sustained without extending the terms of contract. The Third Division in Award 2622 stated:

Third Division Award 2622, (ATDA v. Sou. Ry., Jay S. Parker Referee)

"An elementary rule applicable to the construction of all contracts and agreements is that the rights of the parties thereto are to be determined by the language to be found in the instruments themselves. Otherwise stated, contractual rights are to be determined from the four corners of the agreement executed by the parties."

Since there is absolutely nothing in the agreement providing for punitive pay under the circumstances here present, an award denying these claims must be rendered.

* * * *

The Carrier affirmatively states that all data herein and herewith submitted has previously been submitted to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The Parties agree on the facts out of which this claim has come before us: (1) Prior to November 26, 1950, the regularly advertised and established assignment of first trick dispatcher Lowder was five consecutive work days, Wednesday through Sunday, with consecutive rest days Monday and Tuesday; and effective November 26, 1950, the Carrier changed his consecutive days of work to Sunday through Thursday, with consecutive rest days Friday and Saturday, so that during the period of transition Lowder worked nine consecutive days—Wednesday, November 22, through Thursday, November 30. (2) Prior to December 31, 1950, under the regularly advertised and established assignment of his position, second trick dispatcher Hamilton worked five consecutive days, Thursday through Monday, with consecutive rest days, Tuesday and Wednesday; and effective December 31, 1950, the Carrier changed his consecutive work days to Friday through Tuesday, with consecutive rest days Wednesday and Thursday, so that during the time of transition Hamilton worked six consecutive days—Thursday, December 28, 1950, through Tuesday, January 2, 1951.

The Organization bases its claim on two main contentions: (1) There is nothing in the Agreement which permits the Carrier to change rest days unilaterally. Such changes are properly possible only through negotiation between the Parties. Unilateral change of rest days by the Carrier operates to restrict employes in the exercise of the seniority rights guaranteed by the Agreement: When rest days are changed, the positions may become less attractive to the incumbents, yet they are not permitted to relinquish their assignments after such changes. Unilateral action on rest days by the Carrier is thus unfair. (2) Rule 5 (b) of the Agreement requires the Carrier to pay time-and-half rates to regularly assigned train dispatchers who are required to work on either or both of the rest days assigned to their positions.

The Carrier contends as follows: (1) All prerogatives that railroad management would have in the absence of unionization among its employes and of an agreement with an organization representing them remain with the management except to the extent that such an agreement imposes specific restrictions on or abrogations of such prerogatives. The effective agreement between the Parties imposes no restrictions on the Carrier's right

to change rest days. The only restriction on work and rest days is in Rule 5(a), which says that regularly assigned dispatchers shall, except for emergencies and if possible, have two consecutive rest days per week. Therefore, the right to change unilaterally the two-consecutive-rest day period from one part of the week to another remains with the Carrier. (2) During their respective transition periods Lowder and Hamilton had two rest days in each calendar week. Sunday through Saturday. Therefore, the provisions of Rule 5(b) were not violated.

In respect to the first item of controversy between the Parties, we think we must rule in favor of the Carrier's position. We believe that whatever managerial rights are not removed or restricted by a collective bargaining continue to inhere in management for free exercise by it.

The second issue that divides the Parties is the one on which the determination of the claim mainly turns. During their respective transition periods were Lowder's and Hamilton's rest days so arranged that Rule 5's relevant provisions were complied with? The answer to this question—as in the recent case decided by Award 5854—hinges on our decision in respect to the proper definition of "week". Here, as there, we must attempt to discover the intent of the Parties thereon. If, as the Carrier asserts, the "week" mentioned in Rule 5(a) is the calendar week, then the time-and-half provision of Rule 5(b) was not violated. But if the "week" is considered to begin not with Sunday but with the first of the series of five consecutive work days, then violation did exist for both employes. And in the latter instance, two sub-categories could exist: (1) We could say that the week of the employes was the same after the change as before it. Here Lowder's week would be considered always to start on Wednesday and Hamilton's on Thursday. (2) We could say that before and after the change their weeks began on the first of their five consecutive work days. Here Lowder's week would have begun on Wednesday and ended on Tuesday before December 3, 1950; and, beginning Decmeber 3, his week would have begun on Sunday and ended on Saturday. Hamilton's week before January 5, 1951, would have begun on Thursday and ended on Wednesday. Thereafter it would have begun on Friday and ended on Thursday.

In the case decided by Award 5854 this Board took the first version of the second main alternative mentioned above. That is, it considered the week of the Claimant employe to begin on the first of five consecutive work days, as those days were set up before the transition period; and it held this week to exist both before and after the change in rest days.

But in that case a compelling consideration was the fact that the Parties had in their agreement defined the term "work week" as one that began on the first day on which, after bulletining, the position was assigned to work. And it appeared reasonable to conclude that this week was the one which those Parties had in mind when they wrote their rest-days rule.

In the instant case the Parties' agreement contains no definition of "week" or "work week". In respect to giving us a guide for the settlement of the controversy now before us, then, the instant agreement affords no ready clue to the Parties' intent when they framed their own rest-days rule 5(a) and (b). It might, therefore, be said that, however we decide this case, this Board will in effect be writing a rule for the Parties and thereby exceeding its authority.

We do not think such a view is valid. Our task here, as always, is to interpret existing rules. And here, as in all cases, an interpretation inevitably extends or restricts the applicability and scope of an existing rule. Yet interpretations cannot justifiably be said to be equivalent to the writing of new rules.

Let us consider, then, the intent of the relevant provisions of the agreement. It is clear that, except for emergencies and other unusual situations, the Parties meant to establish (1) a work period of five consecutive work days;

(2) an ensuing rest period of two consecutive days; and (3) a penalty on the Carrier, in the form of premium pay, for the hours it requires its dispatchers to work on such rest days. From this we think it follows that they meant to define "week" as a period of seven days beginning with the first of five consecutive work days. And since there is no rule stating that, after rest days have been changed, the work week remains the same, i.e., begins on the same day as before the change in rest days, we think that Lowder's and Hamilton's weeks changed beginning December 3, 1950, and January 5, 1951, respectively.

From these conclusions it follows finally that the time-and-half rate rather than the pro rata rate should have been paid to Lowder for work performed on Monday, November 27, 1950, and Tuesday, November 28, 1950; and to Hamilton for work performed on Tuesday, January 2, 1951.

If this interpretation of Rule 5 should result in working hardship or inequity on the Carrier or its employes, we suggest that the remedy therefor lies in negotiating a specific definition of "week" and/or specific rules governing adjustments to necessary changes in rest days.

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 Carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 30th day of July, 1952.