Award No. 6750
Docket No. TD-6867

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) The Southern Pacific Company (Pacific Lines), hereinafter referred to as "the Carrier," violated Section (f) of Article 3 of the currently effective Agreement between the parties to this dispute when it blanked assistant chief train dispatcher position No. 314, located in its Dunsmuir, California train dispatching office on Monday, March 23, 1953, instead of filling that position by use of available train dispatchers.

(b) Because of the violation set forth in paragraph (a) hereof, the Carrier shall now compensate Train Dispatcher G. H. Short who was available for service on March 23, 1953, one day's pay at rate of time and one-half trick train dispatcher rate for that date, and

(c) The Carrier shall compensate Relief Train Dispatcher F. A. Drake the difference between the trick train dispatcher pro rata rate which he was paid and the time and one-half rate, assistant chief train dispatcher rate to which he was entitled because of Carrier's failure to use him to fill position No. 314 on Monday, March 23, 1953.

EMPLOYES' STATEMENT OF FACTS: The current agreement between the parties to this dispute, effective April 1, 1947, subsequently revised or amended, is on file with your Honorable Board and by this reference is made a part of this submission as though wholly and completely set forth herein. Rules of that agreement pertinent to this dispute are presented here for ready reference.

"ARTICLE 2 Section (g)—**SERVICE ON OTHER THAN REGULAR ASSIGNMENT.**

"An assigned train dispatcher required to work a position other than his regular assignment, except an assigned train dispatcher who is used on position of chief train dispatcher, shall be compensated therefor at the overtime rate of the position worked; how-

Attention is also directed to Awards Nos. 4151, 5473, 5548 and 5549.

Furthermore, even if it were decided that Dispatcher Short should have been used on Job No. 308 on March 23, 1953, there still would be no basis for claim payment of time and one-half in his behalf; instead he would be properly compensated at the straight time rate of the position. Insofar as overtime is concerned, the contractual right to perform work is not the equivalent of work performed. This principle is well established by a long line of awards of this Division too numerous to require citation.

CONCLUSION

Carrier asserts in this it has conclusively established that the claim in this docket is entirely without merit or agreement support, and requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: On the dates in question the involved dispatcher relief positions had been in existence at Dunsmuir for some time. Relief Dispatcher Gipson was regularly assigned to one of such positions, covering dispatching work only, hours 8:00 A. M. to 4:00 P. M., with rest days Tuesday and Wednesday. Claimant Drake was regularly assigned to another such position, also covering dispatching work only, with hours for our purposes similar and rest days Thursday and Friday. Included in this latter assignment was the requirement that Drake relieve Claimant Short on his regularly assigned dispatcher position on Mondays and Tuesdays.

Dispatcher Gipson was on vacation on Monday, March 23, 1953, the date giving rise to the claim, and his position was being filled by Extra Dispatcher Snively. Due to absence of Regular Dispatcher Banish, occupying one of the positions regularly filled by Gipson on the days of his assigned position, Snively was used to fill Banish's position on such date, and a position known as Position and/or Job 314, which was regularly filled once each week by Gipson as a part of his regular assignment, was blanked on that date. At such time Claimant Short, whose position was filled in relief as a part of Drake's regular assignment as heretofore indicated, was off duty and available, Monday being one of his rest days.

There is little if any controversy respecting the force and effect to be given applicable rules of the Agreement when a regularly assigned dispatcher position is blanked for one day. As we analyze their respective positions the parties agree that if the involved position be assumed to be a regularly established dispatcher position Article 3 (f) precluded the blanking of such a position and an Agreement, dated January 31, 1940, required that a temporary vacancy on such a position be filled by assigning Drake to fill it and permitting Short to work the rest day of his position.

The trouble here comes from a contention advanced by Carrier that the facts disclose no vacancy on a regularly assigned dispatcher position due to the fact that the Monday relief assignment of Gipson's regular position was what is referred to as a utility assignment, i.e., that in order to comply with the requirements of Article 3 (e) of the Agreement Carrier made work for such position by creating the job of Assistant to the Chief Dispatcher for one day (Monday) of each week only. Based on this premise it is argued there was no position to relieve on Gipson's assignment on the date in question. We believe the fallaciousness of Carrier's position lies in its erroneous conclusion that the pertinent and previously mentioned Articles of the Agreement have application to the positions filled in relief by a regularly established relief position instead of days blanked on the regularly

assigned relief position itself. Here it is conceded Carrier had made work on Gipson's position when it was established. It is our view that thereafter the work assigned to such position was a part of that regular assignment and the days thereof could no more be blanked than could days of other regularly assigned positions of different character. Here, also, a temporary vacancy existed in Gipson's regularly assigned position by reason of the Carrier's having taken Extra Dispatcher Snively, who was filling it during Gipson's absence on vacation, off such position, thereby blanking it at a time when no one contends the work theretofore established by the Carrier for Mondays was non-existent and did not remain to be performed. The inescapable result, as we see it, is that Carrier's action as heretofore related resulted in a violation of the Articles of the Agreement to which we have previously referred.

In an attempt to forestall the conclusion just announced Carrier directs our attention to Award No. 6137, asserting it involves a like situation and requires a contrary conclusion. We do not agree. Such Award is clearly distinguishable and is of no value here as a persuasive or controlling precedent. It involved an entirely different factual situation. No position was blanked and the decision there reached was based solely upon the premise that one of the controlling rules of the Agreement required the Carrier to assign the dispatcher to dispatchers' work when it was available instead of performing work of another craft on the dates there in question.

Based on what has been heretofore related we hold that Claims (a) and (b) should be sustained, the latter at the pro rata rate. Well established precedents of this Division (see Award No. 5016 and other Awards there cited) hold that the penalty rate for work lost because it was not given to one entitled to it is the rate the regular occupant would have received had he worked his regular assignment. That, as we have seen, is the rate which the temporary vacation occupant of Gipson's position would have received had he worked it on Monday, March 23.

As to Claim (c) we hold, contrary to Claimant's position, that it should be denied. Where, as here, more than one violation of an Agreement results from the Carrier's action with respect to a single factual situation our Awards preclude the imposition of double penalties. Under the confronting facts Rule 3 (b) on which Claimants rely to sustain their position on this point does not do so. It has application where a dispatcher is required to perform service on his rest day, not to a situation where he is entitled to work but does not perform it.

In conclusion it should be stated we have rejected, not overlooked, Claimant's contentions to the effect these claims were once allowed on an erroneous conception of the facts and subsequently disallowed on that basis; hence Carrier should not be permitted to here defend against them. Without laboring arguments advanced on the question thus raised it suffices to say we find nothing indicating bad faith on the part of the Carrier in that particular and, under the existing facts and circumstances, are not disposed to apply the harsh doctrine on which Claimants rely.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the 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 Agreement was violated.

AWARD

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 5th day of August, 1954.