Award No. 6846

Docket No. TD-6984

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

MISSOURI PACIFIC RAILROAD COMPANY

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

(a) The Missouri Pacific Railroad Company, hereinafter referred to as "the Carrier," acted contrary to the intent of its current Agreement with the American Train Dispatchers Association, when it failed and refused to compensate Train Dispatcher W. O. Elson in accordance with the provisions of Article 3, and Article 7 (f), when in accordance with instructions from proper authority, he reported and served as witness for the Carrier on Tuesday, November 25, 1952, and

(b) The Carrier shall now pay Train Dispatcher W. O. Elson one day's pay at the time and one-half rate of his regularly assigned position as trick train dispatcher for Tuesday, November 25, 1952, which was one of the rest days assigned to his position, and on which day he was required to appear as a witness for the railroad at an investigation which was held from 8:30 A. M. to 5:30 P. M., on that date.

EMPLOYES' STATEMENT OF FACTS: There is in effect an Agreement between the parties, effective August 1, 1945, governing Rates of Pay, Hours of Service and Working Conditions of train dispatchers. Said Agreement and revisions thereof subsequent to that date are on file with your Honorable Board and are, by this reference, made a part of this submission as though fully incorporated herein. They will, hereafter be referred to as the "Agreement". The following rules are pertinent to adjudication of this dispute:

"ARTICLE 1

"(Effective January 1, 1948)

"(a) SCOPE

"This agreement shall govern the hours of service and working conditions of train dispatchers. The term 'train dispatcher,' as hereinafter used, shall include Assistant Chief, trick, relief and extra train dispatchers. It is agreed that one Chief Dispatcher (now

Accordingly, the Agreement in the instant case implies that allowance of any compensation is precluded.

We believe we have now shown that the activity here involved is not "attending court" under Article 7(f) nor "work as a train dispatcher" under Article 3(a). Notwithstanding our position that the Agreement does not provide pay for an activity of this kind, that the claimant had a personal interest in the investigation and that a sense of loyalty should prompt an employe to devote some of his time in rare instances of this kind to the industry from which he derives his livelihood, an offer of a pro rata day's pay was made. This was not acceptable to the claimant and his representatives who have now tried to secure premium pay on the basis of a non-prejudice payment to another train dispatcher who attended court on his rest day. This is an example of the fallacy of appeasement.

Furthermore, equity is not a one-way proposition; the employe is no more entitled to it than the Carrier, and we think we have shown far more reason why this claimant should have given his testimony on his rest day without expectation of payment than the Employes have shown for a penalty rate of pay if equity alone prevailed.

This Organization now has pending in mediation a request for expansion of free transportation privileges and it seems quite inconsistent to be asking for such concessions on the part of the Carrier when there seems to be no inclination to reciprocate even to the extent of contributing a reasonable amount of time on rare occasions to assist in the conduct of the industry from which the concessions are asked. It seems particularly inconsistent in this case where the Carrier is asked not only to compensate the claimant, but also to assume a penalty which is something that is generally understood to be required only when a violative action has been taken.

We are aware that your Board is not a tribunal of equity, but much of the handling of this case by the Organization has dealt with that element which gives some weight to the conclusion that the Employes do not have too much confidence in their contention of Agreement justification for the claim. The Carrier, of course; rests its case upon the absence of any Agreement requirement for payment for the reasons outlined in this submission. We hold that the offer of a pro rata day by the Carrier is not a part of the case here before you. The issue is whether this Agreement requires the Carrier to pay the claimant a punitive day for giving testimony at an accident investigation. The Employes have not cited any provision of the Agreement which contains any such requirement.

(Exhibits not reproduced.)

OPINION OF BOARD: The parties agree on the essential facts in this case. Claimant attended an investigation at the instance of Carrier to determine the responsibility for a collision which occurred within his district.

The following written instructions were sent to Claimant by his Division Superintendent:

> "Please arrange to report to my office at 9 A. M., Monday, Nov. 24, 1952, for investigation to determine cause of and responsibility for Extra 4181 West striking rear of Train No. 79, Engine 340, while standing at Mile Post 463, Pole 20, near Towanda, Kansas at about 5:10 P. M., November 17, 1952. Bring representative if desired."

November 17, 1952 fell on Monday, a day of Claimant's regular assignment; 5:10 P. M., was within Claimant's regular tour of duty and Towanda, Kansas was within his Dispatcher jurisdiction. The investigation not being completed on Monday, November 24, was reconvened on Tuesday, November 25, which was Claimant's rest day. Claimant was questioned at the investigation. The claim presents the question of method of payment due Claim-

ant. He was paid for November 24, a regular day in his assignment but was not paid for Tuesday, November 25, by reason of the fact that it was one of his regularly assigned rest days, however, as a matter of equity Carrier offered to pay him his regular rate for this day. The offer was declined.

Petitioners contend that Articles 3 and 7(f) require payment at time and one-half as he was required to perform service for the Carrier on one of his regularly assigned rest days, Article 3 providing:

> "* * * Any regularly assigned train dispatcher required to perform service on the rest day assigned to his position will be paid at rate of time and one-half * * *."

and Article 7(f):

> "A train dispatcher required by the railroad to attend court, or appear as witness for the railroad, shall be allowed the same compensation as he would have received if working the regular hours of an assignment as train dispatcher, * * *."

In support of position taken Petitioners cite Awards 3462 and 6736 on the interpretation of Article 3 and Award 3198 on interpretation of identical language as used in Article 7(f).

On behalf of Respondent Carrier it is urged that the principle of "mutuality of interest" is controlling stating:

Claimant's attendance at the investigation was as a principal under the "mutuality of interest" principle, and

Rule 7(f) is a special rule giverning compensation to be allowed for attendance at investigations but does not carry compensation where the employe attending may have personal responsibility in the matter under consideration which is the subject of the investigation, citing Awards 134, 2032, 6679, 6736 and others. Also that it cannot be said that the collision was not a matter concerned with the safe movement of trains over territory under Claimant's jurisdiction, and for which he was charged with responsibility. In the matter of Notice Award 6171 is cited. Although Claimant was exonerated the responsibility for the accident could not have been determined except by investigation; citing Awards 4634, 6275, 3342, 5411, 5788 and 6062. Also cited Award 5376 which is contended to be directly in point in the instant case.

A review of awards cited on questions here presented shows conflicts although several variations of the present situation exists therein. In other words there seems to be differences of opinion.

In the instant case we adopt the holding as stated in Award 3198 to the effect that the words "attends court, or appears as witness for the Railway" means something more than appearing as a witness in court or it would be surplusage to add the words "or appears as witness for the Railway" and therefore conclude that Article 7(f) would include a situation as here presented.

In the matter of the Notice we doubt if the language used in the same should be construed as charging the Claimant with notice that he personally was being charged with specific and direct notice of responsibility for the collision.

And finally Carrier apparently likewise had some such thought in mind in the offer made to Claimant which offer was declined. Of course an equity viewpoint in construing contract provisions is not proper and the offer based on equity is not proper and in complete variance with Carrier's stated position in this case, either Carrier should pay time and one-half or in accordance

with the theory presented herein no payment is due for Tuesday, November 25, 1952.

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 claim is sustained, payment should be made as claimed.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of January, 1955.