Award No. 7002
Docket No. TD-6721

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Le Roy A. Rader—Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE GULF, COLORADO AND SANTA FE RAILWAY COMPANY

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

(a) The Gulf, Colorado and Santa Fe Railway Company, hereinafter referred to as "the Carrier," acted contrary to the provisions of Section 2 of Article VI of the currently effective Agreement between the parties to this dispute when, beginning Monday, March 3, 1952, it removed Train Dispatcher P. E. Johnson, Sr., from Position No. 38 in its Galveston, Texas office, an emergency assignment which he had been directed by the Carrier to fill commencing Wednesday, February 27, 1952, and which, under the rules of the Agreement, he had a right to continue filling to and including March 21, 1952.

(b) The Carrier shall now pay Train Dispatcher P. E. Johnson, Sr., the difference between straight-time rate, which he was paid and the time and one-half rate to which he was entitled under the rules for service performed on March 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17 and 18, 1952, and at the time and one-half rate because his illegal removal from the emergency assignment on Position No. 38 prevented him from performing service thereon on March 6, 7, 13, 14, 20 and 21, 1952, all of the claims for time and one-half rate herein listed being supported by the provisions of Section 2 of Article VI of the current Agreement.

EMPLOYES' STATEMENT OF FACTS: An agreement on rules governing compensation, hours of service and working conditions, dated September 1, 1949, between the parties to this dispute, and applicable to the Claimant in this case, was in effect at the time this dispute arose. A copy of that Agreement is on file with this Board and is, by this reference, made a part of this submission as though fully incorporated herein.

In the above referred to Agreement, ARTICLE VI—BASIS OF COMPENSATION, Section 2 thereof reads as follows:

"Section 2. Except as provided in Section 3 of this Article VI, regularly assigned train dispatchers may only be required to perform relief work in cases of emergency and when unassigned train dispatchers are not available; when so used, they will not be paid

to and spelled out those exceptions in their interpretation of Article II, Section 10-b. The fact that no mention was made with regard to any such exception by the American Train Dispatchers' Association proves conclusively that none was either intended or contemplated by that rule.

Without prejudice to its position, as previously set forth herein, that both portions of the Employes' claim in the instant dispute are entirely without support under the Agreement rules and should be denied, the Carrier also asserts that that portion of Part 2 of the Employes' claim, which seeks the payment of eight (8) hours at time and one-half rates to Dispatcher Johnson account not used to protect the temporary vacancy on his assigned rest days, March 6, 7, 13, 14, 20 and 21, 1952 is contrary to the well established principle which the Third Division has consistently recognized and adhered to, that the right to work is not the equivalent of work performed under the overtime and call rules of an Agreement. See Awards 5016, 5117, 5444, 5721, 5943, 6013, 6157 and many others.

In conclusion, the Carrier respectfully reasserts that the claim of the Employes in the instant dispute is entirely wthout support under the Agreement rules and should, for the reasons expressed herein, be denied in its entirety.

All that is contained herein is either known or available to the Employes and their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute. The Claimant held a regular relief assignment, the duties of which included the relief of a first trick Dispatcher, assignment No. 38, Galveston side, held by C. M. Pearcy, Monday and Tuesday of each week. The assigned rest days of Claimant's regular position were Thursday and Friday of each week. The claim set out above gives the situation which resulted in the demand of payment, as stated.

Claimant cites Article II, Section 10 (b) of the Agreement in support of the claim filed. Also Article VI, Section 2 as requiring the continuance of Claimant on the temporary vacancy on position No. 38, once he had been assigned thereto and his removal on March 5 was in violation of that requirement.

Article VI, Section 2 provides in part:

> "* * * if such emergency continues for more than three (3) days, the train dispatcher first used thereon will not be removed, and payment thereafter shall be made at the time and one-half rate. * * *"

Also cited in Award 5400 in support of claim, involving the same parties and the same rule.

That in the instant case Johnson was used off his regular assignment February 29, March 1 and 2, and worked his own assignment on March 3 and 4 on the same job.

In answer to the contention of Carrier it is stated that the necessity for filling position No. 38 from February 27 to and including March 21, was a continuing situation. That Pearcy's error in thinking he was able to resume work on February 28 and reporting for duty on that date, is not controlling; nor was his thinking and Carrier's anticipation that he would report on March 5, controlling. That although Claimant only worked three hours on February 28 and was paid under the Call Rule, Article III, Section 3, has no bearing on the matter. That Claimant worked the position (No. 38) February 27, 28, 29, March 1, 2, 3 and 4, or seven consecutive days and was the first dispatcher used in the position and his removal was improper and therefore he is entitled to be paid at the rate of time and one-half beginning March 1.

On behalf of Respondent Carrier it is contended that claim for March 1 was abandoned during handling on the property. That on the entire claim an emergency existed and the question is as to when it began, Employes alleging that it started on February 28; Carrier that it started on February 29 and cited is the Note to Article VI, Section 2, as follows:

> "NOTE: These Sections 2 and 3 apply only when a regularly assigned train dispatcher is taken from his own position to completely fulfill all of the duties and responsibilities of another position."

and therefore the emergency started at 7:00 A. M., on February 29 and claim for March 2 is not valid. That at about 4:35 P. M., on date of Tuesday, March 4, 1952, the son of Dispatcher Pearcy contacted the Chief Dispatcher and reported his father would be unable to protect his assignment beginning Wedneday, March 5 at 7:00 A. M., by reason of illness and it was indefinite as to when he could return, and that he would be absent at least for a week and possibly longer. He did not return to service until March 22, 1952. And that it was not until 4:35 P. M., of March 4 that Carrier could have assumed that Dispatcher Pearcy would be absent seven days or longer. That both Article II, Section 10 (b) and Article VI, Section 2, are special rules. The latter being special in that it is restricted to the particular subject of regularly assigned dispatchers performing relief work and the compensation therefor. The first rule is restricted to the particular subject of filling temporary vacancies. Both rules are entitled to consideration and no part of the same should be made meaningless. And considering the two rules together Carrier may not plead an "emergency" after three days if there are other ways of filling the position. Article II, Section 10 (b), does provide the other ways, provided a regularly assigned dispatcher made application for the position. That using this construction gives to Article VI, Section 2, its real intent and at the same time it does not nullify Article II, Section 10 (b). Therefore, claim for March 3, 4, 5, 6, 7 and 8 are not valid, and the record shows there was an unassigned train dispatcher available as of 7:00 A. M., March 9. He was, therefore, an available and unassigned dispatcher making Article VI, Section 2, operative, and claims subsequent to March 8 are not valid.

In construing the cited rules together we are of the opinion the proper construction and interpretation of the same as applied to undisputed facts leads to the conclusion that the position of Carrier is sound.

Hence the claim fails.

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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of June, 1955.