Award No. 7914
Docket No. TD-7592

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE TEXAS & PACIFIC RAILWAY COMPANY

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

Under the terms of the controlling agreement, The Texas and Pacific Railway Company, hereinafter referred to as "the carrier," shall pay to Train Dispatcher I. S. McIntosh a sum representing the difference between the amount he received and the amount he would have received if the Carrier had compensated him in accordance with the provisions of Article 7-(a) of the currently effective Agreement, for service performed as chief train dispatcher at Fort Worth, Texas, beginning July 3 to and including July 16, 1954, and beginning November 23 to and including November 29, 1954.

EMPLOYES' STATEMENT OF FACTS: There is a Schedule Agreement between The Texas and Pacific Railway Company and the American Train Dispatchers Association, governing Hours of Service, Compensation and Working Conditions of Train Dispatchers, effective September 1, 1954. Said Agreement is on file with your Honorable Board and by this reference is made a part of this submission as though fully incorporated herein. The following rules are pertinent to adjudication of this dispute:

"ARTICLE I-SCOPE

"(a) This agreement shall govern the hours of service compensation, and working conditions of train dispatchers. The term 'train dispatcher' as hereinafter used shall include night chief, assistant chief, trick, relief, and extra train dispatchers. It is agreed that **one chief train dispatcher** in each dispatching office shall be excepted from the scope and provisions of this agreement." (Emphasis ours)

"ARTICLE 7 (a)—BASIS OF EMPLOYMENT—COMPENSATION.

"(a) Train dispatchers shall be monthly employes but the monthly compensation shall be computed on a daily basis. The daily rate shall be determined by multiplying the monthly rate by 12 and dividing the result by 261. To determine the straight time hourly rate, divide the monthly rate by 174."

When the instant dispute arose, Claimant I. S. McIntosh was a regularly assigned relief Train Dispatcher in the Fort Worth, Texas office of the Car-

Thus, if the two awards last mentioned above could be considered analogous (which we contest), they should be corrected here and now so that this erroneous theory can be curbed in its infancy. Even a cancer can be cured in its early stages. In this case, the Board can keep one from starting if you will give consideration to the rules of the applicable agreement and apply them in line with both their literal and common-sense meaning. We repeat that there has never been an award rendered on the specific issue involved here. This is a **new** issue you are called upon to decide here. We sincerely urge you to recognize that this is a new issue, and that it has not been decided in previous awards. This docket is the first to contain the specific question posed here. A denial award can be the only correct and legal conclusion.

We have clearly shown that the Organization's contention is not suppoted by any rule in the current agreement. We have also shown that in the 1945 agreement, there was a requirement insofar as filling of chief dispatcher positions in the absence of the encumbent thereof. We have set forth the details of negotiations in 1948, at which time the Organization relinquished the former rules pertaining to excepted chief dispatcher positions in order to obtain other rules which they evidently felt were more favorable to them. They are now asking your Board to give them back the original rules, and, of course, they still want to maintain the favorable rules which they obtained in 1948. We respectfully urge that your Board is not authorized to do this under the law. We submit that you could not possible justify a sustaining award here when it has clearly been shown that the Organization has just served a Section 6 Notice to accomplish the purpose which they ask your Board to illegally accomplish for them. Will your Board attempt to take over the functions conferred upon the National Mediation Board under the Act? The Mediation Board is the only tribunal of proper jurisdiction in this matter. Under the law, it has that jurisdiction; your Board has not the right. The Organization fully understands that, but they evidently have in mind that the Mediation Board can only mediate and proffer arbitration, but that your Board can issue a binding award. An award is binding only so long as it is legal. What the Organization asks you to do here is not legal. We have also shown that a sustaining award here would be adversed to employes as well as managements and undoudtedly more adverse to the former.

In summary, we respectfully submit that:

I. The Board should dismiss the November portion of the claim.

II. The July claim should be denied because there is no rule to support it, which is evidenced by the Organization's efforts, past and present, to negotiate such a rule (Award 4259).

It is affirmed that all data submitted herein in support of the Carrier's position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: This claim is on behalf of a regularly assigned Relief Train Dispatcher, in Carrier's Ft. Worth, Texas, train dispatching office, who had requested and was granted permission to perform temporary service on the position of Chief Train Dispatcher in that office during the period July 3 through July 16 and November 23 through November 29, 1954. The claim is for the difference between the amount he received, based on a daily rate computed by multiplying the monthly rate of the Chief Train Dispatcher by 12 and dividing the result by 313 and the amount he would have received in accordance with the provisions of Article 7 (a) of the Agreement, which would have applied a divisor of 261 to the annual rate arrived at above thereby producing a higher daily rate.

The claimant subsequently attempted to withdraw his claim but, concededly, this abortive act does not preclude handling of the claim by the Association if it believes the Agreement to have been violated.

While no procedural question is raised concerning the July 3-16 period the Carrier maintains that the part of the claim for November 23-29 was not properly handled on the property as required by the Railway Labor Act and this Board's Circular No. 1. It is conceded that Carrier provided no written declination of the November 23-29 claim but we find nothing in the Railway Labor Act, in Circular No. 1 or in any of the provisions of the Agreement before us requiring a written declination. We do, however, find a statutory requirement for conference and, based upon the facts in this record, hereby hold that sufficient written and personal discussion was had between the parties to satisfy the requirement. Carrier's contention is therefore rejected and the November period will be determined on the merits together with the July period.

The Employes contend that on the dates in question the claimant was covered by all the rules of the Agreement and that, therefore, his daily rate of compensation for those days must be computed in accordance with Article 7 (a) which reads as follows:

"Article 7.

(a) Basis of Employment—Compensation. Train dispatchers shall be monthly employes but the monthly compensation shall be computed on a daily basis. The daily rate shall be determined by multiplying the monthly rate by 12 and dividing the result by 261. To determine the straight time hourly rate, divide the monthly rate by 174."

The Carrier contends that the position of Chief Train Dispatcher is not subject to any rule or Agreement.

"ARTICLE 1

(a) Scope. This agreement shall govern the hours of service, compensation, and working conditions of train dispatchers. The term 'train dispatcher' as hereinafter used shall include night chief, assistant chief, trick, relief, and extra train dispatchers. It is agreed that one chief train dispatcher in each dispatching office shall be excepted from the scope and provisions of this agreement."

The basic question, then, before us is: While performing temporary service on the excepted position, in the absence of the incumbent of that position, is the claimant covered by Agreement rules?

In the light of a long and imposing series of sustaining awards on this issue, and believing that no good purpose would be served here by attempting to elaborate upon what has been said therein, we feel compelled to adopt the principle which would answer the above question in the affirmative. That is to say, only the occupant of the position of Chief Train Dispatcher is excepted from the Agreement and any employe relieving him for any cause would be entitled to the benefits of the Agreement. In so holding we are mindful of Award 7405 but do not consider it to be controlling here.

The Carrier also urges that acquiesced practice over five years supports its position. We find that contention to be without merit here for as we have said before in Award 6308 "When the meaning and intent of the provisions of a collective bargaining Agreement are clear and umambiguous unprotested past practices, which are violations thereof, are not controlling and will neither be permitted to vitiate the force nor prevent the enforcement thereof. See Awards 3444 and 5834 of this Division."

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 Employe involved in this dispute are respectively Carrier and Employe 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 herein involved; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1957.

DISSENT TO AWARD NO. 7914, DOCKET NO. TD-7592

There are several reasons why this Award is erroneous. For one thing, it erroneously sustains application of a time factor to a rate of pay different from the time comprehended in the pay rate, thus having the effect of changing the rate of pay per unit of work; but the primary fallacy rests in the fact that it purports to determine the manner in which Carrier should have compensated claimant when, in the absence of any agreement provisions requiring use of employes of his class, he sought and voluntarily filled a position which was not within the scope of any labor agreement and for which the rate of pay was one unilaterally fixed by Carrier.

For these and other reasons not set forth herein, it is not valid.

Consequently, we dissent.

/s/ J. F. Mullen
/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp