Award No. 8817
Docket No. TD-8547

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(a) The Louisville & Nashville Railroad Company, hereinafter referred to as "the Carrier," acted contrary to the wording and intent of the rules of the Schedule Agreement between the parties, particularly Section (a) of Article III, effective September 1, 1949 when on October 15, 1954 it required Mr. H. L. Adair, train dispatcher in the Mobile, Alabama office of the Carrier, to perform service on a rest day assigned to his position, at straight-time rate of pay, and

(b) The Carrier shall now compensate Train Dispatcher H. L. Adair an amount representing the difference between what he was paid at straight-time rate of pay and what he would have received if he had been properly compensated at rate of time and one-half for service performed on Friday, October 15, 1954.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the Louisville & Nashville Railroad Company and its train dispatchers represented by the American Train Dispatchers Association covering rates of pay, rules and working conditions, effective April 16, 1948 (Sixth Edition), and amendments thereto are 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 hereinafter, he referred to as the "Agreement."

Pertinent Sections of the Agreement read as follows:

"Article 1 (a) Scope:

"The term 'train dispatcher', as hereinafter used, shall include night chief, assistant chief, trick, relief and extra dispatchers. It is agreed that one (1) chief dispatcher in each dispatching office shall be excepted from the provisions of this agreement."

which the train dispatchers agreed to provisions under which they are to be paid the straight daily rate of pay for the Chief Train Dispatcher's position for service rendered as Chief Train Dispatcher in all circumstances, subject only to the exceptions contained in the last two sentences of the last paragraph of the understanding of September 25, 1947 as revised by understanding of August 27, 1953. The claimant, a regularly assigned relief dispatcher, who was paid the daily rate of the trick dispatcher because it was slightly more than the straight time daily rate of the Chief Dispatcher's monthly rate, has been paid in accordance with the agreements between the parties. The claim for time and one-half is, therefore, not valid and should be denied.

All factual data submitted in support of the carrier's position has been presented to duly authorized representatives of the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts here are simple and not in dispute and sufficiently appear in the statement of claim.

Carrier contends that Claimant was paid in strict accordance with Letter Agreement of September 25, 1947, as amended by another Letter Agreement of August 27, 1953, whereas Claimant insists upon payment under Rule III (a) pertinent part of which reads:

> "* * * A 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. * * *"

The Letter of Agreement of September 25, 1947 recites inter alia:

> "In affording the Day Chief Dispatchers a rest day each week and two weeks' vacation each year, or when such Chief Train Dispatchers are otherwise temporarily absent for one or more days, **the position shall be filled from those covered by your agreement** * * *." (Emphasis ours.)

Claimant was one of those covered.

This referee is committed to the holding on this Division that Rule III (a) follows him to the relief job. Awards 6581 and 6583.

Parties are in agreement that the controversy hinges on the following language in the letter of September 25, 1947 viz.,

> "Train Dispatchers who relieve Chief Train Dispatchers shall be compensated at the straight time daily rate of pay of the Chief Train Dispatcher's position for each day worked on such position on same basis as Chief Dispatchers."

It is difficult to understand why the Carrier in this case avoided any reference to our Awards 3344 and 7663, where the facts and rules are almost identical except for the parties involved, and the Carrier filed no dissent in either award.

We think the instant case is even stronger because here the Carrier, as already noted, stated "the position shall be filled from those covered by your agreement."

Claimant's agreement contains a specific provision for payment of time and one half under the circumstances disclosed.

The claim is good and should be sustained.

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: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April, 1959.

DISSENT TO AWARD 8817, DOCKET TD-8547

In this Award the Referee disregards what the parties before the Board in this Docket have made a matter of agreement and so ignores the bargaining powers of the parties. These are not the standards by which this Board functions under statute and obviously cannot be accepted.

Prior to the letter Agreement referred to in the Opinion, Train Dispatchers did not enjoy any preference, by Agreement or otherwise, to be used on Chief Train Dispatcher positions in any respect. Said letter Agreement was incident to the culmination of activities begun by the Association in 1945 to bring Chief Train Dispatcher positions within the Scope of the Rules Agreement. In Mediation Agreement A-2237, dated September 25, 1947, it was therein agreed that Day Chief Train Dispatcher positions were not only wholly excepted from the Rules Agreement, but recognized as official positions. This Mediation Agreement is contained in the Record as Carrier's Exhibit "AA" and shown in the Rules Agreement as Appendix "A". The Association was, nevertheless, still desirous of obtaining for Train Dispatchers the right to be used to fill temporary vacancies, etc., on Day Chief Train Dispatcher positions. In the letter Agreement, entered into on the same day as the Mediation Agreement, **Carrier agreed to so use Train Dispatchers and it was further agreed between the parties, without qualification or restriction of any kind, that Train Dispatchers so used would be paid "at the straight time daily rate of pay of the Chief Train Dispatcher's position for each day worked on such position on the same basis as Chief Dispatchers."** Although the letter Agreement underwent minor change in August, 1953, the substance thereof remained unchanged. Not only does the Referee ignore the express language in the letter Agreement, but he further ignores the undisputed and

uncontradicted fact that **in the application of the letter Agreement Train Dispatchers were paid at the straight time rate under all circumstances** when used on Day Chief Train Dispatcher positions. This, without prior claim or protest from October, 1947, the effective date of the letter Agreement, until the instant dispute arose, which was in October, 1954, a period of seven years. This furher despite the fact that a rule such as now relied upon by the Association was in effect at all times pertinent, having had its inception in 1942, as a result of Mediation Agreement A-1122-E and contained in the Rules Agreement as Section 3(a) of Appendix "B". It is a canon of construction, with which this Referee is and should be familiar **(Award 1876)**, that the actions of the parties are as indicative of intent as the written word. **Awards 8366, 8207, 7953, 6929.** The claim, without more, should have been denied.

In this case Claimant, in filling temporary vacancy on a Day Chief Train Dispatcher position due to illness of the incumbent, made a second start within twenty-four hours. No claim was or could be progressed on that basis. In this respect the Referee ignored Memorandum Agreement entered into as part of Mediation Agreement A-2237 wherein it was agreed that no claim for or on behalf of Train Dispatchers would be progressed for service performed in excess of eight hours **on any day** when such excess service is performed in the position of Chief Train Dispatcher. Although, apparently as an afterthought, the Association now offers a different construction of the Memorandum Agreement, the Memorandum Agreement has been applied, as here, for seven years, from September 25, 1947, until the instant dispute arose, without prior protest or claim. Again, the intent of the parties is clear by their actions.

The Carrier did not try to "dodge" Awards of this Board because the letter Agreement before the Board in this Docket is peculiar to these parties and such an Agreement was not present in **Awards 6581 and 6583** by this Referee. These Awards are, therefore, completely distinguishable. The same is true concerning **Award 3344. Award 7663** is not only distinguishable, but otherwise so confusing and conflicting that it cannot stand as authority in this case. The Opinion in that Award indicates the existence of a practice on the Carrier there involved of paying time and one-half. Such was not the case here and makes the Award distinguishable. Even then, the Referee in that Award found that the rule relied upon by the Carrier involved distinguished the case from other Awards and, while holding that such rule did not nullify the premium pay rule, proceeded to analyze the rule thusly,—

> "* * * Article 5 (k) has the effect of placing relief service for the Chief Train Dispatcher within the scope of the Agreement, providing by whom and under what circumstances temporary vacancies in the Chief Train Dispatcher position will be filled; **at the same time limiting payment for any service performed as Chief Train Dispatcher to the straight time rate of the Dispatcher position worked.** * * *" (Emphasis added.)

While that Referee found that the rule did not nullify the premium pay rule, at the same time he found that the rule limited **"payment for any service performed as Chief Train Dispatcher to the straight time rate of the Dispatcher position worked."** The Award is obviously conflicting in itself and, in view thereof, there is a further question as to just what that Referee sustained. The claim as presented was not sustained, nevertheless, the Award reads, "Claim sustained." The present Referee could have so found had he taken the time to seriously consider this Award. At any rate, the practice indicated in **Award 7663** distinguishes it from the instant case.

The Referee notes that "the Carrier filed no dissent" to **Awards 3344 and 7663.** Carriers do not file dissents, that is the prerogative of the Carrier Members, who, after analyzing Awards, determine whether a dissent is necessary, such as in this case. The present Award is void of reasoning, sound or otherwise, and we have frequently held that an Award is no better than the reasoning contained within it. This is such an Award. The Award is erroneous and we dissent.

/s/ **C. P. Dugan**

/s/ **J. F. Mullen**

/s/ **R. M. Butler**

/s/ **W. H. Castle**

/s/ **J. E. Kemp**