

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis B. Murphy, 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," violated the currently effective Agreement between the parties to this dispute, including Article II, Sections 10-b and 14, when on Sunday, May 2, 1954, it failed to use senior unassigned Train Dispatcher J. W. Fewell to fill a vacancy in the Assistant Chief Dispatcher position beginning at 9:00 P. M., Sunday, May 2, 1954, instead required Mr. L. N. Andrews, the regular incumbent of Assistant Chief Dispatcher Position No. 50 to resume his regular position with only two (2) hours off duty, thereby performing dispatcher service for nineteen (19) hours between 7:00 A. M., May 2, 1954 and 5:00 A. M., May 3, 1954.

(b) Carrier shall now compensate unassigned Dispatcher J. W. Fewell, the difference between what he was paid and what he would have been paid had he been used to fill the vacancy in the Assistant Chief Dispatcher Position No. 50, beginning at 9:00 P. M., Sunday, May 2, 1954, instead of filling a trick dispatcher position beginning at 11:00 P. M., Sunday, May 2, 1954.

EMPLOYEES' STATEMENT OF FACTS: Mr. L. N. Andrews was, on May 2, 1954, regularly assigned to Assistant Chief Dispatcher Position No. 50, hours 9:00 P. M., until 5:00 A. M., daily except Friday and Saturday, rest days. On that date, May 2, 1954, Mr. Andrews was used to fill position of Chief Train Dispatcher, a position not covered by the Agreement.

Senior unassigned train dispatcher, Mr. R. E. Johnson, was instructed to fill the vacancy thus created in Position No. 50, Assistant Chief Train Dispatcher, Sunday, May 2, 1954.

Mr. J. W. Fewell, an unassigned train dispatcher junior to dispatcher R. E. Johnson, was instructed to furnish rest day relief for regularly assigned

(3) Where a practice is widespread and well established the only reasonable inference is that both parties have acquiesced in the practice. See Award No. 6607.

The Carrier has also presented evidence that its practice under the agreement rules relied upon by the Employees has been widespread and well established.

Without prejudice to its position, as previously set forth herein, the Carrier desires to call attention to the fact that the claim in behalf of Claimant J. W. Fewell in the instant dispute for the difference between the rate of pay for train dispatcher and the rate of pay for assistant chief dispatcher for Sunday, May 2, 1954, and the claim in behalf of Claimant W. M. Vanderburg for a day's pay at pro rata rate for Sunday, May 2, 1954, as appealed to the Third Division in another dispute briefly described in Executive Secretary Tummon's letter to the Carrier of July 21, 1955, as follows:

"(GC&SFRy) Failure, on Sunday, May 2, 1954, to use senior unassigned Train Dispatcher J. W. Fewell to fill vacancy in Assistant Chief Dispatcher position,—ETC. That Train Dispatcher W. M. Vanderburg be compensated."

constitutes a duplication of penalty claims for the one and same alleged violation. This handling on the part of the Employees is emphatically protested by the Carrier, as the Third Division has consistently held that it will not allow claims for a double penalty. See Awards 3316, 5953 and many others.

In conclusion, the Carrier respectfully reasserts that the Employees' claim in each of the questions at issue in the instant dispute is entirely without support under the governing agreement rules in effect between the parties hereto and should, for the reasons previously expressed herein, be denied in its entirety.

The Carrier is uninformed as to the argument the Employees will advance in their ex parte submission, and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are necessary in reply to the organization's ex parte submission or any subsequent oral arguments or briefs submitted by the petitioning organization in this dispute.

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

(Exhibits not reproduced.)

OPINION OF BOARD: There is no disagreement between the parties in this case as to the essential facts, which briefly are these:

On Sunday, May 2, 1954, the incumbent of the Assistant Chief Dispatcher position was used to perform rest day relief service on the excepted Chief Dispatcher's position, 9:00 A. M. to 5:00 P. M.

Train Dispatcher R. E. Johnson, the senior unassigned Train Dispatcher in that office, was to fill the position. However, one hour prior to his reporting he became ill and was unable to work the position.

The next senior unassigned Dispatcher in the Galveston office was J. W. Fewell, Claimant herein. At the time in question Fewell was working temporarily on one of the established Relief Train Dispatcher positions, and on May 2, he was scheduled to perform relief service on the Third Trick position, 11:00 P. M. to 7:00 A. M. The next junior unassigned Train Dispatcher was engaged and was not immediately available.

The Carrier chose to use the Assistant Chief Dispatcher to fill his own regular assignment, even though he had already performed a full day's service on that day.

The Organization contends that the Carrier should have used the senior unassigned Train Dispatcher, Mr. Fewell, to fill the position and require the incumbent of the Third Trick Train Dispatcher position, one Vanderburg, to work one of his assigned weekly rest days. They also contend that Mr. Fewell as the senior unassigned qualified and available Train Dispatcher at the time in question should have performed the service on the one day vacancy in the Assistant Chief Dispatcher's position, pursuant to Article II, Section 10-b.

"Section 10-b. Temporary vacancies of not more than seven (7) calendar days' duration may be filled in the following order of precedence: (1) as a fifth day of service for any available relief train dispatcher holding a four-day assignment, (2) by the senior qualified and available unassigned train dispatcher who will not thereby have claim to work more than five (5) consecutive days, or (3) as provided hereinafter for a temporary vacancy of more than seven (7) calendar days. A temporary vacancy known to be of more than seven (7) calendar days' duration will be made known to the train dispatchers in the office and will be filled by permitting regularly assigned train dispatchers to place themselves, in accordance with their seniority, on this and any other vacancy, other than that of selected assistant chief dispatchers, resulting from such placement; any such temporary vacancy on which a regularly assigned train dispatcher does not place himself to be filled by the senior qualified and available unassigned train dispatcher who will not thereby have claim to work more than five (5) consecutive days. Upon completion of such temporary service, regularly assigned train dispatchers affected shall either displace a junior regularly assigned train dispatcher occupying a temporary vacancy or return to their regular assignment if it has not been abolished or taken by a senior train dispatcher through the exercise of displacement rights, in which latter event they will, within forty-eight (48) hours, exercise seniority over junior train dispatchers other than selected assistant chief dispatchers. Time lost in making changes under the provisions of this Section 10-b will not be paid for, and regularly assigned train dispatchers who place themselves on temporary vacancies under the provisions of this Section 10-b shall assume the rest days and other conditions of such temporary vacancies."

The record is a very lengthy one, considerable of it is improper and cannot be considered.

The record reveals that during the period from May 1, 1954, to and including May 14, 1954, the incumbent of rest day relief Position No. 2 was

absent on vacation. This position is assigned to work Thursday through Monday, with Tuesday and Wednesday as rest days. The two week vacancy was not desired by any regularly assigned Train Dispatcher, therefore, in accordance with Article II, Section 10 (b) of the agreement, it was assigned to J. W. Fewell, the senior qualified and available unassigned Train Dispatcher. At 7:00 A. M. on Sunday, May 2, 1954, Assistant Chief Dispatcher Mr. N. L. Andrews, the regular incumbent of Position No. 50, regularly assigned to work from 9:00 P. M. to 5:00 A. M., Sunday through Thursday, was used to provide rest day relief for the Chief Dispatcher.

Mr. Andrews worked the Chief Dispatcher's position on May 2, 1954, this position is not covered by the Agreement, nor does it come within the Hours of Service Law. There is no prohibition in the Agreement or the Hours of Service Law, against an employe working as Chief Dispatcher and then working his own assignment as Assistant Chief Dispatcher on the same day.

It appear that our first and only question in this situation is, was there a vacancy to be filled under the above rule or was the Carrier under the Agreement permitted to use the regularly assigned incumbent of Assistant Chief Dispatcher Position as part of his regular assignment. True, Mr. Andrews had planned to be off Position No. 50 (Assistant Chief Dispatcher) on May 2, 1954 and Mr. Johnson did plan to work in his position, but when Mr. Johnson reported ill, Mr. Andrews worked instead of taking off.

Mr. Fewell at the time was performing service temporarily on one of the established Relief Dispatchers' positions and only for sake of argument we will say that a vacancy did occur, we do not agree that Mr. Fewell, an extra employe, in effect, would have the right to displace Mr. Andrews, the regular assigned employe on his own assignment.

However, the evidence in this case does not show that a vacancy existed. Mr. Johnson did plan to work in Mr. Andrews' place but because of illness was unable to do so and then Mr. Andrews filled his own assignment on Position 50 (Assistant Chief Dispatcher).

This Division has recently decided in Awards 8812, 8813 and 8814 similar situations between the same parties and required the same Claimant Mr. J. W. Fewell, to remain on an unfinished temporary vacancy, instead of using him on a one-day temporary vacancy of Assistant Chief Train Dispatcher Position No. 50. We support the Division's holdings in these awards and even through a vacancy had existed we would have to deny Mr. Fewell's claim as under the existing circumstances he would not have been available to work the position, but would have been required to work the temporarily established Relief Train Dispatcher's position on the Third Trick position, 11:00 P. M. to 7:00 A. M.

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 Employees involved in this dispute are respectively Carrier and Employees 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 did not violate the Agreement as contended by the Claimant.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 5th day of August, 1959.