Award No. 11560
Docket No. TD-13631

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

JOINT TEXAS DIVISION OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY—FORT WORTH AND DENVER RAILWAY COMPANY
(Burlington-Rock Island Railroad Company)

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

(a) The Joint Texas Division of the Chicago, Rock Island and Pacific Railroad Company—Fort Worth and Denver Railroad Company (Burlington-Rock Island Railroad Company), (hereinafter referred to as "the Carrier") violated the effective schedule agreement between the parties, specifically Rule 1, and Rule 16, thereof, when it failed to properly compensate Train Dispatcher J. W. Wood for services performed September 7, 8, 9, 11, 12, 13, and 14, 1961.

(b) The Carrier shall now be required to additionally compensate the individual claimant for service performed on the dates specified in paragraph (a) above in the amount representing the difference between what he was compensated and the pro rata daily rate of Acting Chief Dispatcher.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the Carrier and the Claimant Organization, effective August 6, 1942. There is also a Memorandum of Agreement, effective September 1, 1949, revising certain rules of the agreement. Both are on file with your Honorable Board and by this reference are made a part of this Submission the same as though fully set out herein.

Rule 1, and Rule 16 (revised September 1, 1949), are particularly pertinent to this dispute and, for ready reference of your Honorable Board, are quoted here as follows:

"Rule 1, Scope.

The term 'Train Dispatcher' as herein used shall include only Trick, Relief and Extra train dispatchers, and shall also include

dispatchers a contractual right to perform relief chief dispatcher service, and the Board held such service to be within the scope of the agreement.

(b) On none of these properties were there two distinctly different types of relief chief work to be performed as on the Joint Texas Division.

(c) In none of these sustaining awards was there an effective special agreement setting forth a formula for computing relief chief dispatcher pay on days other than Sunday when the chief is absent because of vacation, illness, etc., such as Carrier's Exhibit No. 1.

5. The only comparable awards of this Board are those rendered on the GM&O Railroad, particularly Third Division Award 7405, where the relief chief dispatcher service was held to be entirely excluded from the scope of the agreement, and a specific agreement was found prescribing a rate of pay the same as that received by the chief dispatcher, such as already accorded the claimant herein.

For the reasons expressed above, this claim must be denied.

Carrier affirmatively states that all data herein and herewith submitted have previously been submitted to the Employes.

(Exhibits not reproduced).

OPINION OF BOARD: Claimant was a regularly assigned Third Trick Dispatcher. On September 7, 8, 9, 11, 12, 13 and 14, 1961, he filled a vacation vacancy as Chief Dispatcher. At that time the Chief Dispatcher's rate of pay was $766.00 per month. Claimant was paid at the rate of $29.37 a day. He contends that he should have been paid at the rate of $35.09 a day. His claim is for the difference for the seven days he so relieved the Chief Dispatcher.

Petitioner contends that Carrier violated Rules 1—Scope, and 16 which read as follows:

"**Rule 1, Scope.** The term 'Train Dispatcher' as herein used shall include only Trick, Relief and Extra train dispatchers, and shall also include Chief Train Dispatcher when assigned to work as a Trick Train Dispatcher."

"Rule 16—Rate of Pay

Monthly rates paid to employes covered by this Agreement shall be the rates in effect on August 31, 1949, less Two Dollars and Eighty Cents ($2.80) per month, which shall become the basic monthly rate for a month of 174 hours.

Thereafter, to determine the straight time hourly rate for such employes, divide the monthly rate by 174. To determine the daily rate, multiply the monthly rate by 12 and divide the result by 261.

When train dispatcher relieves chief dispatcher on chief dispatcher's rest day, the rate will be the monthly rate paid chief dis-

patcher as of August 31, 1949, less $2.80 per month. The daily rate will be computed by multiplying new monthly rate by 12 and dividing by 261, the hourly rate to be determined by dividing the monthly rate by 174.

Future wage adjustment, so long as such rates remain in effect on such basis, shall be made on the basis of 200 hours per month.

All existing weekly or monthly guarantees shall be reduced to five days per week. Nothing in this agreement shall be construed to create a guarantee of any number of hours or days of work where none now exists.

Rates of pay for additional positions which may be created or restored will be no less than the rates of positions of a similar nature then existent.

Nothing in this agreement shall be construed as a guarantee of any number of hours or days of work."

Rule 16, as quoted above, was revised effective September 1, 1949, to give effect to the five day work week agreement which also became effective the same date.

Petitioner argues that Claimant's daily rate while filling the vacation vacancy should have been calculated in accordance with Rule 16 which is $766.00 (Chief Dispatcher's monthly rate) less $2.80 times 12 ($9158.40) divided by 261 ($35.09). For seven days this amount to $245.63.

Carrier contends that Claimant was properly paid under an Agreement dated at Houston, Texas, September 17, 1941 which reads as follows:

"There having been some complaint as to the proper method of figuring daily rate of the Chief Dispatcher's position when relieved by Trick Dispatchers, in order to prevent any future misunderstanding the following will govern:

Effective September 1, 1941, the daily rate to be paid Trick Dispatchers when relieving the Chief Dispatcher, will be computed by multiplying the monthly salary by 12, dividing the result thereof by 313, to arrive at the daily rate."

This Memorandum is signed by A. G. Whittington, Carrier's Vice President and by Trick Dispatchers, J. M. Long, J. L. Stover, W. M. Upshaw and Vandy O. Anderson. It is not signed by Claimant nor by any officer or duly authorized agent of the Organization. The four Trick Dispatchers who executed the Memorandum signed it as individuals. It was executed before the Organization was certified as the collective bargaining representative for train dispatchers employed by Carrier.

Rule 16 of the Agreement between the parties dated August 6, 1942 provided as follows:

"**Rule 16. Rate of Pay.** (a) The daily rate of pay of Train Dispatchers will be arrived at by multiplying the monthly rate by twelve and dividing the result by three hundred thirteen.

(b) Rates of pay for additional positions which may be created

or restored will be no less than the rates of positions of a similar nature then existent."

This Rule 16 was modified effective September 1, 1949 as above quoted.

There is no merit to Carrier's position that since the Petitioner nowhere challenged the September 17, 1941 Agreement on the property, or in its Ex Parte Submission, but only in its rebuttal, that it could not raise the issue here. The fact is that on January 12, 1962 Petitioner wrote to Carrier, in part, as follows:

"The 313 divisor was correct under the agreement of September 1, 1941 when the train dispatchers were on a six day basis but this agreement was revised and superceded in the agreement of September 1, 1949 which provided for a five day week for train dispatchers and the 261 divisor."

Also, the Agreement of August 6, 1942, in any event, replaced any agreement with individual employes the Carrier may have entered into prior to the time Petitioner became the certified representative for Carrier's train dispatchers. Also, Petitioner's Ex Parte Submission says:

"There is an agreement between the Carrier and the Claimant Organization, effective August 6, 1942. There is also a Memorandum of Agreement, effective September 1, 1949, revising certain rules of the agreement. Both are on file with your Honorable Board and by this reference are made a part of this submission the same as though fully set out herein."

These are the only valid Agreements before us. The Memorandum dated September 17, 1941, has no validity and may not be considered.

Carrier also argues that "Claimant is subject to Rule 16 of the August 6, 1942 Agreement" which provided that: "The daily rate of pay of Train Dispatchers will be arrived at by multiplying the monthly rate by twelve and dividing the result by three hundred thirteen." This is not so. The Memorandum of Agreement dated September 8, 1949 specifically says:

"Effective September 1, 1949, Rules 5, 6, 14 and 16 of the agreement currently in effect between the parties signatory hereto are abrogated and the following rules substituted in lieu thereof."

Rule 16 of the August 6, 1942 Agreement did not exist when this claim arose. The first paragraph of Rule 16 in the 1949 Agreement, above quoted, specifically says that the covered employes monthly rates shall be based on 174 hours. The second paragraph of Rule 16 says that: **"To determine the daily rate, multiply the monthly rate by 12 and divide the result by 261."** (Emphasis ours.) This refers to employes covered in Rule 1 in their ordinary, every day operation.

The third paragraph of Rule 16 applies only when a train dispatcher relieves a chief dispatcher on the latter's rest day and that, too, uses a divisor of 261 days.

It is clear that the 313 divisor contained in the August 6, 1942 Agreement was changed to 261 in the Agreement effective September 1, 1949. It was changed for every purpose whenever a Train Dispatcher relieved a Chief Dispatcher.

The record also shows that for a period of ten years prior to the time this claim arose Carrier used the 261 divisor to compensate Train Dispatchers whenever they relieved a Chief Dispatcher. On October 25, 1961 Claimant submitted his claim and said:

> "It has been the practice to pay a regular trick dispatcher relieving the Chief Dispatcher on vacation, and otherwise, the Acting Chief Dispatcher's rate."

Petitioner wrote to Carrier on October 27, 1961 and in referring to Rule 16 and the 261 divisor said that "this method of payment has been used for many years and its validity thereby assured . . ." Carrier replied only that the practice was erroneous, in contravention of the agreement and without authority.

Rule 16 in the Agreement effective September 1, 1949 is clear and unambiguous. It clearly means that whenever a train dispatcher relieves a chief dispatcher, for whatever reason, he is paid a daily rate based on the chief dispatcher's monthly rate less $2.80 times 12 and divided by 261. This is further supported by Carrier's recognition and practice on the basis of this formula for about ten years prior to the time this claim arose.

It is true that the Agreement does not cover wage rates or working conditions of Chief Dispatchers. They are generally outside the Scope of that Agreement. We have held, however, that only the occupant of the position of Chief Dispatcher is excepted and that Train Dispatchers relieving him, for any reason, are entitled to all the benefits of the Agreement and to the Chief Dispatcher's monthly rate. Awards 5371 (Elson), 5904 (Daugherty) and others. In the Agreement involved in Awards 5371 and 5904 the Scope Rule read:

> "The term Train Dispatcher as hereinafter used shall be understood to include Trick, Relief and Extra Dispatchers only."

The language is almost verbatim with the Scope Rule in the Agreement before us.

In a complex work operation of train dispatching, it is a common practice for Train Dispatchers to relieve Chief Dispatchers on their days of rest, when they are ill, on leave of absence and on vacation. The Agreement contemplates this by providing in Rule 16 how Train Dispatchers shall be paid when they so relieve a Chief Dispatcher. It is not reasonable to say that when they so relieve a Chief Dispatcher they are no longer covered by the Agreement. If we consistently held that way, we would be upsetting a normal and reasonable arrangement and practice. We would further ignore contract rights to which covered employes are entitled. It is not our function to deprive covered employes of rights and privileges contracted for them by their certified representative. It is, rather, our responsibility to examine the total Agreement and apply the facts thereto.

On the basis of the valid Agreements and all of the relevant facts in the record we conclude that Claimant is entitled to be compensated as claimed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are re-

spectively 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 is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1963.