

Award No. 12232
Docket No. TD-14155

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

BOSTON AND MAINE RAILROAD

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

(a) The Boston and Main Railroad, (hereinafter referred to as "the Carrier"), violated the effective schedule agreement between the parties, Article 4 (a) thereof in particular, by its action in failing to compensate Extra Train Dispatcher D. J. Manson in accordance with the terms of said rule for services performed on July 16 and 17, 1962.

(b) The Carrier be required to compensate Claimant Manson at time and one-half rate instead of at the pro rata rate paid for services performed on the dates specified in paragraph (a) hereof.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, effective May 1, 1950, copy of which is on file with your Honorable Board and by this reference the same is incorporated into this Submission the same as though fully set out herein. The said Agreement has been amended from time to time in respect to certain agreement rules, said amendments being captioned as "Decision TD", consecutively numbered, and said amendments are likewise incorporated herein by reference.

For the ready reference of the Board the Agreement rules material to the instant claim, or referred to in the record thereof, are here quoted:

"ARTICLE 4 (a) SERVICE ON REST DAYS
(Agreement effective May 1, 1950)

Each regularly assigned Train Dispatcher (and extra Dispatchers who perform five days dispatching service in one week) will be allowed and required to take two (2) days off per week as rest days, except when unavoidable emergency prevents furnishing relief. Such assigned rest days shall be consecutive to the fullest extent possible. Nonconsecutive rest days may be assigned only in instances where

The agreement of May 1, 1950, and supplements thereto are on file with the Board and by reference are made a part of the record.

POSITION OF CARRIER: The Petitioner takes the position that a regular or extra dispatcher must be "allowed and required" to take two rest days weekly. And, if not "allowed" his two rest days, the Railroad is liable for overtime rates, the Petitioner basing its position on Article 4 (a) reading in part:

"Extra Train Dispatchers who are required to work as Train Dispatchers in excess of five (5) consecutive days shall be paid time and one-half times the basic straight time worked of the position filled for work on either or both the sixth or seventh days . . ."
(Emphasis ours.)

However, the Railroad did not "require" the claimant to work the two claim dates, the claimant had the option of laying off on the two dates, or working. He elected the latter. See Carrier's Exhibit A, attached. Having moved by "exercising seniority", "rest days" do not apply. Article 4 (b) reads in part:

"These definitions of the term 'rest days' will not apply in case of transfers due to Train Dispatchers exercising seniority."

The Board has already ruled in like circumstances that when the Railroad did not "require" an individual to do something, that the rule is inapplicable. See Third Division Award 8262. The Board has ruled in numerous other awards that in the exercise of seniority in transferring from one assignment to another straight time rates prevail.

In summary, the claimant exercised his seniority to the position. He was not required to transfer. He was allowed straight time rates, which is the maximum allowance under the Rules.

Claim is without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: D. J. Manson, an Extra Train Dispatcher, covered a temporary vacancy for a period of five days from Wednesday, July 11, 1962, to Sunday, July 15, 1962. After completing the assignment, he performed a service upon another temporary vacancy on Monday and Tuesday, July 16 and 17. He makes claim based on Article 4 (a) for payment on a time and one-half rate for Monday and Tuesday, July 16 and 17, instead of the straight time pay awarded him.

Carrier argues that Claimant was not required to work in excess of five consecutive days. It maintains that since he exercised seniority under Rule TD-8 in working on the sixth and seventh day, the time and one-half rate of Article 4 (a) is not applicable. It submits that the pertinent rule is Article 4 (b) because the term "rest days" does not apply in case of transfers due to Dispatchers exercising seniority. It also urges that the term "Train Dispatcher" in Article 4 (b) includes "Extra Dispatchers," for Article 1 (a) of the Scope lists Extra Dispatchers in its definition of employees to be encompassed in the term "Train Dispatcher."

We reject the application of Rule TD-8 and Article 4 (b) because they refer to regularly assigned Train Dispatchers and their seniority and rest days, whereas this dispute concerns an Extra Train Dispatcher. Since Article 4 (a) specifically relates to Extra Train Dispatchers, it is expressly in point to the issue in preference to the Scope and other cited rules.

Carrier emphasizes that because it did not require Claimant to work on the sixth and seventh consecutive days, he was not eligible for time and one-half pay under Article 4 (a) which in part states:

“... Extra Train Dispatchers who are required to work as Train Dispatchers in excess of five (5) consecutive days shall be paid time and one-half times the basic straight time worked of the position filled for work on either or both the sixth or seventh days, . . .”

Consideration, however, must be given to the additional clause which completes this sentence of the rule, . . . “but shall not have the right to claim work on such sixth or seventh days.” It is apparent from this entire sentence that Extra Train Dispatchers do not have the prerogative to make the choice which Carrier maintains Claimant exercised by seniority on July 16 and 17. Extra Dispatchers are not entitled to rest days unless they work five consecutive days. The decision to work on the sixth and seventh consecutive days rests not with the employee but with Carrier. If Carrier requires this employee's services on those days, the rule provides that he be awarded payment at time and one-half rate for his work. Award 8998, in reference to a rule similar to 4 (a) referred to in the instant case, confirms our position, for it denied the right of unassigned Train Dispatchers to claim work on the sixth and seventh consecutive day.

We hold that since Carrier permitted Claimant to work on the sixth and seventh consecutive days, he is entitled to be paid at time and one-half rate in accordance with Article 4 (a).

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 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 Agreement of the parties was violated.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1964.

**CARRIER MEMBERS' DISSENT TO AWARD 12232
DOCKET TD-14155**

The Majority asserts

"We reject the application of Rule TD-8 and Article 4(b) because they refer to regularly assigned Train Dispatchers and their seniority and rest days, whereas this dispute concerns an Extra Train Dispatcher. * * *"

Let us judge the decision by the correctness and accuracy of the foregoing statement. Article 4(b), which the Referee says refers "to regularly assigned Train Dispatchers" contains the following provision which the Carrier relied upon to prove that extra Train Dispatchers would not be paid overtime on the sixth and seventh days when they exercised seniority:

"* * * These definitions of the term 'rest days' will not apply in case of transfers due to Train Dispatchers exercising seniority."

The issue posed was whether the term "Train Dispatchers" as used above applied only to "regularly assigned Train Dispatchers" or to "extra Train Dispatchers" as well. The Carrier's proof was indisputable. It offered Article 1(a) of the Scope Rule, which reads:

"The term 'Train Dispatcher' as hereinafter used shall be understood to include Assistant Chief Dispatchers, Trick Dispatchers, Relief Dispatchers, and Extra Dispatchers, as these terms are defined in Section (b) of this Article." (Emphasis ours.)

There we have the case. The Referee now tells the parties they did not include extra Train Dispatchers in the term "Train Dispatchers" when the rule explicitly said they did. This decision makes a sham of the parties' contract when the definition of "Train Dispatcher" is ignored.

Award 8998, cited by the Majority, has no relevancy to this dispute, and certainly does not "confirm" their position. There were no rules involved there similar to Article 4(b) or Article 1(a) of the contract involved here. The Majority's failure to comprehend or give consideration to this fact, accounts for the erroneous decision rendered.

For the foregoing reasons, among others, we dissent.

**W. F. Euker
R. E. Black
R. A. DeRossett
G. L. Naylor
W. M. Roberts**

**LABOR MEMBER'S REPLY TO CARRIER MEMBERS'
DISSENT TO AWARD 12232, DOCKET TD-14155**

The dissent registered herein by the Carrier Members is but one more of numerous instances of their resort to dubious intellectual deportment in an obvious attempt to becloud and confuse.

Award 12232 correctly points out that Article 4 (a) of the Agreement applies to extra train dispatchers, whereas Article 4 (b) relates to regularly assigned train dispatchers. The dissenters refrain from pointing out, if indeed they understand, that the definition of the term "rest days" to which the dissent refers has no application whatsoever to extra train dispatchers either in the Agreement here involved or in any other agreement in which that nationally negotiated rule appears. The rhetorical effort of the dissenters amounts to nothing more than citing scripture—but only such parts thereof as they wish to select—to achieve their obvious purpose.

R. H. Hack