Award No. 14174
Docket No. TD-15509

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ERIE-LACKAWANNA RAILROAD COMPANY

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

(a) The Erie-Lackawanna Railroad Company, (hereinafter referred to as "the Carrier"), violated the effective schedule Agreement between the parties, Article 3, and Article 6 (formerly Article 5) thereof in particular, by its action in failing to fill the first trick position of Assistant Chief Dispatcher in the then existing Huntington, Indiana, train dispatching office on June 12, 13, 14, 17 and 18, 1963, as a result of which the individual Claimants named in paragraph (b) hereof were deprived of service which they were entitled to and should have been used to perform.

(b) The Carrier be required to compensate the individual Claimants herein named at the time and one-half rate of Assistant Chief Dispatcher because of being deprived of their right to perform the service herein referred to and for which each of them was available while observing their assigned weekly rest days:

R. L. Casper	June 12, 18, 1963
W. E. Coffman	June 13, 14, 1963
P. E. Michael	June 17, 1963

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties, copy of which is on file with this Board, and the same is made a part hereof the same as though fully set out herein.

For the Board's ready reference, Articles 3 and 6 of the Agreement are here quoted in pertinent part:

"ARTICLE 3

"Under all those circumstances, and since facts and Agreements in the cases relied on by the Association are materially different from those now before us, it is our conclusion that this claim must be denied."

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"The Organization cites no specific provision whereby the Carrier is obligated to completely fill the shift temporarily vacated by illness of the regular employees. Further, it offers no evidence to show that the past practice has always been the filling of such vacancies as asserted. On the other hand, Carrier has cited awards, including 934 and 1412, which interpret provisions similar to the provisions in this Agreement which hold that the Carrier is not obligated to fill such vacancies."

With Petitioner's entire argument in this dispute having been that under the provisions of Articles 3 and 6 a "guarantee" exists that the involved position be filled the five days claimed, and with Carrier having shown that no such "guarantee" eixsts either under agreement rules or practice, Carrier submits that the foregoing awards also dictate a denial decision in this dispute.

Without detraction from or prejudice to the foregoing, concerning claim for five days at time and one half, this Board has enunciated in over two hundred different awards that the right to perform work is not the equivalent of work performed insofar as the overtime rules of an agreement are concerned. And, that the one making a claim for time and one half for allegedly being deprived of work, has not done that which makes the higher rate applicable. With this principle so often pronounced by this Board, Carrier does not deem it necessary to say any further in this respect, except to repeat that this claim is without merit in any event.

Based upon the facts and authorities cited, Carrier submits that this claim is completely lacking in rules support and should be denied.

OPINION OF BOARD: The regular First Trick Assistant Chief Dispatcher was ill and absent from work from June 12 through June 18, 1963. June 15 and 16 were his regularly assigned rest days and the regular relief dispatcher worked his scheduled hours on those days. All of the other days were blanked.

The issue is whether the Carrier had the right to blank the position for the days the regular occupant was absent because of illness and whether the position was actually blanked on those days.

It is the Employe's position that since this was a seven day position (five days for the regular assigned employe and two days for the regular relief employe) it must be filled on each day. Once a position is established in conformity with the Agreement, it may only be abolished in accordance with the terms of that Agreement. Further, that the work of the absent employe was actually performed on those days.

Carrier argues that, in the absence of a specific prohibition, it has "an absolute right to blank an assigned position". There is no such restrictive rule in the Agreement.

There is no rule in the Agreement restricting the blanking of a position. Article 8(c) is not applicable because it provides for notice to an employe

and the General Chairman whenever changes in residence are required because of consolidations or changes in dispatching territory, and in the event of a force reduction. Neither of the two elements is present in this case. Carrier did not change the employe's residence, nor was there a force reduction in the sense intended in said rule. The incumbent employe's position continued to exist. He was not furloughed. He was voluntarily absent because of illness.

There is no unanimity in the Awards of this Board dealing with the right of a Carrier to blank a position in the absence of a contract prohibition. Both parties have cited Awards purporting to sustain their respective positions. One thing should be made clear. There is distinction between a position blanked by the affirmative act of a Carrier in the absence of circumstances brought about by the incumbent employe, and the blanking of a position because such employe is voluntarily absent from work. Nonetheless we are not required to rule on this issue.

A position is blanked when no one performs the work regularly assigned to the absent employe. Work assigned to the absent employe was performed on the days in question by the trick dispatcher and by the Chief Train Dispatcher in addition to the duties which they regularly performed. Carrier, for efficiency or other reasons must have felt the need for an Assistant Chief Train Dispatcher on the First Trick. Carrier alone had the exclusive right to create that position. Certainly, the employe assigned to that position was expected to perform work during his assigned hours. The mere fact that the Chief Train Dispatcher was his supervisor is not evidence that the work of the incumbent employe had disappeared. In fact the record shows that the work "was covered and protected by the first trick dispatcher and chief dispatcher". The position was not actually blanked.

Only the appropriate penalty remains to be considered. We recognize that there are a divergence of holdings. A preponderance of the Awards hold, however, that claimants should receive pro-rata rather than time and one-half for the hours involved. We affirm the ruling of those Awards.

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 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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.