Award No. 15590
Docket No. TD-16384

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don J. Harr, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

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

(a) The Southern Pacific Company (Pacific Lines) hereinafter referred to as "the Carrier," violated the existing schedule Agreement between the parties, Article 8, Section (b) thereof in particular, by its action in dismissing Train Dispatcher D. J. Biggs from Carrier's service on April 28, 1966, following hearing held on April 19, 1966 for alleged violation of Operating Rule 810, which hearing failed to establish the alleged rules violation.

(b) The Carrier shall now be required to reinstate Claimant D. J. Biggs to service with all rights unimpaired, clear his employment record of the charge which provided basis for Carrier's action and compensate him for loss of compensation from date of dismissal until restored to service.

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

Article 8, Section (b) of the Agreement, here particularly involved, is hereby quoted in full:

"ARTICLE 8.

Section (b). Discipline. A train dispatcher who has been in the service as such more than ninety (90) days or whose application for employment has been approved, shall not be disciplined or dismissed without a fair and impartial hearing as provided in the following sections."

Following Sections of Article 8 pertinent to Section (b) are here also quoted in full for ready reference:

"Section (c). Hearings. When charged with an offense likely to result in disciplinary action, he shall be advised in writing of the precise charge at the time notified of such hearing, which shall be

OPINION OF BOARD: On March 26, 1966, the regular third-trick dispatcher of the Lathrop District telephoned that he was sick and could not work his shift at 11:59 P. M. The Assistant Chief Dispatcher attempted to reach Claimant at the two telephone numbers on file in the office. Extra train dispatcher Querman was used to fill the vacancy when Claimant could not be located.

Claimant was notified to appear for hearing on a charge of "failure to be available for call at your usual calling place . . . which may involve a violation of Rule 810."

Rule 810 reads:

> "810. Employes must not engage in other business without permission of the proper officer. They must not absent themselves from their employment without proper authority. They must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty.
>
> An employe subject to call for duty must not absent himself from his usual calling place without notice to those required to call him."

The Claimant was found guilty of violating Rule 810 and dismissed from service. The claim was appealed and the appeal was denied by Carrier.

There is testimony in the transcript that the Claimant felt he was obligated to protect this position. It is apparent from a review of the transcript of the hearing that the Claimant was confused and unsure of his position.

We must look to the Agreement rules. Article 3, Section (b) reads:

> "ARTICLE 3.
>
> Section (b). Work on Rest Days. An assigned train dispatcher required to perform service on the rest days assigned to his position shall be paid at the rate of time and one-half for service performed on either or both of such rest days. An extra train dispatcher who is required to work as a train dispatcher in excess of five (5) consecutive days shall be paid one and one-half times the basic straight time rate for work on either or both the sixth or seventh days but shall not have the right to claim work on such sixth or seventh days."

Award 15407 (Lynch) interpreted an identical rule. This Award states:

> "Extra train dispatchers who are **required** to work as train dispatcher in excess of five (5) consecutive days shall be paid . . . but shall not have the right to claim work on such **sixth** or **seventh** days." (Emphasis ours.)
>
> The agreement makes no exceptions on this point. Neither can we."

During the six day period preceding Saturday, March 26th, Claimant had worked as a train dispatcher on five successive days. It is clear from the agreement that Claimant had no right to claim the work on the date in question. As a result of Article 3, Section (b) and its interpretation, Claimant was not required to protect the position on the 26th.

We have ruled on many occasions that agreement rules prevail over operating rules when there is a conflict. Here the agreement prevails over operating Rule 810.

We believe that the statements made by the Claimant at his hearing have no bearing on this case. The Agreement, Article 3, Section (b) is clear and unambiguous. The individual employe has no right to interpret the agreement.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May, 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15590, DOCKET TD-16384 (Referee Harr)

The Award sustains the claim solely and expressly on the absurd conclusion that Article 3, Section (b), which prescribes the specific rate of pay Carrier shall allow extra dispatchers for services performed on a sixth or seventh day, impliedly prohibits Carrier from requiring such dispatchers to notify Carrier when they are going to be absent from their usual calling places on a sixth or seventh day. (Carrier's Operating Rule 810, as interpreted by Carrier, requires such notice — see Awards 2919, 8833, 12991, among others, on Carrier's right and duty to make, interpret and enforce operating rules.)

No question of inconsistency between the notice requirement in Rule 810 and the provisions of Article 3, Section (b) was submitted to this Board, as required by law. In their handling on the property, and in their submission to this Board, the Employes did not assert that there was inconsistency and conflict between these two rules or that Rule 810 was superseded in any way by Article 3 (b). To the contrary, the Employes frankly and unqualifiedly stipulated that they were obligated to comply with Carrier's rules, and of course Rule 810 was the rule under discussion. In their rebuttal they stated:

> "There has been no intent on the part of the Organization's representatives, at any time, to as much as suggest that train dispatchers are not subject to observance of all of the Carrier's rules. It would be little short of asinine to urge any such view . . ."

The Employes sought a sustaining award in this case on two broad grounds: (1) Carrier had a practice of not requiring train dispatchers to be available for calls and did not consider them in violation of Rule 810 when they were not available on the sixth or seventh day; and (2) Carrier did not make a sufficient attempt to call Claimant. (See the fifth and tenth paragraphs of "Position of Employes" for their clear statement of their position.) No other issue was handled on the property and submitted to this Board.

The Board's jurisdiction is limited to the determination of the two issues properly submitted. It has no jurisdiction to bypass the issues the parties have framed in the record and base the decision on a finding that Article 3, Section (b) implies some absurd restriction which the parties themselves did not find there.

We have no jurisdiction over any issue that has not been handled on the property in the usual manner and submitted to us in accordance with the law. Section 3 First (i) of the Railway Labor Act and Awards 15562, 13741, 13664, 12646, 11908, 11252.

Turning now to the absurdity of the conclusion that there is conflict between Rule 810 and Article 3, Section (b), our records establish that not only Carrier, but the petitioning organization itself and this Board have all consistently recognized that Carrier has a perfect right to call extra dispatchers for serivce on the sixth or seventh day under a rule such as Article 3, Section (b). With reference to such a rule, Petitioner stated its position this way in Position of Employes, recent **Award 12232:**

> "The provisions of Article 4 (a) [same as Art. 3, Section (b)] are clear and unambiguous. Insofar as extra dispatchers are concerned the rule makes it abundantly clear that:
>
> (a) Extra train dispatchers who perform five consecutive days train dispatcher service in one week will be allowed and required to take two days off as rest days, that
>
> (b) **Extra train dispatchers may, nevertheless, be required to work in excess of five consecutive days,** that (Emphasis ours.)

(c) If extra train dispatchers work in excess of five consecutive days (except in the course of exercising seniority rights under Agreement rules) they are to be compensated at time and one-half rate of the position worked for either or both the sixth or seventh days, and

(d) Extra train dispatchers 'shall not have the right to claim work on such sixth or seventh days.' "

In disposing of that claim, the Board ruled:

AWARD 12232 (Engelstein)

". . . **The decision to work on the sixth and seventh days rests not with the employe but with Carrier.** If Carrier requires this employe's services on those days, the rule provides that he be awarded payment at time and one-half rate for his work . . ." (Emphasis ours.)

Certainly, where the rule in question [Article 3, Section (b)] contemplates that Carrier will from time to time require extra employes to work on the sixth and seventh days and expressly provides the rate of pay for work on such days, it is absurd to say that this same rule impliedly prohibits Carrier from taking the necessary precaution of requiring such employes to give Carrier notice when they are going to leave their calling place and thereby make themselves unavailable for service on such days.

We are not here concerned with any requirement that Claimant must stand by or "hold himself available for call" (Compare Awards 13935 and 10846); rather, the simple question here concerns a deliberate failure to give notice of absence from usual calling place and nothing more. The portion of Rule 810 which Claimant violated reads:

"An employe subject to call for duty must not absent himself from his usual calling place without notice to those required to call him."

There is no contention that Carrier has withheld permission to be absent in the circumstances of this case when a proper notice has been given. Having failed to give the required notice, Claimant was obligated to remain in contact with his calling place so that a call could reach him.

We know of no case before this Division where the Employes have openly taken the position that an employe who is enjoying a rest or lay-over period and hence has no right to claim work during the period cannot be required to comply with the notice requirements of a rule such as Rule 810. Such an arbitrary position was taken by Operating Employes assigned to regular runs and hence not in extra service in **First Division Award 13524,** and that Board ruled:

"We find nothing inherently unreasonable in the requirements of Rule 700 or 704 and we think **Carriers are entitled to information as to where operating employes can be reached during layovers in their assignment in case extra service is required. Particularly so where there is no rule of the agreement prohibiting assigned employes from performing extra service.** There is no allegation here that Carrier arbitrarily, capriciously or discriminatorily withheld permission to leave the vicinity under the rules mentioned." (Emphasis ours.)

The same question was subsequently presented in **First Division Award 15209** where the claimant had been dismissed from the service, and it was summarily disposed of by quoting Award 13524 with unqualified approval.

In the instant case, Claimant was in extra service, and no rule prohibited using him on the date involved; to the contrary, Article 3, Section (b), which this Award finds to be controlling, expressly recognizes that Carrier may require extra dispatchers to perform service on the sixth and seventh days, and all of our Awards construing that and similar rules recognize that Carrier has this right.

The foregoing First Division Awards recognizing a right in Carrier to require employes to give notice of their whereabouts during periods when they would normally rest, as long as the agreement does not prohibit Carrier from using them, are entirely consistent with the universal rule that Carrier's prerogatives are unlimited except as restricted by law or agreement. **We know of no Award of this or any other Board which holds that an employe who is subject to being required to work cannot be required to give Carrier notice of his whereabouts or of his absence from his usual calling place merely because he is not the employe who is entitled to claim the work under the agreement. The finding that Carrier does not have that right in the instant case is both novel and anomalous. We know of no authority that supports such a finding. During the discussion of the claim in panel the Labor Member assured the Referee that there are many Awards and authorities which support this ruling, but as yet he has not cited a single one. It will be interesting to see whether in an answer to this dissent the Labor Member will come forward with some Awards and authorities that are pertinent to this point.**

Under the law, Carrier has an obligation to operate its trains efficiently and on time. In construing the agreement between a Carrier and its employes this Board is under a legal obligation to presume that the parties intended to assist rather than hinder the Carrier in discharging that legal obligation. The supply of dispatchers is necessarily limited. Any ruling that unreasonably hinders a Carrier in its efforts to keep in touch with extra dispatchers and call them when their services are required clearly violates public policy. Certainly, it is arbitrary and capricious for this Board to imply that there is such a restriction in Article 3, Section (b) when the parties themselves did not allege it was there.

The provisions in the law making Awards of this Board final and binding do not empower the Board to validly make a finding or an Award that is not supported by any relevant evidence. Both the Federal Courts and the Congress have noted that Awards which have no foundation in reason or fact are not valid and should not be enforced by the Courts. **Barnett v. Pennsylvania-Reading Seashore Lines**, 145 F. Supp. 731, affirmed 245 F. 2d 579. **Gunther v. San Diego & Ariz. E. Ry.**, 382 U. S. 257 (1965). Report No. 1201 of Committee on Labor and Public Welfare, U. S. Senate, dated June 2, 1966, in connection with bill (H. R. 706) to amend the Railway Labor Act.

An attempt to resolve a case at this appellate level on a basis that not only differs from but is contradictory to the positions taken by both parties in the record will often lead to an absurd result such as that reached in this Award. In the end, both sides will suffer from such procedure, and that is the reason the law does not permit it.

We dissent.

G .L. Naylor
R. E. Black
T. F. Strunck
P. C. Carter
G. C. White

LABOR MEMBER'S ANSWER TO CARRIER MEMBER'S DISSENT TO AWARD 15590 (Docket TD-16384)

Were it not for the fact that what is being fobbed off on this Board as a "dissent" in Docket TD-16384, Award 15590, is over-generously seasoned with distortion and inaccuracy, the invitation of its author for a response thereto would be accorded the eloquently silent contempt which such diatribes so obviously deserve.

Like a latter-day Don Quixote, the author of the so-called "dissent" rides off in all directions, thundering like a parish elocutionist, and evidencing an incredible disregard for the issue presented by the docket — simply that the Carrier failed to meet the burden of proof imposed upon it as an indispensable prerequisite to imposition of discipline upon the individual claimant — in this instance economic capital punishment. Instead, what is captioned as a "dissent" is given over to an attempt to reargue a record which the apparent author of the "dissent" had already twice argued to the Referee. The "dissent" is a somewhat sonorous if not sniveling Blackstonian discourse which may be intended to impress those who its author may patronizingly regard as less informed in the complex field of jurisprudence.

This response will not be in kind. Nor will it attempt to equal or outdo in length or excel in apparent legalistic erudition.

Conceding that the author of the somewhat ostentatious opus has a right to his own opinions, this respondent does not deem it inappropriate to suggest that no one has a right to be wrong in his facts.

At page 4 it is erroneously asserted that during the panel argument:

> ". . . the Labor Member assured the Referee that there were many Awards and authorities which support this ruling . . ."

This Labor Member said no such thing! What he did say was that an employe, on his rest day, is not required to sit by the telephone waiting for a call in the event the Carrier **might** need his services.

In the last paragraph at page 4, it is said that:

> ". . . Both the Federal Courts and the Congress have noted that Awards which have no foundation in reason or fact are not valid and should not be enforced by the courts . . ."

Barnett v. Pennsylvania-Reading Seashore Lines and Gunther v. San Diego & Arizona Eastern (the latter a landmark U. S. Supreme Court decision) are cited as authority. No such issue was involved in either of these decisions, and a review of both of them fails to even disclose any dicta, much less an express holding, as is alleged by the apparent author of the dyspeptic diatribe here the subject of comment.

More extended comment with respect to other distortions and inaccuracies would serve no useful purpose.

The apparent author of the "dissent," presumably at least, is quite well aware of the established principle, that in disputes such as that here in

reference the entire agreement is before the Board. Indeed, the Carrier Members of this Division have more than once called attention to this point in their over-generous and gaseous dissents. Attention is directed to what the Carrier Members had to say, with citation of authority, in their dissent in Award 8484:

> "Agreements between the parties are before us in their entirety for disposing of disputes presented to this Board. From the inception of this Board referees have properly not only accepted and given ocnsideration to additional arguments presented by Carrier or Labor Members, but at times have based their decisions on rules of Agreements as well as prior Awards of this Board, which were not, and notwithstanding that they were not, cited or argued to them by either side in submissions or otherwise."

The apparent author of the mis-named "dissent" would understandably disregard the fact that in his presentation of the claim disposed of by Award 15407, cited in the instant case as precedent, it was HE who contended, and the Referee agreed, that extra train dispatchers cannot have no right to, claim work on the sixth or seventh days. Here he urges that extra train dispatchers must make themselves available for work on such days.

This respondent is constrained to point out that some philosopher once observed that of all the various sorts of indigestion which may afflict one, among the worst is that sort which comes from eating one's own words! Further, this respondent would express the hope — vain though it may be — for fulfillment of that assurance in the Good Book "And the wind ceased and there was a great calm." For assuredly surcease from this sort of distorted, inaccurate and over-windy drivel is long overdue in the interests of the intended functioning of this Board.

George P. Kasamis
Labor Member

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