



Award Number 17772
Docket Number-TD-18267

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION
SEABOARD COAST LINE RAILROAD COMPANY

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

- (a) The Seaboard Coast Line Railroad Company, (hereinafter referred to as "the Carrier"), violated the effective agreement between the parties, Article IV (h) (1) paragraph 2, when on August 19, 20, and 21, 1968, it failed to require the senior **available extra train dispatcher to perform extra train dispatcher work** and instead required a junior extra train dispatcher to perform said extra work.
- (b) Because of this violation the Carrier shall now compensate the senior available extra train dispatcher R. G. Thigpen, (hereinafter referred to as "the Claimant"), for three days, August 19, 20, and 21, 1968, at the daily rate of trick train dispatcher.

EMPLOYEES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, a copy of which is on file with this Board. By this reference the said Agreement is incorporated into and made a part hereof, as though fully set out.

For the Board's ready reference Article IV(h) (1), the Agreement rule here particularly involved, is here quoted in full text:

"(h) EXTRA WORK

(1) Train dispatcher extra boards shall be established by the Company in each dispatching office. Train dispatchers who are not regularly assigned as such shall select the extra board of their choice by notifying the appropriate Division Superintendents, providing a copy thereof to the General Chairman and the involved Office Chairmen. A train dispatcher who is not regularly assigned and who fails to select an extra board of his choice will be considered as being assigned to the extra board attached to the office in which he last performed service as train dispatcher.

Extra train dispatchers placing themselves on the extra board of their choice, after having had a sufficient time to qualify, will be required to perform, in seniority order, all extra work for which available. Failure to perform extra train dispatcher service in accordance with this Article IV(h) will result in forfeiture of train dispatcher seniority in accordance with Article IV(g).

will show the specific absence of penalty provision requiring payment as claimed.

The make-whole payment, as was made here, is exactly in accordance with that previously accepted as precedent by the Organization. Attached hereto is copy of correspondence between your Organization and former Seaboard Air Line Railroad dealing with the same subject matter. Please note Mr. V. F. Williams', then General Chairman and now Vice President, statement reading:

'The current agreement was violated and extra dispatcher H. V. Frick is now entitled to the difference in what he earned as telegrapher on June 3, 1964, and what he would have earned had he been called in accordance with the current agreement to protect the third ~~trick~~ dispatcher's position Atlanta-Birmingham sub divisions on that date.'

with which we agreed when we allowed the claim. The now involved current agreement rules have not changed this interpretation. The fact that we made a subsequent erroneous payment in the claim of B. T. Phillips, January 12, 1968, at Tampa does not change the rules or interpretation thereof. In this respect your attention is invited to Third Division Denial Awards 4534 and 6773.

For the reasons stated in conference and elaborated on herein, the claim of Mr. Saturday is without merit and, therefore, it is declined."

The exchange of correspondence between former General Chairman Williams, from which is quoted a portion of the penultimate paragraph of the above-quoted letter, and former Seaboard Air Line Director of Personnel Duffer, dated September 5 and October 27, 1964, is attached hereto as Carrier's Exhibits "A" and "B".

(Exhibits Not Reproduced)

OPINION OF BOARD: The basic facts are not in dispute. Essentially, only the remedy is before this Board.

Although Claimant did not work as a train dispatcher on those dates, he was paid at the train dispatcher rate. And the Carrier advised him that he was so paid because there was no extra telegrapher to replace him as Clerk-Operator. Is then the Claimant entitled to eight (8) hours additional pay at the train dispatcher's rate for each of the dates in the claim? Employees' claim is in the nature of a penalty.

There are many awards of this and other Divisions which have sustained penalty claims for the violation of rules in the schedule agreement. And there are other awards which limited damages to actual monetary loss resulting directly from such a breach. The former sustained penalty damages on the theory that without such a penalty the Carrier is given a license to violate the agreement with impunity. The rights and privileges provided for in the collective bargaining agreement must be protected and if no damages are assessed the rules in the agreement could become meaningless. This is a valid principle frequently followed by the neutral member of this Board.

But not every contract violation per se justifies a penalty. In Award No. 14177 the Board, with this Referee, said that "Punitive damages may be assessed when it is shown that the Carrier has deliberately and mali-

ciously persisted in violating the Agreement, in spite of protests from employes and their representatives." There is no showing here that Carrier "has deliberately and maliciously persisted in violating the Agreement". There is no showing that the Employes ever complained or protested Carrier's handling of similar situations. On the contrary, one claim was settled on the property by paying the employe the difference between the dispatcher rate and the telegrapher rate. Here, also, the Carrier did not profit from the failure to assign Claimant to the temporary dispatcher vacancy. There is also no evidence of arbitrariness or favoritism in making the assignments. Under these circumstances the assessment of punitive damages is improper. Since Claimant was paid at the dispatcher's rate, he is entitled to no further compensation.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March 1970.