Award No. 18440
Docket No. TD-18814

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Melvin L. Rosenbloom, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC TRANSPORTATION COMPANY TEXAS AND LOUISIANA LINES

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

(a) The Southern Pacific Company — Texas and Louisiana Lines — (hereinafter "the Carrier") violated the effective Agreement between the parties, Rules 21 & 6 thereof in particular, by its failure and declination to compensate Train Dispatcher E. E. Manofsky at the time and one-half rate of his position for service performed June 13, 20, 27 and July 4, 1969.

(b) Carrier shall now additionally compensate Claimant Manofsky for the difference between the time and one-half rate he was paid and the time and one-half rate to which he was entitled for rest day service performed on June 13, 20, 27 and July 4, 1969.

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 incorporated into this Ex Parte Submission as though fully set out herein.

For the Board's ready reference, Rule 6 and Rule 21 of said Agreement, effective May 1, 1967, are here quoted in full text:

"RULE 6.

Each regularly assigned train dispatcher will be entitled and required to take two (2) regularly assigned 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. Non-consecutive rest days may be assigned only in instances where consecutive rest days would necessitate working any train dispatcher in excess of five (5) days per week.

Regularly assigned train dispatchers who are required to perform service on the rest days assigned to their positions will be paid at the rate of time and one-half for service performed on either or both of such rest days.

Under date of September 2, 1969, Office Chairman H. L. Roger addressed an appeal to the Superintendent of Transportation and under date of September 4, 1969, Mr. J. E. Adams, Carrier's Superintendent of Transportation denied the claim stating in pertinent part as follows:

> "Chief dispatcher Manofsky was on his days off on these dates and vacancy occurred and since there was no extra man available or regular dispacther working on this district available, E. E. Manofsky was called for the trick dispatchers work in line with his seniority and elected to fill the vacancy as trick dispatcher on position No. 36.
>
> Mr. Manofsky was not required to perform the service as he certainly had the prerogative of declining in which case next senior dispatcher would have been called."

Conference was subsequently held between the Superintendent of Transportation and the Office Chairman on September 11, 1969 and the Superintendent of Transportation declined the claim in writing on the same date.

On October 25, 1969 the then General Chairman, Pat Cain, appealed the decision to Mr. J. D. Davis, Carrier's Manager of Labor Relations, and by him denied under date of November 12, 1969. Conference was subsequently held on December 8, 1969 and by letter of the same date Carrier's Manager of Labor Relations confirmed his denial.

General Chairman Elect, H. L. Roger, advised the Manager of Labor Relations that his decision was not acceptable and that the matter was being referred to the President of the Claimant Organization for further handling.

All data and contentions herein set out have been the subject of discussion and/or correspondence between the parties or are known and available to the Carrier and therefore made a part of this dispute.

CARRIER'S STATEMENT OF FACTS: The claimant, Mr. E. E. Manofsky, held a regular assignment as Chief Dispatcher, Position No. 9, in the Central Dispatching Office, Houston, Texas on each date of claims. Assignment No. 9 works 12:01 A. M. to 8:01 A. M., off days Fridays and Saturdays. The rate of this position in June, 1969 was $929.01 per month, and a daily rate of $42.7130; in July, 1969, rate was $959.88 per month, daily rate $43.9943.

On each date of claim, a vacancy existed for a trick train dispatcher, Position No. 36, on the El Paso-Sanderson District, 12:01 A. M. to 8:01 A. M. The rate of pay of this trick train dispatcher position in June, 1969, was $840.64 per month, $38.6501 per day, and in July, 1969, $865.86 per month, and $39.8096 per day. Each date of claim fell on a Friday, the first rest day of Claimant Manofsky. There is no question as to whether or not Manofsky was properly used on the assignment, and the only issue in this case is whether Manofsky should have been paid time and one-half rate at Chief Dispatcher's rate as claimed, or, time and one-half rate at Trick Dispatcher's rate, as allowed.

This case has been handled in the usual manner, including conferences, and is now properly before this Board for decision.

OPINION OF BOARD: Claimant is a Third Trick Chief Dispatcher, Position No. 9, regular rest days Friday and Saturday. On each of the claim

dates (four consecutive Fridays) a vacancy existed for a third trick train dispatcher, Position No. 36. Since there was no extra man available on those dates, Claimant was offered work in the vacant position in accordance with his seniority pursuant to an agreement between the parties dated August 22, 1963, which provides in material part:

> " * * * If such incumbent does not desire to perform service on his rest days under this agreement, the work will then be offered to other regularly assigned dispatchers on the dispatching districts, in seniority order, who are on their rest days * * * "

Claimant was paid time and one-half the rate applicable to Position No. 36 for the time he worked in that position. Claimant's regular position carries a rate more than ten percent greater than the rate of Position No. 36.

Claimant contends that he should have been paid time and one-half his regular rate of pay for the time he worked in Position No. 36. He asserts that, in paying him at the lesser train dispatcher's rate, the Carrier violated the Agreement, the relevant portions of which provide:

Rule 6

> Each regularly assigned train dispatcher will be entitled and required to take two (2) regularly assigned days off per week as rest days * * *
>
> Regularly assigned train dispatchers who are required to perform service on the rest days assigned to their positions will be paid at the rate of time and one-half for service performed on either or both of such rest days.
>
> Extra train dispatchers who are 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 * * *

Rule 21

> Assigned train dispatchers required to work on lower rated assignments will receive the same rate of pay as if working their regular assignment.
>
> When positions of chief and/or assistant chief are consolidated with trick train dispatcher positions, the consolidated position shall carry the wage rate of the higher rated of the two positions.

The Carrier defends the method of payment to Claimant for the days involved on the ground that Claimant was not "required" to work on his rest days but did so strictly as a volunteer. It follows, Carrier argues, that in volunteering for the work, Claimant must be deemed to have accepted the rate applicable to the work. We find no merit in Carrier's contentions.

We do not accept the theory that the word "required" as used in the above-quoted rules was intended to restrict the application of those rules to situations in which an employe is ordered to perform an assignment contrary

to or without regard to the employe's desire. Nor do we believe that Carrier truly holds that view even though it argues for it herein. The fact is that Carrier paid Claimant a penalty rate (time and one-half) for the time he worked Position No. 36. The Carrier did so presumably pursuant to Rule 6, which is the only provision in the Agreement relating to compensation for work on rest days. Rule 6 prescribes the payment of the penalty rate only to dispatchers "required" to work on rest days. Since Carrier paid Claimant a penalty rate for the work he did on his rest days even though Claimant was not compelled to work those days, Carrier is in effect conceding that the word "required" as it is used in Rule 6 is not intended to confine the coverage of the rule to employes who work on rest days only because they are ordered to do so.

Moreover, the circumstances of this case do not allow us to accept the argument of Carrier that Claimant was a mere volunteer for the work in question. The parties are in accord that the Agreement of August 22, 1963, gave Claimant the right to claim work on positions other than his own on his rest days. Specifically, Claimant had a right to work Position No. 36 and the fact that he could have declined the work does not detract from this right. In other words, Carrier was required to assign this work to Claimant. The situation is no different than if Carrier had been required to assign Claimant work on his own position on his rest day. In both cases, Claimant's rights are linked to and exercisable only on the rest days assigned to his own position and for that reason the basis of compensation must be determined under that portion of the contract dealing with work on rest days by regularly assigned employes. Rules 6 and 21 govern and clearly manifest an intention of the parties that regularly assigned employes will be paid for work on rest days at time and one-half their regular rate. If the parties had intended some other rate to apply they could have and should have done so in the Agreement of August 22, 1963, which deals explicitly with and provides for the contingency of an assigned employe working a position other than his own on his regular rest day. The parties did not see fit, however, to make such a differentiation.

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

The Carrier violated Rules 6 and 21 of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of March 1971.

CARRIER MEMBERS' DISSENT TO AWARD 18440, DOCKET TD-18814
(Referee Rosenbloom)

The Referee in this case has strangely insisted on imputing controlling significance to Rule 6 of the agreement in spite of the fact that Rule 6 was never cited in the claim letter and appeal letters which the Employes submitted to Carrier in handling on the property. Neither was it cited by Carrier in its letters on the property. In his first proposed award the Referee said "Rule 6 governs" and predicated the award on his own notions of the implications of such an overtime rule. In a subsequent panel discussion it was disclosed that the Referee's notions regarding the implications of an overtime rule were predicated largely on the overtime rule applicable to government employes -- a specific rule that is foreign to this record and irrelevant to the agreement rights of these parties.

The Referee's attention was again directed to the fact that in their claim letter and appeal letters on the property the Employes cited and relied solely on Rule 21; and the only issue framed on the property, hence the only issue that could properly be before us, was whether, under the particular facts of this case, Claimant was actually "required" to work the lower rated position on the claim dates.

The Referee thereafter drafted a revised proposal and the latter was adopted as Award 18440 by a sustaining vote of the Referee and Labor Members. In the next to last paragraph of the Opinion in this award the Referee again attempts to support the claim by using Rule 6 as a crutch and by using it in a way that is foreign to the case before us. The record contains not a single word of explanation for Carrier's action in allowing the time and one-half rate instead of the straight time rate; and the Referee's presumption that it was solely because of the provisions of Rule 6 and an interpretation which Carrier placed on the word "required" in that rule is sheer surmise and conjecture on the part of the Referee. Had there been any basis in fact for the fine spun argument regarding Carrier's own interpretation of the word "required" in Rule 6, we have no doubt that such argument would have been made by the very capable labor representatives who have handled the case. Their complete silence on the subject convinces us that the argument is entirely spurious. In any event, we are confined to the record before us and are not at liberty to base our decision on our own speculation and conjecture.

The last paragraph of the Opinion in this award leaves some doubt in our mind as to whether the Referee has ruled that Claimant was in fact "required" to work, as the Employes alleged, or whether he has ruled the word "required" in Rule 21 is not to be given its usual meaning. In either case, he is clearly wrong.

Carrier has taken the position throughout that Claimant was not in fact required to work on the claim dates and that junior men who were qualified were available. The Employes have clearly summarized their position on the last page of their rebuttal as follows:

> "Carrier implies that Claimant could have declined the work on the basis that a junior train dispatcher would have been offered the work. There has been no evidence presented that there was a junior train dispatcher available * * * "

Manifestly, the Employes had the burden of proving every essential element of their claim, and we believe a fair reading of the record compels the conclusion that junior men were available, and Claimant worked the position solely because he wanted to work it and not because he was "required" to work it.

The generally accepted meaning of the word "required" is well established. As stated in **Ballentine's Law Dictionary:**

> "According to all the lexicographers, and in common parlance, it means to command; or, as Webster defines it, to ask by right and by authority."

This record contains no evidence tending to show that in Rule 21 the parties used the word "required" in any sense other than its generally accepted meaning; therefore, in order for Claimant to bring himself within the purview of Rule 21, it was incumbent upon him to prove that he was in fact commanded by Carrier to work the lower rated position on the claim dates. Claimant here did not even allege that he was commanded. In these circumstances, the award sustaining the claim is palpably erroneous and we dissent.

G. L. Naylor

R. E. Black

W. B. Jones

P. C. Carter

H. M. Braidewood

LABOR MEMBERS' ANSWER TO CARRIER MEMBERS' DISSENT
AWARD 18440, DOCKET TD-18814

The Carrier Members' dissent is extremely hard to comprehend. The basic disagreement with Award 18440 seems to be that the agreement was applied as written and the entire agreement is before the Board. The Carrier Members have an eighteen (18) page brief that is titled:

> THAT ALL RULES OF THE PARTIES' AGREEMENT ARE BEFORE THE DIVISION AT ALL TIMES AND MAY BE APPLIED BY IT TO THE FACTS OF RECORD WHETHER OR NOT CITED IN THE RECORD OR IN HANDLING OF A PARTICULAR CASE ON THE PROPERTY.

Thus it would appear a little late now to register a dissent over the entire agreement being considered in rendering Award 18440. The dissent further states the Board does not speculate nor use conjecture, yet asks the Board to speculate regarding a junior man being available.

The revised proposal was a result of the Carrier Members' reargument of the case.

George P. Kasamis
G. P. Kasamis
Labor Member

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