

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19738
Docket Number TD-19845

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Soo Line Railroad Company

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

(a) The Soo Line Railroad Company (hereinafter referred to as "the Carrier") violated the effective Agreement between the parties, Rule 4(a) thereof in particular, when it refused to compensate Claimant Extra Train Dispatcher R. E. Krubsack eight (8) hours at one and one-half times the then applicable Assistant Chief Train Dispatcher's position rate for August 3, 4, 10 and 11, 1970 which was service on the sixth or seventh days.

(b) The Carrier shall now compensate the individual Claimant for the amount of the difference between the pro-rata rate and the time and one-half rate for each date August 3, 4, 10 and 11, 1970 at the then applicable rate for Assistant Chief Train Dispatcher's position to which he is entitled under the terms of the Agreement.

OPINION OF BOARD: Extra Train Dispatcher Krubsack worked off the train dispatcher's extra board in Carrier's Stevens Point, Wisconsin Train Dispatching Office. His claim for time and one-half, instead of straight time for work on the claim dates, is based upon Rule 4 of the Agreement.

Carrier contends: 1) that the Board is without jurisdiction to consider the claim because no conference was held on the property; and 2) that its method of payment during the claim period was proper under Rule 10 (c) and the NOTE following Rule 4(b).

Petitioner objects to the Board's consideration of Rule 10(c) and the Rule 4 NOTE on the ground that Carrier never raised these issues on the property and relied solely on a different rule prior to its Submission herein.

The general rule on the jurisdictional question is that the failure to hold a conference on the property precludes consideration of the merits of the claim by this Board. Award Nos. 12290, 11434, 11484, 13907, 13013, and 17478. However, in Award 15880 (Zumas) this Board stated that:

"There is an obvious and proper qualification to the rule that this Board may not vest itself with jurisdiction where there is no conference on the property. If one of the parties refuses or fails to avail itself of a conference where there is an opportunity to do so, it cannot then assert the defense of a lack of jurisdiction. To allow otherwise would do violence to and frustrate the intention of the statute (Railway Labor Act)".

In the Opinion in Award 15880 this Board cited a number of prior Awards as being in accord with the holdings therein. See Award Nos. 12853, 10950, 10675, 10567, 13120, 13959.

The record here shows that the claim was filed on September 8, 1970, was denied in a September 30, 1970 letter by Carrier, and was appealed by the Organization in a December 3, 1970 letter. This last letter requested to be advised of Carrier's decision within 30 days. Then, in a March 1, 1971 letter, the Organization stated that a conference had not been held, that it was agreeable to a telephone conference provided this was acceptable to Carrier, and that Carrier's failure to reply would be deemed a denial of conference. In an April 6, 1971 letter the Organization stated that Carrier's failure to reply was deemed a denial of conference and that the claims were being forwarded to the President of the Organization. The Organization's letters received no response from Carrier until its letter dated January 26, 1972, which discussed the merits of the claim but made no reference to a conference.

We believe these facts show that there was opportunity for a conference and that the Carrier did not avail itself of that opportunity. The March 1 letter of the Organization clearly raised the subject of conference, and, though the letter expressed a preference for a telephone conference, we do not take this expression to mean the Organization was agreeable to a telephone conference only and not agreeable to a face to face meeting. Further, the Carrier gave no indication that a telephone conference was unsuitable or otherwise engage in a dialogue about a conference. The claims were not forwarded to the Organization's President until 37 days after the conference subject was raised in the March 1 letter. Yet Carrier remained silent during this period and for seven months thereafter. It did not respond to the Organization's letters until January 26, 1972, and even then Carrier's letter made no reference to the Organization's earlier statements about a conference. In making these findings we have critically examined the Organization's attempt to convert Carrier's silence into a denial of conference. Such attempt, we conclude had no effect upon Carrier's opportunity for a conference; it was but a meaningless act which received no weight in our considerations. We have also considered that there are no time limits in the applicable Agreement. In this regard see Award 17709 wherein we held that, in the absence of any specific time limit on the rendering of decisions, it must be presumed that the parties contemplated a reasonable time. We cannot say here that the Organization was unreasonable in respect to the time factors which evolved on the property.

In light of the foregoing we find that this record does not preclude claimant from having his claim considered by this Board.

We also find that Carrier's defense regarding Rule 10(c) and the NOTE to Rule 4 is properly before the Board. In Carrier's January 26, 1972 letter, the NOTE was the subject of an express reference which implicitly raised Rule 10(c) also.

We come now to the merits of the dispute. The pertinent rules are the third paragraph of Rule 4(a), the NOTE following Rule 4(b), and Rule 10(c). These rules read as follows:

"RULE 4 - REST DAY

(a)

"Extra Train dispatchers who are required to work as 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."

"(b)

"NOTE: It will not be deemed a violation of this agreement for a train dispatcher to work in excess of of five (5) consecutive days due to making change of assignments, in which case he will assume the relief days of the position to which he transfers."

"RULE 10 - FILLING POSITIONS -- VACANCIES

(c) Vacancies and new positions known to be of seven (7) working days and no more than ninety (90) working days' duration shall be considered temporary. Notice of such temporary or new position shall be posted in the office where existing for a period of seventy-two (72) hours and assigned to the senior qualified applicant regularly assigned in that office making application. Positions left unfilled shall then be promptly bulletined to all extra train dispatchers on the system for a period of ten (10) days and assignment made to the senior qualified applicant within ten (10) days from the close of the bulletin, provided, however, the bulletin may be closed and assignment made immediately upon receipt of application from the senior extra train dispatcher on the system. In the event no applications are received the senior extra dispatcher assigned to the office extra board will be assigned thereto. Train dispatchers filling positions under this Section (c) will revert to their former positions or status, when such positions are discontinued or terminated. Positions bulletined under this Section (c) that exist for more than ninety (90) days shall be immediately rebulletined as regular under Section (d) of this Rule 10, except when an extension of time is agreed upon between the General Superintendent and General Chairman." (Underlining added).

The claim period covers July 29 through August 16, 1970. (The claimant did not work on July 27 and 28, 1970.) From Wednesday, July 29, through Sunday, August 2, he worked five consecutive days in relief on a position of second trick train dispatcher in Carrier's Stevens Point, Wisconsin Train Dispatching Office.

Beginning on Monday, August 3, he worked three full weeks vacation relief on the Assistant Chief Dispatcher position; this is a Monday-Friday assignment with Saturday-Sunday rest days. On August 8, 9, 15, and 16, which were rest days of the Assistant Chief Dispatcher position, he worked on a second trick dispatcher position.

The claimant put in time slips for time and one-half pay for August 3, 4, 10, and 11, his contention being that these dates are either the sixth or seventh days of work as an extra train dispatcher after completing five consecutive days of work as an extra train dispatcher. Carrier disallowed the claim. Instead, Carrier allowed time and one-half for August 8, 9, 15, and 16, which were the rest days of the Assistant Chief Dispatcher position.

Carrier says its method of payment was correct under Rule 10(c) and the NOTE to Rule 4. The Rule 10(c) contention is that no applications were received for the vacation vacancy on the Assistant Chief Dispatcher position, that claimant was the senior extra train dispatcher on the extra board when the vacancy arose, and that, as such, he was properly assigned to and assumed the rest days of the vacancy in accordance with Rule 10(c). The record shows, however, that claimant was not the senior train dispatcher on the extra board at the time in question. Accordingly, Rule 10(c) has no application and his work on the vacation vacancy, insofar as Rule 10(c) is concerned, was at the direction of Carrier.

But Carrier also contends that the Rule 4 NOTE, alone, justified its action in that the NOTE applies where train dispatchers-regularly assigned or otherwise-are transferred to a position to afford vacation relief and, in such cases, the relieving dispatcher assumes all conditions of the vacancy, including rest days. The Award cited by Carrier on this issue, Award 11286, which involved the same NOTE and these same parties, might well be distinguishable from the instant dispute, because that Award dealt with a regularly assigned dispatcher in contrast to the extra dispatcher herein. However, it is not necessary to discuss that Award because the NOTE issue is resolved by correspondence which is in the record before us, and which was exchanged prior to the inclusion of the NOTE under Rule 4(b). This correspondence, in pertinent part, is as follows:

"July 20, 1949 letter of A. C. Peterson, General Chairman,
A.T.D.A., Stevens Point, Wisconsin.

"Enclosed are the four copies of supplemental agreement, which are unsigned for reasons set forth below.

We believe that the note which appears after Rule 4(b) should be deleted because the last sentence of Rule 4(b) takes care of the matter when a train dispatcher changes positions due to exercise of seniority.

"It appears that you wish us to agree to waive payment of punitive time to anyone who works in excess of 5 consecutive days as train dispatcher when instructed to change positions, instead of when making such in the exercise of seniority.

We feel that it is not consistent for us to agree to the provisions of this note."

"August 1, 1949 letter of E. J. Buhlman, Mgr. Personnel & Safety, Soo Line Railroad, Minneapolis, Minn.

"The note following Rule 4(b) is, of course, self explanatory and clarifies the intent of the agreement when changes in assignments are made due to exercise of seniority."

"August 8, 1949 letter of A. C. Peterson, General Chairman.

"Inclosed are two copies (one of which is the original) of the supplemental agreement. They have been signed with the understanding outlined in your letter of Aug. 1, 1949, that the note under rule 4(b) applies specifically to changes made by train dispatchers in the exercise of seniority."

The foregoing correspondence leaves no doubt that the intent of the contracting parties was that the NOTE only applies to change of assignments through the exercise of seniority and, conversely, does not apply to the herein facts where an extra train dispatcher changed assignments at the direction of Carrier.

In view of the foregoing we find that the third paragraph of Rule 4 controls the herein facts. The claim dates of August 3, 4, 10, and 11 are sixth or seventh days worked by claimant as an extra dispatcher after completing five consecutive days of work as an extra train dispatcher. The claim dates are clearly required by the third paragraph of Rule 4 to be paid for at the time and one-half rate and we shall sustain the claim. Award Nos. 12232, 15407, and 19549. The record shows, however, that the Carrier erroneously paid claimant time and one-half for other days during the claim period. Accordingly, our Award here shall be subject to appropriate adjustment for these overpayments of wages to claimant.

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 was violated.

A W A R D

Claim sustained subject to adjustment for overpayments of wages during claim period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killum
Executive Secretary

Dated at Chicago, Illinois, this 11th day of May 1973.