

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20019
Docket Number TD-19729

Gene T. Ritter, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Grand Trunk Western Railroad Company

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

(a) The Grand Trunk Western Railroad Company (hereinafter "the Carrier") violated the existing Agreement between the parties, Article 3(a) (2) in particular when it refused to compensate Train Dispatcher L. DeYoung at the rate applicable to Chief Dispatcher for service performed on the rest days of his assigned position in Carrier's Durand, Michigan train dispatching office on July 2, 3, 9, 10, 23, 24, and October 15, 16, 1970.

(b) Because of said violation Carrier shall now additionally compensate Claimant DeYoung in the amount representing the difference between the pro rata rate at which he was paid and the time and one-half rate which he should have been paid.

OPINION OF BOARD: Claimant was a regularly assigned train dispatcher, with assigned rest days of Thursday and Friday of each week. During the following periods, the Chief Dispatcher, a non-scheduled employee, was absent from his position and Claimant was offered the opportunity of filling the Chief Dispatcher's vacancy. During the following periods, Claimant worked the Chief Dispatcher's position:

Wednesday - July 1, 1970 through Monday, July 13, 1970.

Monday - July 20, 1970 through Friday, July 24, 1970

Monday - October 12, 1970 through Friday, October 16, 1970

The Organization cites Article III(a)(2) of the Agreement, which is:

"Article III - Rest Days

(a) - (2) Regularly assigned train dispatchers who are required to perform service on the rest days assigned to their position will be paid at rate of time and one-half for service performed on either or both of such rest days."

The Organization contends that Claimant did not request this position, and under the above quoted part of Article III, time and one-half payment for rest day's service on the position of Chief Dispatcher is a proper confirmation.

Carrier alleges that Claimant was offered the entire vacancy on each absence of the Chief Dispatcher and that in accepting the vacancies of this position, Claimant assumed the hours, rate of pay, days off and responsibilities of the Chief Dispatcher; that the Chief Dispatcher's position was a non-scheduled position and that the placing of Claimant in such position was in the nature of a temporary promotion where Claimant assumed all of the conditions of the Chief Dispatcher's position, including its rest days. Carrier further submits that the instant claim should be denied because it is not supported by any rule, agreement or past practice on the property.

The Organization cites Award No. 5371 in support of its position in this dispute. This Board finds that the circumstances involved in Award 5371 are not compatible with the facts in this case. The Claimant in Award 5371 had worked his regular Dispatcher's assignment for 5 days and was offered to work the Chief Dispatcher's position on the rest day of his regular position. In the instant case, Claimant was offered the entire work week of the Chief Dispatcher each time Claimant assumed the position of Chief Dispatcher.

The contentions of Carrier are well taken in this dispute. Claimant assumed the hours, rate of pay, days off and responsibility of Chief Dispatcher. Claimant was offered the opportunity of filling the Chief Dispatcher's vacancy; he was not ordered to fill the vacancy. The position filled by this Claimant was a non-scheduled position and the placing of Claimant in such position was in the nature of a temporary promotion. This claim is not supported by any rule or Agreement and the Organization has failed to show past practice on this property which would tend to support this claim. This claim will be denied.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1973.

Labor Member's Dissent to Award 20019, Docket TD-19729

The Railway Labor Act created the National Railroad Adjustment Board for the general purpose of establishing a tribunal to provide for the prompt and orderly settlement of disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. Awards of the National Railroad Adjustment Board should conform with and/or aid in achieving this general purpose.

Award 20019 would be a pernicious attack on awards furthering and accomplishing this general purpose, if Award 20019 was not so palpably erroneous to make it devoid of precedential value.

The dispute involved the rate of compensation payable to a Train Dispatcher performing service on his assigned rest days in vice of the absent Chief Train Dispatcher. Unable to resolve the issue on the property, the dispute was referred to the Third Division as provided in Section 3 First (i) of the Railway Labor Act, which further provides that along with such petition a full statement of the facts and all supporting data bearing upon the disputes will be submitted to the Adjustment Board. The dispute was docketed as Docket TD-19729, became deadlocked and a neutral referee was selected and named by the Mediation Board to make an award.

At the next step in the adjudication procedure, argument before the Referee, the Referee at the outset read his outline of facts obtained by his preliminary study of Docket TD-19729 inviting comments upon his determination of the facts. One of these facts contained in the Referee's outline was that the Claimant was offered the opportunity of filling the Chief Dispatcher's vacancy. The Referee was told it was not a fact the Claimant was offered an opportunity of filling the Chief Dispatcher's vacancy and a perusal of the record would show Claimant's service on his assigned rest days was a result of a managerial directive and not an exercise of seniority. An action such as offering an opportunity to fill a vacancy or an action such as accepting an offer or opportunity to fill a vacancy would create substantive proof of such actions but lack of such actions could not yield any probative evidence. Anything more than a cursory reading of the record would have revealed no proof and, therefore, Carrier's contentions could not stand.

The rest day rule in the Agreement contains a definition of the term "rest days" and the only exception is this definition shall not apply in cases of transfers account Train Dispatchers exercising seniority.

Labor Member's Dissent to Award 20019, Docket TD-19729 (Cont'd)

Award 20019 attempts to overcome the crystal clear findings found in Award 5371 by rejecting Award 5371 because "the circumstances involved in Award 5371 are not compatible with the facts in this case." This does not detract from the decision in Award 5371 between these same parties holding:

"The relevant parts of the agreement are as follows:

"Article I--Definition.

'The term Train Dispatcher as hereinafter used shall be understood to include Trick, Relief and Extra Dispatcher only.'

"Article III--Rest Days and Relief Service.

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

"The Carrier declined the claim on two grounds:

"(1) The position of Chief Train Dispatcher is outside the scope of the agreement, and on the days claimant relieved as Chief Train Dispatcher he could not claim the benefit of Article 3 (2) of the agreement.

"(2) Claimant was not required to perform service and therefore may not claim the benefit of Article 3 (2) of the agreement.

"As to the first ground, we have held in numerous awards that only the occupant of the position of Chief Train Dispatcher is excepted from the agreement and any employe relieving him for any cause would be entitled to the benefits of the agreement.

"As to the second ground, claimant was requested by proper authority to work as Chief Train Dispatcher on the days in question. The fact that he was willing to do so does not mean he was not 'required to perform service' within the wording and intent of Article 3(2). See Awards 5174, 4850 and 4461.

"Neither of the grounds relied upon by the Carrier are tenable and the claim should have been allowed."

Labor Member's Dissent to Award 20019, Docket TD-19729 (Cont'd)

In the original argument before the Referee and in two subsequent rearguments, Awards were cited and presented to show:

- (1) This Board has sustained claims for time and one-half compensation for rest day service while relieving the Chief Train Dispatcher. Awards 2905, 2906, 2986, 3096, 3344, 4012, 5371, 5904, 7663, 19845 and 19866.
- (2) Only the incumbent of the Chief Train Dispatcher's position is excepted from the scope of the Agreement and not the position itself. Awards 5975, 9040, 11560 and 18070.
- (3) A Train Dispatcher does not become Chief Dispatcher by virtue of working the Chief Train Dispatcher's position and Train Dispatchers working in relief of the Chief Train Dispatcher are covered by the Agreement. Awards 2943, 5244, 5371, 5716, 5975, 7914, 9040, 11560, and 18070.

In addition the Referee was presented a copy of the ICC Order dated February 5, 1924 in Ex Parte 72 continued in effect as provided in Section 1 Fifth of the Railway Labor Act. This Order excepts certain specified Chief Dispatchers from the Train Dispatcher class but states "This exception shall apply to not more than one Chief Dispatcher on any division."

Notwithstanding the overwhelming precedent presented, the Referee refused to change a word of his proposed award though the only precedent offered by or in behalf of the Carrier was that contained in Awards 12772, Docket CL-12503, and Award 12773, Docket CL-13439. Awards 12772 and 12773, in addition to being a different craft and agreement, involved failure to bulletin new positions which the Board held to be official positions.

While the tenacious rejection of the factual evidence and precedential support presented could lead to questioning the credibility of the neutrality of the Referee, there can be no question that an award is only as sound as the reasoning used in reaching the decision rendered.

Award 20019 is, at best, a nullity and I most vigorously dissent.



J. P. Erickson
Labor Member