NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20666
THIRD DIVISION Docket Number TD-20512

William M. Edgett, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Burlington Northern Inc.

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

(a) The Burlington Northern, Inc. (hereinafter referred to as "the Carrier"), violated the currently effective Agreement between the parties, Article 16 thereof in particular, when it failed and refused to properly compensate Claimant C. C. Whitmore for vacation earned in the year 1970 pursuant to the provisions of said Agreement.

(b) Because of said violation, the Carrier shall now be required to compensate Claimant Whitmore in an amount representing the difference between what he was paid for vacation and what he should have been paid under the terms of the Agreement for the twenty (20) day paid vacation he received in the year of 1971.

OPINION OF BOARD: Claimant worked for 135 days as an extra train dispatcher during 1970. He relinquished his seniority as a train dispatcher in December of that year and returned to his regular assignment as second trick Wire Chief. On June 11, 1971 he asked Carrier whether he would receive the higher dispatcher rate for the vacation taken during 1971. On June 17, 1971 Carrier advised him that he would not. Further correspondence followed and finally in a letter dated October 1, 1971 in reply to a letter Claimant had sent to him, Carrier's Vice President, Labor Relations advised Claimant that in Carrier's view he had been correctly paid at the Wire Chief's rate when he took vacation in June and August, 1971.

This claim was filed on January 3, 1972. Carrier has defended on procedural grounds and on its merit. The Board has concluded that Carrier's procedural defense requires dismissal of this claim. Article 24(f) states:

"***(f) GRIEVANCES----CLAIMS

"A train dispatcher who considers himself unjustly treated shall present his grievance or claim in writing direct, or

"through his duly accredited representative, to the Superintendent within sixty (60) days from date of occurrence on which it is based, and decision of the Superintendent shall be rendered within sixty (60) days from date grievance or claim is received, or from date of conference, if one is had thereon. If the train dispatcher is not satisfied with the decision rendered, appeals may be made subject to the order of progression, time limits, etc., provided in Section (c) of this Article."

The Organization seeks to avoid the effect of Article 24(f) by pointing out that the vacation paid to claimant was paid under the provisions of another agreement and that Carrier could have paid him vacation as provided by this organization's agreement at any time during the calendar year 1971. In part that position rests on an interpretation of award No. 9850.

In Award No. 9850 the Board dismissed a claim for non-compliance with the time limit rule of the applicable agreement. In doing so it measured the date on which limitations began to run at the end of the calendar year. The facts in that case differ from the case now before the Board. In No. 9850 Claimant was scheduled for vacation but did not take it. Thus there was no "occurrence" until the last date on which the vacation could have been taken and for that reason the Board stated that limitations began to run on that date. Here there were two "occurrences"; one was in June and the other in August when Carrier paid claimant at the Wire Chief rate. There was then an "occurrence" and an obligation on claimant to file his claim within sixty days of it.

Claimant's failure to file his claim within the period specified in Article 24 (f) requires the Board to dismiss his claim.

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 Claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1975.

Labor Member's Dissent to Award 20666, Docket TD-20512

Award 20666 commits serious error when the dispute contained in Docket TD-20512 is dismissed on procedural grounds rather than reaching and deciding the case on its merits. The Carrier Members and the Referee constituted the majority in the adoption of Award 20666. The Carrier Members sought to and did convince the Referee on a procedural ground which these same Carrier Members have very recently argued vigorously against.

As Award 20666 states the Claimant did work 135 days as an extra train dispatcher in 1970 and as a result qualified for a train dispatcher's vacation. While Award 20666 does not detail it, Docket TD-20512 clearly shows that the Claimant also qualified for a telegrapher's vacation, because as the Carrier states, "When not required to work as a dispatcher, he performed service 121 days as a telegrapher-wire chief in the Carrier's Spokane relay office." The Carrier also states "The claimant received 20 days' vacation in 1971 to which he was entitled to under the qualifying provisions set forth in Article 1, paragraph D of the Telegraphers' Agreement, . . ." In its answer to the Employes' Ex Parte Submission the Carrier states:

> "On page 10 of the Organization's submission, this Board is asked to declare Carrier's reference to the Telegraphers' Agreement irrelevant. That agreement cannot be ignored in this case because the claimant, working under that agreement, took advantage of (1) his continuous service as telegrapher for vacation qualifying purposes, (2) his seniority date as a telegrapher in fixing his vacation dates, (3) the telegraphers' rule that allows telegraphers to split their vacation periods and (4) the restrictive advance notice requirements that must be observed when changing vacation dates from those originally scheduled. All the mechanics of the telegraphers vacation agreement were applied to the claimant's 1971 vacation, including the compensatory provisions. ***"

From the above there can be no question that the vacation which the Claimant took, as well as the compensation allowed, was strictly based on the Telegraphers' Agreement alone. Yet, on the basis of the vacation dates of his telegrapher's vacation, the Carrier Members convinced the Referee that the telegrapher vacation dates were the dates of occurrence on which the time limits should toll and, therefore, the claim in Docket TD-20512 should be

dismissed. From the Carrier Members' contention in this dispute it would appear they feel that the Agreements are so interwoven that a date of occurrence under one Agreement must also be a date of occurrence under the other Agreement.

However, Carrier Members' contentions seem to wander at will. Award 20666 was adopted on March 31, 1975. A Dissent was entered by the Carrier Members to Award 20585 on January 22, 1975 in which it was stated:

> "Furthermore, it is well settled by this Board that service as a Train Dispatcher is not subject to any rule of the Telegraphers' Agreement. See, for example, Award Nos. 3674, 5629 and 12725."

This is not an acceptance of the stated position nor an endorsement to the Carrier Members' Dissent to Award 20585 but to show that on January 22, 1975 the Carrier Members took an opposite position.

The Awards mentioned in the Carrier Members' Dissent contain some interesting comments regarding work in more than one craft or under more than one agreement, viz.:

Award 3674 -

> "The Board concludes that there was no violation of the Rest Day Agreement as alleged. When Wright was working as a dispatcher he was working under the Dispatchers' Agreement, not the Telegraphers' as supplemented by the Rest Day Agreement. It was just as if he had used his day off to work in a grocery store. The organization surely would not contend that the grocer owed him time and one-half whatever his compensation might be because he worked the other days of the week as a telegrapher, covered by the Rest Day Agreement. In fact, we believe this case arose out of the close kinship between the dispatchers' and telegraphers' work. However close that kinship may be, we cannot let it influence our thinking in this case."

Award 5629 -

> "It is true that the Carrier is the sole employer, but the employment rights of the employes are by agreement segregated and distributed into crafts. This being so, in situations where an employe acquires status under two agreements, the contractual distribution into

"crafts is violated if his status under one agreement is given any effect upon his status under the other, whether to his advantage or to his disadvantage (see Award 3674)."

Award 12725 -

"This Board has held, in Award 3674 for example, that when a regular assigned telegrapher:

'. . . was working as a dispatcher he was working under the Dispatchers' Agreement, not the Telegraphers' as supplemented by the Rest Day Agreement. It was just as if he had used his day off to work in a grocery store. . . .'

"Under such holding, service as a train dispatcher is not subject to any rule of the Telegraphers' Agreement, including Rule 4. It necessarily follows that service as a train dispatcher does not nullify application of any rule of the Telegraphers' Agreement, including Rule 6. Rule 6 guarantees a regular assigned telegrapher eight hours' pay within each twenty-four hour period. The stated exceptions do not include periods of service as a train dispatcher; therefore, the rule applies in such cases. And certainly it contemplates the rendering of service if such can lawfully and reasonably be required.

"There was no reason, contractual or otherwise, why the telegrapher could not lawfully be used on the days in question so as to earn the payment required by Rule 6.

"It follows that the Carrier did not violate the Agreement, and the claim, therefore, must be denied."

From the Carrier Members' mention of Awards 3674, 5629 and 12725, and the rulings contained in those Awards, it must be considered that the Carrier Members are, or at least were, in agreement with the principle that each craft's Agreement stands alone as an independent contract. However, in the instant case the Carrier Members turned full circle and convinced the Referee that the vacation under the Telegraphers' Agreement caused the time limit to toll for a claim for vacation compensation under the Train Dispatchers' Agreement.

This bifurcation of positions regarding employes working under more than one contract which the Carrier Members have engaged in (which the American Indian described as speaking with forked tongue) would be amusing if it were not for the serious effect it had on the instant Claimant. It would appear that this shifting of position and/or contentions could cause this Referee as well as other Referees to have reason to doubt the Carrier Members' credibility.

Award 18930 sustains a claim in an identical dispute. Award 20340 is a dispute where vacation compensation for an extra train dispatcher was involved (though the case is not exactly identical to the instant dispute) and Award 20340 states:

> "*** The key to the entire matter is in the clear language of the rules and the fact that the vacation was earned under the Agreement; it cannot be taken away from the employe. The Award in 18930 quoted above affirms this reasoning in a situation wherein the employe resigned and then went to work in a different craft."

Notwithstanding this clear ruling in Award 20340, Award 20666 by dismissing the claim has taken away the train dispatcher vacation which the Claimant had earned. Award 20666 dismissed the claim in Docket TD-20512 on a procedural ground which the majority knew was wrong, or at least directly counter to the position recently expounded, and I must dissent.

J. P. Erickson
Labor Member