NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23243
THIRD DIVISION Docket Number TD-22474

Kay McMurray, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Chicago, Milwaukee, St. Paul & Pacific
(Railroad Company

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

(a) The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as "the Carrier"), violated the current Agreement (effective November 1, 1962) between the parties, Rule 11 thereof in particular, when it refused to pay Mr. T. E. Bigley (hereinafter referred to as "the Claimant") at the rate of time and one-half for service performed on his rest day on January 6, 1977.

(b) The Carrier shall now compensate the Claimant the amount of the difference between the straight time rate allowed and the time and one-half rate for service performed on January 6, 1977 which was Claimant's rest day.

OPINION OF BOARD: The facts in this case are not in dispute. The Carrier called Claimant, T. E. Bigley, on January 6, 1977, to perform services as a Chief Dispatcher. He was paid at the straight time rate, applicable to the Chief Dispatcher's position. Mr. Bigley made a claim for pay at the time and one-half rate since the day was his assigned rest day in his position of Dispatcher. In so doing he relied upon Rule 11 which reads:

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

However, on the day under consideration, Claimant worked as a Chief Dispatcher, not as a Dispatcher. Such a relief assignment is excepted from the Agreement by Memorandum No. 4, which reads:

"As between the undersigned, it is mutually agreed that the application of Rule 1 (a) of the Agreement effective November 1, 1962, when a train dispatcher is used to relieve the Chief Train Dispatcher, such train dispatcher will accept the rate of pay and working conditions of the Chief Dispatcher position and will not be paid additionally for any time worked in excess of eight (8) hours on any day while performing such relief Chief Train Dispatcher service as overtime.

"Except for the above stipulation, train dispatchers, when relieving the Chief Train Dispatcher, are covered by all other rules of the Agreement between the parties effective November 1, 1962."

The Organization points out that there is no overtime claim involved and, therefore, Memorandum No. 4 does not apply. Its position is stated as follows:

"Contrary to what the carrier contends . . . there was a single stipulation, i.e., exception to the Agreement rules for train dispatchers working in relief or vice of the Chief Train Dispatcher and that exception was no overtime for service in excess of eight (8) hours on a day while working in vice of the Chief Train Dispatcher."

Accordingly, the penalty pay afforded in rule 11 should be allowed since it was not excluded by Memorandum No. 4.

The record is silent with respect to certain items which might have been helpful in determining a solution to the case before us. In accordance with Board rules we are constrained from reviewing evidentiary material which was not discussed on the property. Accordingly, based on the record, we are essentially confronted with a literal interpretation of the language of Memorandum No. 4.

Unfortunately, we cannot agree with the narrow interpretation espoused by the organization.

The conjunction "and" by definition and normal usage means "also, in addition, moreover, as well as, plus," etc. Its use preceding the overtime statement does not connote exclusivity to the overtime portion of the Memorandum. Nor does the use of the term "above stipulation" in the second paragraph necessarily confine the modification of the contract

to a single item. A stipulation may, and often does, contain more than one item or condition. Based on the foregoing, we cannot conclude that Memorandum No. 4 applies only to overtime pay as contended. Claimant worked in a position that required payment of the Chief Dispatcher's rates for which he was compensated.

Based on this record and literal interpretation of the language of Memorandum No. 4 we cannot apply rule 11 to the Chief Dispatcher's position.

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: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1981.

LABOR MEMBER'S DISSENT TO
AWARD 23243 DOCKET TD-22474

Award 23243 is palpably erroneous.

Award 23243 states:

"However, on the day under consideration, Claimant worked as a Chief Dispatcher, not as a Dispatcher. Such a relief assignment is excepted from the Agreement by Memorandum No. 4, which reads:

> 'As between the undersigned, it is mutually agreed that the application of Rule 1 (a) of the Agreement effective November 1, 1962, when a train dispatcher is used to relieve the Chief Train Dispatcher, such train dispatcher will accept the rate of pay and working conditions of the Chief Dispatcher position and will not be paid additionally for any time worked in excess of eight (8) hours on any day while performing such relief Chief Train Dispatcher service as overtime.
>
> Except for the above stipulation, train dispatchers, when relieving the Chief Train Dispatcher, are covered by all other rules of the Agreement between the parties effective November 1, 1962'."

And:

"Based on this record and literal interpretation of the language of Memorandum No. 4 we cannot apply rule 11 to the Chief Dispatcher's position".

Rule 1 (a) referred to in Memorandum No. 4 provides:

"RULE 1 (a)

RELIEF AND APPOINTMENT OF
CHIEF TRAIN DISPATCHERS

Relief of Chief Train Dispatchers for their annual vacation, and other temporary periods of absence from their positions, shall be made by qualified train dispatchers from the office involved without regard to seniority.

Any permanent appointment to position of Chief Train Dispatcher shall be made from employees holding seniority as train dispatcher".

Therefore, the relief of Chief Train Dispatchers is reserved to train dispatchers by the Agreement and a train dispatcher working in relief of a Chief Train Dispatcher does not become a Chief Train

Dispatcher by virtue of working in relief of a Chief Train Dispatcher.

Award 23243 also stated:

> "Claimant worked in a position that required payment of the Chief Dispatcher's rates for which he was compensated".

But under this theory the language in Memorandum No. 4 reading:

> "Except for the above stipulation, train dispatchers, when relieving the Chief Train Dispatcher, are covered by all other rules of the Agreement between the parties effective November 1, 1962".

would be rendered meaningless and/or removed from the Agreement. Or, stated another way, under that theory all that would or could ever be required when a train dispatcher relieved a Chief Train Dispatcher would be payment at the rate of Chief Train Dispatcher, regardless of the circumstances, which would entirely abrogate the provisions contained in the second paragraph of Memorandum No. 4.

The Board has consistently found that the parties did not engage in a useless act when they agreed to a rule. The Board is not empowered to remake Agreements or rewrite rules as shown in the following awards:

> THIRD DIVISION AWARD 22310
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> "Since the Board has no authority to remake agreements when conditions have changed, or otherwise, the Claim has no basis in the rules and must be denied".
>
> THIRD DIVISION AWARD 23063
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> "For us to so find would require us to rewrite Rule 49, The Grievance Procedure. This, of course, we are neither inclined or empowered to do".

Award 23243 will have little, if any, precedential value as the decision is admittedly "based on this record" plus a "literal interpretation of the language of Memorandum No. 4" which is not

supported by that Agreement language.

As Award 23243 is palpably erroneous and/or because the Agreement interpretation espoused would require remaking or rewriting of a portion of the Agreement, which the Board is not empowered to do, I must dissent.

J. P. Erickson
Labor Member

REPLY TO LABOR MEMBER'S DISSENT
TO
AWARD 23243 (DOCKET TD-22474)
(Referee McMurray)

The Dissent to Award 23243 does not alter the validity of its disposition. Memorandum No. 4, first paragraph, cannot be bifurcated into parts having different applications. An employee, filling a temporary vacancy, cannot be better off than the incumbent would have been, if used. Yet, while it is conceded that a "train dispatcher used to relieve the Chief Train Dispatcher....will accept the rate of pay and working conditions...." (emphasis added), contractual support for more is not to be found and the Board so ruled.

The Dissent simply reflects that the Dissentor, being convinced against his will, is of the same opinion still.

P. V. Varga

W. F. Euker

P. E. LaCosse

J. E. Mason

J. R. O'Connell