NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23606

THIRD DIVISION Docket Number TD-23314

Martin F. Scheinman, Referee

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

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

(a) The Seaboard Coast Line Railroad Company (hereinafter referred to as "the Carrier"), violated the effective Agreement between the parties, Articles I(a) and (IV)e thereof in particular, and Memorandum Agreement, Third Order of Call, made effective June 21, 1973, when it failed to call Train Dispatcher J. G. Sammons to fill the vacancy on the Chief Dispatcher's position, March 12, 1975.

(b) The Carrier shall now be required to compensate Claimant Sammons one day's pay at the rest day rate (time and one-half) because of such violation.

OPINION OF BOARD: Claimant, J. G. Sammons, is regularly assigned to a first shift train dispatcher's position from 7:00 a.m. to 3:00 p.m. On March 12, 1975, Claimant's rest day, a vacancy occurred on the Chief Dispatcher's position due to absence of the incumbent, C. W. Caldwell. Carrier assigned the incumbent of the second shift, A. J. Langley, to fill this vacancy. Langley had worked his regular shift 3:00 p.m. to 11:00 p.m. on March 11, 1975. He then filled the vacancy on March 12, 1975.

The Organization contends that Carrier violated the Federal Hours of Service Act as well as the Memorandum Agreement of June 21, 1973, when it failed to call Claimant to fill this vacancy on March 12, 1975. It asks that Carrier compensate Claimant one day's pay at time and one-half.

Specifically, the Employes argue that Langley worked his normal shift on 3:00 p.m. to 11:00 p.m. on March 11 and then worked the Chief Dispatcher position from 8:00 a.m. to 4:00 p.m. on March 12th. Since Langley worked an aggregate of fifteen (15) hours during a 24 hour period, the Organization insists that the Hours of Service Law was violated.

The Organization acknowledges that the work of Chief Dispatcher position is not ordinarily subject to the Hours of Service Act. However, it asserts that when covered service is combined with uncovered service - a situation commonly referred to as "commingled service" - all such service is subject to the Act. Section 3(b) of the Act is cited in support of this proposition. It states:

> "(b) For the purposes of subsection (a), in determining the number of hours an employee is on duty in a class of service, and at a place described in paragraph (1) or (2) of such subsection there shall be counted, in addition to the

time spent by him on duty in such service at such place, all time on duty in other service performed for the common carrier during the twenty-four-hour period involved."

Thus, the Employes insist that Carrier could not use Langley on the vacancy on March 12th. Under the Memorandum of Agreement signed June 21, 1973, Note 1, Langley was not available to perform the work. It states:

"Under no circumstances save 'emergencies,' as contemplated by the Hours of Service Law, shall a train dispatcher be considered 'available' if his service under the above order would violate the Hours of Service Law."

Therefore, the Organization maintains that Claimant, the Senior available employee should have been given the vacancy.

Carrier, on the other hand, asserts that the Agreement rules were not violated because the Chief Dispatcher position is excepted from coverage. To support this contention, Carrier cites the Note to Article I, Scope. It states:

"NOTE: It is agreed that one chief dispatcher in each dispatching office is excepted from the rules of this agreement."

Since the position is not covered, Carrier argues that there is no basis for determining that it is required to fill the vacancy according to seniority.

Carrier also argues that if the Agreement does apply to the vacancy on March 12, 1975, the claim should still be denied. It insists that Claimant lacks the requisite fitness and ability to perform the job.

The central issue to be determined is whether the exception in the Scope Rule, regarding the Chief Dispatcher, applies to the individual, selected by Carrier, to be the Chief Dispatcher only as applies to the position in general. If the exception applies to the position then Carrier must be viewed as having the unilateral right to fill the position outside of the requirements of the Agreement. Conversely, if the exception applies only to the person, then the Agreement applies at the times when the incumbent is absent.

This same question was recently decided by this Board in Award 23278 in a case involving the same parties. There, the Board decided that "only the incumbent is excluded from the provisions of the Agreement and not the position."

This Board has for many years followed the doctrine of res judicata.

Nothing presented here convinces us to depart from that philosophy.

Thus, the position of Chief Dispatcher is exempt from the Agreement only when the incumbent is in the position. Carrier, of course, has the unilateral right to determine the incumbent. When the incumbent is absent the position is covered by the Agreement.

When Langley was called the Hours of Service Law was violated. On this there can be no dispute. In turn, given the Memoranda of Agreement dated June 21, 1973, Langley was not "available" because his service violated the Hours of Service Law.

We will next turn to the Claimant. We are persuaded that Claimant is not entitled to an award here. This is because Rule IV(e), the Seniority provisions, requires that fitness and ability must be sufficient. Claimant had previously been a chief dispatcher but was demoted for cause. Clearly, Carrier has demonstrated that Claimant did not possess the requisite fitness and ability for the position. For this reason, we will deny Part (b) of the claim. See Award 23278.

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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 10th day of March 1982.


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