

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25696
Docket Number CL-25670

Eckehard Muessig, Referee

(Brotherhood of Railway, Airline and Steamship Clerks
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9872)
that:

CLAIM NO. 1

1.(a) Carrier violated the agreement between the parties when on May 15, 19, 20, 24, 31, June 1, 5, 13, 15, 16, 21, and 22, 1976, it required Relief Operator R. K. Price, Jr., to suspend work on his regular assignment and relieve Train Dispatchers in the Radford Division dispatching office.

(b) Carrier shall now be required to compensate Relief Operator R. K. Price, Jr., for eight (8) hours at the pro rata rate of pay applicable to the position he would have worked on dates indicated in Paragraph (a) above. This pay in addition to any pay received on dates indicated.

2.(a) Carrier further violated the agreement between the parties when on May 15, 19, 20, 24, 31, June 1, 5, 13, 15, 16, 21 and 22, 1976, it caused, required or permitted Relief Operator R. K. Price, Jr., to perform relief train dispatcher work when he was not regularly assigned to the Radford Division Office.

(b) Carrier shall now be required to compensate the senior available, idle Radford Division Train Dispatcher, extra in preference, for eight (8) hours pay at the time and one-half rate of pay for each date listed in Paragraph 2(a) above. This compensation to be in addition to any pay received on dates indicated.

The foregoing not to include Extra Operator R. K. Price, Jr., or is he to be considered a train dispatcher, regular or extra.

CLAIM NO. 2

1.(a) Carrier violated the agreement between the parties when on June 27, 29 and 30; July 5, 13, 14, 15, 16, 17, 20, 23, 24, 25, 26, 27, 30, 31; and August 1, 2, 3, 9, 10, 11, and 12, 1976, it required Relief Operator R. K. Price, Jr., to suspend work on his regular assignment and relieve Train Dispatchers in the Radford Division dispatching office.

(b) Carrier shall now be required to compensate Relief Operator R. K. Price, Jr., for eight (8) hours at the pro rata rate of pay applicable to the position he would have worked on dates indicated in Paragraph (a) above. This pay in addition to any pay received on dates indicated.

2.(a) Carrier further violated the agreement between the parties when on June 27, 29 and 30; July 5, 13, 14, 15, 16, 17, 20, 23, 24, 25, 26, 27, 30 and 31; August 1, 2, 3, 9, 10, 11, and 12, 1976, it caused, required or permitted Relief Operator R. K. Price, Jr., to perform relief train dispatcher work when he was not regularly assigned to the Radford Division office.

(b) Carrier shall now be required to compensate Train Dispatcher D. E. Wilburn for eight (8) hours pay at the time and one-half rate of pay for each date listed in paragraph 2(a) above. This compensation to be in addition to any pay received on dates indicated.

The foregoing not to include Extra Operator R. K. Price, Jr. or is he to be considered a Train Dispatcher, regular or extra.

OPINION OF BOARD: The significant events leading to this dispute began on October 15, 1975, at which time Carrier advertised the position of Relief Operator "KD" at its "KD" Office/"DO" Office, located at Randolph St. Tower, Roanoke, Virginia. The assigned hours and primary duties were:

"7:00 AM to 4:00 PM 'KD' Office (Mon.)
12:01 AM to 8:00 AM 'DO' Office (Thurs, Fri., & Sun.)
12:01 AM to 8:00 AM Randolph St. (Sat.)

* * * * *

"Receive and transmit messages, compile information for midnight reports and will be expected to qualify for Train Dispatcher. Also operate CTC machine, Teletype machine, handle train orders and other duties incident thereto."

The Claimant was assigned to the advertised position at the expiration of the advertisement period on October 22, 1975.

On October 29, 1975, the Organization protested the Bulletin, stating, in pertinent part:

"Initially we object to headquarters being made in 'KD' Office inasmuch as the preponderance of the work on this position will be at 'DO' Office. However, it is obvious the reason for making the headquarters at 'KD' Office is to be found in the primary duties as follows:

"***and will be expected to qualify for Train Dispatcher.

"We also object to such language '***and will be expected to qualify for Train Dispatcher' for the reason that an employe has to be regularly assigned in a Division Office in order to qualify as Train Dispatcher."

"This is exemplified by Rule 68(b) reading as follows:

"Employees in Division offices will be in line for promotion to Train Dispatcher in accordance with the order of their standing in the division office. When a position or a vacancy occurs in a division office the assigned employes in such offices will move up and the last position or positions left vacant shall be advertised except as provided in the fourth paragraph of this Rule 68(b). When an employe is assigned to the last trick, he will be in line for promotion to the next higher trick when vacant, advancing to the first trick as vacancies occur."

* * * * *

"The order of standing of an employe in a division office will be left according to the date he was assigned to the last position left vacant in such office.

The entire rule speaks of regularly assigned employes in division offices and not employes working one day only in such offices. Your attention is also directed to Rule 69(b) of the Agreement dated April 1, 1973, particularly the sixth paragraph thereof.

Moreover, this rule has been carried forward in its present form since the 1939 Telegraphers Agreement and was again revised on February 16, 1958 and it has never been the practice or the intent of the rule when employes working one day only in the division office to be required to qualify for Train Dispatcher. Your attention to this matter and correction of same will be appreciated. Please advise."

The Bulletin protest was not resolved as such, and on November 30, 1976, in a letter to the Carrier, the Organization withdrew the protest on the basis that "this matter is covered by the claim under our file 537-643. The Organization added that: "We see no further point to belabor the matterin the form of a bulletin protest...."

The first claim herein, was initiated on June 29, 1976. Shortly afterward, a second claim was filed by the same Claimant. These claims contend that the Carrier violated the Agreement, beginning on May 15, and on a selected number of days through August 12, 1976. The claims are essentially grounded on the contention that the relief of Train Dispatcher's work is limited to Employees regularly assigned to a position in "KD" Office all days of the work week. Accordingly, the issue here is whether the controlling rules permit the use of a Relief Operator, regularly assigned one (1) day per week in the Division Office as a Telegrapher and four (4) days per week outside of the Division Office as a Telegrapher, as an Extra Train Dispatcher. The parties cite and, in some instances, rely upon a number of the Rules, including Rules 14, 36, 38, 68 and 69, of their April 1, 1973 Master Agreement.

At the outset, the Board notes that it has thoroughly reviewed the voluminous record, going back some nine years. While we have considered and given appropriate weight to each of the respective contentions and issues brought forth by the parties, it is the opinion of the Board that it is unnecessary to address each of these in order to decide this matter. Turning first to the series of procedural issues raised by the parties, we find that the weight of the record provides greater substance to the Organization's contentions that the claims are properly before the Board. First, with respect to the time limit assertions of the Carrier, we note that the Carrier, in its letter of June 28, 1983, acknowledged that the "claim required further review and would be discussed at the next conference". Carrier's letter also stated that: "It was also agreed that the time limit within which the Carrier is required to respond to your letter of November 24, 1976 would be extended to sixty (60) days from the date of the next conference". The record then shows that next conference was held on February 16, 1984. Accordingly, the time limit for presenting the claim to the Board did not expire until April 15, 1984. The Notice of Intent to File an Ex Parte Submission was dispatched on February 16, 1984. Consequently, while there were extended periods of inactivity with respect to the progressing of these claims, the Carrier's actions and acknowledgement of the claims lends substance to the Organization's arguments that the claims had not been abandoned and that they came before this Board in a timely manner.

With respect to the timing of the Organization's notice to invoke arbitration and simultaneously to conference the claim, while reasonable questions have been raised in this respect, the Board finds itself in agreement with the Organization. The Board hastens to add, however, that under other circumstances, we would have agreed with the Carrier's position. However, given the prolonged history of these claims, and the parties actions as they were being progressed, it would not be reasonable to conclude that the Organization was in violation of Section 3, First of the Railway Labor Act.

Turning to the argument that the doctrines of estoppel and res judicata are applicable herein, the Board notes that the Carrier primarily relied upon Rule 14 and Third Division Award No. 23299 to advance these particular assertions. The Board, however, concludes that Rules 68 and 69 are governing in this instance for the Dispatchers, and that the claims cannot be set aside on the grounds relied upon by the Carrier.

Concerning the assertion that the January 8, 1979 Memorandum Agreement is controlling, we conclude that this position is in contradiction to the record. The claims here were filed prior to the Section 6 Notice, dated October 27, 1976, and, under the circumstances herein, the Board has no reasonable basis to set aside a claim because of proposed contract changes, which occurred subsequent to the claim.

In summary, while this Board does not ignore the many awards that have held that delays of the magnitude encountered in this matter while bringing an issue before proper authority, may be construed as an abandonment of a claim or as acquiescence to an adverse decision, we conclude that these principles are inoperative here. Thus, on this record and given the particular facts and circumstances in this case, we find that this matter is properly before this Board.

Turning to the substantive issues, it is apparent both from a reading of Rules 68 and 69, which are controlling here, and by the prolonged history of these claims, that the application of the Rules to the facts of these claims does not lead to a clear and unequivocal conclusion of Rule violation, as asserted by the Organization. The key issue which the Organization pursues is whether Rules 68 and 69 permit a Relief Operator, who is not regularly assigned within their order of standing in the Division Office, to perform Extra Dispatcher work. In embracing this contention, the employees primarily rely upon the second sentence of Rule 68(b) which, in pertinent part, reads:

"Employees in division offices will be in line for promotion to train dispatcher in accordance with the order of their standing in the division office. (Emphasis supplied)"

The Organization asserts that the Claimant had no standing in the Division Office since he did not hold a regular assignment there. Extensive rationale, both with respect to past practice and application of the appropriate Rules, has been provided to arrive at this conclusion.

The Carrier, also relying upon its construction of Rules 68 and 69, contends that in the absence of a restriction which would limit Extra Train Dispatchers' work to those Employees regularly assigned to work in "KD" office five (5) days each week, it follows that a regularly assigned relief Employee whose position is assigned in a Division Office less than five days of his work week is eligible to qualify for Train Dispatcher. With respect to the past practice arguments of the Organization, the Carrier asserts that Rule 68 is clear and unambiguous. Therefore, past practice considerations are not properly before the Board. The Carrier has also provided extensive rationale in the record in furtherance of its assertions.

After careful consideration of the whole record, the Board finds itself in agreement with the position advanced by the Organization. The Dispatchers are a unique craft and have certain rules which take precedence, in this case, Rules 68 and 69. And, while these rules are not as clear and unambiguous as asserted by the Organization, when they are applied to the facts of these claims and when they are viewed in the context of the total record, the Board concludes that they support the claims.

With respect to the monetary payment sought by the Claimant, the Board has noted the particular facts and circumstances brought forth in this lengthy record, and also notes that the Claimant has suffered no monetary loss. Consequently, the Board agrees with the Carrier's position on this issue, and, accordingly, will deny this portion of the claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

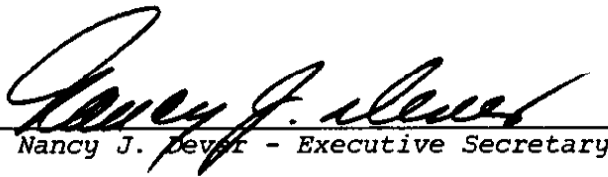
Claim sustained in accordance with the Opinion.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1985.