Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33950
Docket No. TD-34971
00-3-98-3-719

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim the difference in pay between the straight time and overtime rate of pay of the Relief Managers position for Friday, April 4, 1997 when Mrs. Neville worked as Relief Manager on her regularly assigned rest day and was only paid the straight time rate of pay."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, regularly assigned as a Train Dispatcher, was instead assigned to serve as a Relief Manager on days that would have otherwise been designated rest days. For her service on those days she was not paid the overtime rate of pay.

The record shows that the issue of compensation for regularly assigned Train Dispatchers when they work as Relief Managers is not a new one to the parties. Rather,

they agreed on December 12, 1988 that when employees are assigned to those positions there would be paid a "Relief Managing Train Dispatching rate of pay of $158 per day," subsequently raised to $247.33 "for a 12 hour shift . . . ," which the parties calculated by determining the "approximate average of the positions involved" and deemed to be the "agreed upon rate when (employees) provide relief on such positions." Later, the parties clarified this Agreement stating that the agreed upon rate was due to a need for an "established fixed rate" and that the intent behind the Agreement was " . . . to provide . . . a 'daily' fixed rate."

Now the Organization attempts in this claim to have regularly assigned Train Dispatchers paid at a different rate for the periods in question. We decline to order any such result. Rather, the disposition of this claim is driven by the parties' own clear and unambiguous language repeated over time. That language, set forth above, is that employees under these circumstances will be paid at a "fixed" rate. Moreover, to the extent that there might be any confusion, a view that we do not hold, their stated intention was again that in light of various rates in effect for the relief positions in question the employees were to be paid at a fixed rate. Thus, once the Carrier paid employees who served as Relief Managers and paid them at that rate, it complied with the parties' Agreement and intent as to the rate to be paid.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February, 2000.

Labor Member's Dissent
To Award 33950, Docket TD-34971
(Referee Perkovich)

Yes, the parties did reach an Agreement on December 12, 1988 that established a daily rate of pay for Relief Manager Train Dispatching, a position title synonymous with Chief Train Dispatcher. That Agreement provided, in part:

> "This will confirm the agreement reached with R. L. Mullaney of my staff providing for a Relief Manager Train Dispatching rate of $158 per day."

However, that is no different than when the parties agreed to daily rates of pay for Assistant Chief Dispatchers and Trick Dispatchers. By Agreement, all Train Dispatching positions have a daily rate of pay.

When the Organization pursued this claim, it was not because there was confusion about whether or not a rate of pay for a Relief Manager Train Dispatching had been established. Rather, it was pursued because the Carrier was requiring the Claimant, a regularly assigned train dispatcher, to work the Relief Manager Train Dispatching on her rest days and then only paying her the straight time daily rate. This was a clear violation of Rule 11 (b), which provides:

> "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 argued that "the Relief Manager position is a promoted, exempt position and service on this position is not subject to the working conditions of the collective bargaining agreement". This was the main thrust of the Carrier's defense of this claim.

This is not the first time a Carrier, or this Carrier, has made this argument in this circumstance. However, as the Organization pointed out in the on-property correspondence, as well as its Submission to the Board, the Board has consistently rejected this argument.

Third Division Award 2905 found:

> "The facts in this case are undisputed, and its resolution necessarily depends upon the proper interpretation of the following provision of Article 3(a)...
>
> > 'A regularly assigned train dispatcher required to perform service on the rest day assigned to his position will be paid at rate of time and one-half.'
>
> According to its literal import a regular assigned dispatcher is entitled to time and one-half for any work which he may be required to perform for the carrier on any of his regularly assigned days of rest.

To escape the effect of such a construction, the Carrier advances two main contentions, the first of which is that the position of Chief Train Dispatcher is not within the scope of the Agreement, and hence is not subject to its terms....conceding that the Chief Dispatcher, whose position the Claimant was required to fill, was an official and that the position was not within the scope of the Agreement, it does not follow that Claimant acquired the position of Chief Train Dispatcher by temporarily performing the duties of that office during the absence of its incumbent. The construction contended for by the Carrier implies the concept that a regularly assigned train dispatcher without relinquishing his status as such may, by the act of the Carrier be deprived of the protection which the Dispatchers' Agreement affords him. We find nothing in the Agreement to support this concept or its corollary namely, that of a regularly assigned train dispatcher temporarily performing the duties of a Chief Dispatcher is entitled only to the emoluments incident to the latter position notwithstanding a provision of the Agreement to the contrary."

Third Division Award 2943 found:

"If we accept the contention of the Carrier that Read in performing the duties of the position was also excepted, then we would have two chief dispatchers excepted from the position at the same time in direct violation of the Agreement. We are of the opinion that under this rule, so long as the chief dispatcher's position is occupied, the occupant of the position only is excepted from the agreement and any employee relieving him for any cause would be subject to the provisions of the agreement. This construction of the Agreement is supported by Award No. 2905."

Third Division Award 2986 found:

"While performing the duties of the Chief Train Dispatcher this relief man did not thereby cease to be controlled by the terms of the contract. He was, in effect, fulfilling its terms....

On December 26, he worked on his rest day and while the position worked was an excepted one, his assignment was under the terms of the contract and for that day he must be paid at the penalty rate...."

Third Division Award 4012 found:

"Summarized, Award 2905 holds that the plain and unequivocal import of Article 3 (a) of the Dispatchers' Agreement is that a regularly assigned dispatcher is entitled to time and one-half for any work which he may be

required to perform for the Carrier on any of the regularly assigned days of rest of his position and that when he works relief for a chief dispatcher on the assigned rest day of his won position he is entitled to such pay. It is our considered opinion the decision is sound and merits continue approval. That in so holding we are only being consistent is evidenced by repeated awards of the Division to the same effect. (See Awards 2905, 2943, 2944, 2986, 3096 and 3344.)

...the fact a dispatcher performs temporarily relief service as a Chief Dispatcher does not result in his becoming a Chief Dispatcher or lose him any rights and privileges under the rules of the Agreement applicable to his regular assignment."

Third Division Award 5371 found:

"On two of his regularly assigned rest days, claimant, a regularly assigned Relief Train Dispatcher, at the request of the Carrier filled the position of Chief Train Dispatcher. He was paid on a pro rata basis at the rate for Chief Train Dispatcher. His claim is for the difference of the pay received and pay at the time and on-half rate provided for in Paragraph 2 of Article 3(a) of the Agreement....

> '(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....

...we have held in numerous awards that only the occupant of the position of Chief Train Dispatcher is excepted from the agreement and any employee relieving him for any cause would be entitled to the benefits of the agreement." (Underscoring added.)

Third Division Award 7914 found:

"The basic question, then, before us is: While performing temporary service on the excepted position, in the absence of the incumbent of that position, is the claimant covered by Agreement Rules?

In the light of a long and imposing series of sustaining awards on this issue...we feel compelled to adopt the principle which would answer the above question in the affirmative. That is to say, only the occupant of the position of Chief Train Dispatcher is excepted from the Agreement and any employee relieving him for any cause would be entitled to the benefits of the Agreement."

Third Division Award 18070 found:

"There is a long line of awards by this board holding that although the occupant of the position of Chief Dispatcher is excepted from the schedule agreement, Train Dispatchers relieving him are entitled to all the benefits of the Agreement. In Award 11569 we said:

'...It is not reasonable to say that when (Train Dispatchers) relieve a Chief dispatcher they are no longer covered by the Agreement. If we consistently held that way, we would be upsetting a normal and reasonable arrangement and practice. We would further ignore contract rights to which covered employees are entitled. It is not our function to deprive covered employes of rights and privileges contracted for them by their certified representative. It is, rather, our responsibility to examine the total agreement and apply the facts thereto.'"

Third Division Award 19845 (between these same parties) found:

"...Claimant was assigned to work vacation relief on the Chief Train Dispatcher's position....The Chief Train Dispatcher's position is not within the scope of the Agreement. For the work Claimant performed on the Chief Train Dispatcher's position he was paid the pro rata rate of that position. The claim before us is that he should have been paid time and one-half for working on his rest day, November 2, 1970....

Claimant was regularly assigned as Night Chief Dispatcher, a position covered by the Agreement. Under Rule 4(a) of the Agreement one of the emoluments vested in Claimant as consideration for his services is...

'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 services performed on either or both of such rest days. (Emphasis Supplied)'

> Under that provision Claimant had an absolute vested right to compensation at time and one-half rate for service which Carrier required him to perform on one of his regularly assigned rest days..." (Underscoring added.)

This arbitral precedent goes back nearly 55 years. To counter this overwhelming precedent, the Carrier provided absolutely no arbitral Awards to support its position. In fact, there were no Awards at all attached to its Submission to the Board. Nevertheless, the Majority ignored this precedent.

The Majority states that "the disposition of this claim is driven by the parties' own clear and unambiguous language repeated over time". What is this so-called "clear and unambiguous language repeated over time"? The Majority states it as being:

> "[the parties] agreed on December 12, 1988 that when employees are assigned to those positions there (sic) would be paid a 'Relief Managing Train Dispatching rate of pay of $158 per day,' subsequently raised to $247.33 'for a 12 hour shift . . . ,' which the parties calculated by determining the 'approximate average of the positions involved' and deemed to be the 'agreed upon rate when (employees) provide relief on such positions.' Later, the parties clarified this Agreement stating that the agreed upon rate was due to a need for an 'established fixed rate' and that the intent behind the Agreement was '. . . to provide . . . a 'daily' fixed rate."

Is this an accurate depiction of the "parties' own clear and unambiguous language repeated over time"? Hardly.

The parties did reach an Agreement on December 12, 1988 which established a "rate of $158 per day". This Agreement was reproduced in its entirety as Carrier Exhibit A. However, this rate was not "subsequently raised to $247.33". Carrier Exhibit B is a reproduction of a Letter of Understanding reached between the parties dated January 12, 1993 which provided:

> "This will confirm discussion regarding the Relief Manager Train Dispatching rate of pay provided in letter dated December 12, 1988 and your desire to increase the rate from $158 per day.
>
> After reviewing the respective rates of the Managers of Dispatching, I am agreeable to adjusting the rate of $161 per day, which represents an approximate average of the positions involved effective January 1, 1993."

Carrier Exhibit C was a reproduction of an August 6, 1996 Memo from the Carrier's Labor Relations to the General Chairman which stated:

> "Per our conversation Aug 6, 1996 pertaining to the rate of pay for a relief Manager working a 12 hour day. I have agreed on a temporary basis without prejudice or precedence to compensate a dispatcher that works the relief manager's position on a 12 hour day in rotation with the promoted managers as follows;
>
> STRAIGHT TIME FOR 12 HOURS AT THE RELIEF MANAGERS RATE
>
> This would come out to $247.32 for a 12 hour shift which is still well over what a promoted manager makes per day."

This is when the rate was "subsequently raised...for a 12 hour shift", but it was not the "approximate average of the positions involved". In fact, according to the Carrier, $247.32 was "still well over what a promoted manager makes per day".

Carrier Exhibit D was a reproduction of an August 15, 1996 Memo from the Carrier's Labor Relations to the Claimant which stated:

> "The verbal agreement with Jeff does provide that train dispatchers will be paid time and one-half for the additional 4 hours during the interim until we get the management positions assigned, even on a temporary basis. I am assuming that at least temporary assignment of the management positions will occur in the very near future.
>
> This is being done without prejudice to our position that the relief management rate of pay that has been negotiated encompasses all working conditions of the management position."

Carrier Exhibit E was a reproduction of a July 25, 1997 statement from former ATDD General Chairman Neff to Labor Relations concerning the "Relief chief dispatcher rate of pay". In this statement, Mr. Neff explains how and why the parties reached the December 12, 1988 Agreement. He said:

> "When the agreement was reached to consolidate offices it was also agreed to provide for 4 exempted positions in the new office. After working with this for some time, after the consolidation, it became apparent that there were various rates in effect for the exempted positions and a need to established (sic) a fixed rate for the relief of each of those position (sic) by the regular train dispatchers. That was done and the intent of that agreement was to provide that relief would be done by the regular train dispatchers at a 'daily' fixed rate for all exempted 'releaved' (sic) positions.

> 'daily' meant just that. Based on my experience and the number of offices I have worked in both as a supervisor, and train dispatcher, the exempted position was not paid overtime for more than 8 hours worked on any given day."

It is apparently this statement that the Majority refers to as "Later, the parties clarified the Agreement stating that the agreed upon rate was due to a need for an 'established fixed rate' and that the Intent behind the Agreement was '. . . to provide . . . a 'daily' fixed rate." Obviously, that characterization is completely wrong. This was not a clarification of the agreement by the parties.

It is clear in reading this statement that Mr. Neff was speaking of "more than 8 hours worked on any given day" and not rest day service under Rule 11 (b) when conveying his impression of the intent of the agreement. This is confirmed by the Carrier it its letter dated November 19, 1997, reproduced as Carrier Exhibit L:

> "You have been furnished a copy of the statement provided by former General Chairman Neff, which confirms my position of the intent of such agreement, acknowledging such work to be 'management' work and not subject to overtime after eight hours in a day."

Working "more than 8 hours" in a day was not the dispute between the parties. The Carrier was already compensating those working the Relief Manager Train Dispatching, including the Claimant, four hours at the overtime rate when working a 12 hour shift, albeit without prejudice to its position.

It is worth noting that later in the on-property record, Mr. Neff clarified his earlier statement by stating "that there was no intent in this agreement to override the other provisions of the schedule agreement". There is no evidence to the contrary.

Given the vast arbitral precedent in support of the Organization's position and the parties actual "clear and unambiguous language repeated over time", the Majority's decision is erroneous and holds no precedential value whatsoever. Therefore, I dissent.

Respectfully submitted

David W. Volz

David W. Volz
Labor Member