

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

BOSTON AND MAINE RAILROAD COMPANY

STATEMENT OF CLAIM.—

"(1) That the Management of the carrier should not have permitted Mr. P. H. Pearson, who is junior to all other regularly assigned train dispatchers in the Concord, New Hampshire, dispatching office, to displace Mr. F. P. Learned from his position as assistant chief dispatcher because the latter is senior to Mr. Pearson—both as an employee and as a Train Dispatcher.

"(2) That those who were displaced because a junior man (Mr. Pearson) was permitted to displace a senior man (Mr. Learned) be compensated for all monetary loss sustained by them by reason thereof.

"(3) That Mr. Pearson should not have been nor hereafter be accorded privileges with respect to the retention, accumulation and exercise of seniority as train dispatcher which the rules of the schedule-agreement deny to others."

STATEMENT OF FACTS.—In their ex parte submission the employees made the following statement of facts:

"Effective as of December 28, 1921, an agreement governing working conditions of chief, assistant chief, trick, relief and extra train dispatchers was entered into between Management of this carrier and the representatives of its Train Dispatchers. That agreement made no distinction between chief, assistant chief, trick, relief and extra dispatchers, and contained the following rule governing the exercise of seniority:

"Where ability and merit of two men is equal, the choice of positions either within the same office or between different dispatching offices of a division, so far as possible, should be determined upon the basis of seniority."

"In addition thereto, rules governing the weekly rest-day, relief requirements, vacations, sick pay, computation of pay, and transportation—all applied to chief, assistant chief, trick, relief and extra dispatchers without qualification.

"As a result of subsequent negotiations, an agreement governing working conditions was entered into between the parties and became effective as of April 5, 1929, and was in effect when this dispute originated and is still in effect. This agreement contains, among others, the following rules which directly affect the question in dispute, viz:

"ARTICLE 1. *Scope*.—The term "train dispatcher" as hereinafter used shall be understood to include assistant chief, trick, relief and extra dispatchers; provided, that, Articles 5 and 8 of "The Train Dispatchers' Schedule" shall not apply to assistant chief dispatchers with the exception of the last paragraph of Section (d) of Article 5.

"ARTICLE 5. *Seniority*.—(a) Seniority as a train dispatcher will date from the time service as such is first performed on the division upon which he is employed as such, except as hereinafter provided. Provided further, that seniority standing as shown on seniority rosters in effect on or before the date of this agreement will not be changed.

"(c) Failure to perform service as train dispatcher for a period of ninety (90) days shall cause forfeiture of seniority except when not used as such due to lack of work, in case of sickness, or as provided for in Sections (d) and (1) of this Article.

"(d) Seniority rights shall be cumulative when accepting official positions with the Boston & Maine Railroad or the American Train Dispatchers Association.

"Chief and Assistant Chief Dispatchers shall retain and accumulate seniority and shall be permitted to exercise the same on their home division in the same manner as are trick dispatchers.

"(f) Where ability of two men is equal, the choice of positions either within the same office or between different dispatching offices of a division, so far as possible, should be determined upon the basis of seniority.

"Seniority under this section may be exercised only in bidding on vacancies or new positions, or as provided in Sections (h), (i), and (j) of this Article. * * *

"(g) A complete list of all those holding seniority rights as train dispatcher on the division will be issued at the beginning of each year and be subject to correction upon proper representation if taken up within thirty (30) days after the issuance of the list. Such lists shall show name, present occupation, date of last entry into service in any capacity, and seniority standing as train dispatcher. Copies to be furnished the Chairman of each office and to the General Chairman of the American Train Dispatchers Association.

"(1) Leave of absence not to exceed ninety (90) days may be granted when application in writing is made to the proper official. When approved by the Management and the General Chairman, leave of absence may be extended in excess of ninety (90) days without forfeiture of seniority. Copy of letter granting leave of absence shall be furnished the man on leave and the General Chairman.

"Mr. P. H. Pearson was at the time of the origin of this dispute and is now junior in point of seniority as train dispatcher to any other regularly assigned train dispatcher employed in the Concord, N. H. dispatching office.

"For some time prior to and until May 1926 Mr. Pearson held and filled the position of Second Trick Assistant Chief Dispatcher in the Concord, N. H. dispatching office but, in May 1926, he left his position and the dispatching service to accept a position in a minor capacity with the Passenger Traffic Department of this carrier.

"When Mr. Pearson left his position as Second Trick Assistant Chief Dispatcher, and the dispatching service, in 1926, Mr. C. F. Archer, in the exercise of his seniority, moved from his position as Third Trick Assistant Chief Dispatcher to the Second Trick made vacant by reason of Mr. Pearson having accepted service in another department. Concurrently therewith Mr. C. V. Cushing, in the exercise of his seniority, moved from his position as trick dispatcher to the vacancy in the Third Trick Assistant Chief Dispatcher position which had been vacated by Mr. Archer.

"Subsequent thereto the dispatching force in the Concord office was reduced which caused Mr. F. H. Willard to lose his trick dispatcher position and who, thereupon, exercised his seniority by displacing Mr. Cushing and taking the position of Third Trick Assistant Chief Dispatcher.

"Mr. F. P. Learned entered the service of this carrier on August 15, 1895, and holds seniority as train dispatcher dating from August 8, 1907. From June 1914 and until the Woodsville, N. H., dispatching office was abolished on September 6, 1930, Mr. Learned held and filled the position of Chief Train Dispatcher in the Woodsville, N. H., dispatching office.

"When the Woodsville, N. H., dispatching office was abolished, the territory theretofore handled by the dispatchers located in that office was combined with the territory handled by the dispatchers located in the Concord dispatching office. Seniority rosters of the two offices were, under the rules, also combined, whereupon Mr. F. P. Learned exercised his seniority to a trick dispatcher position in the Concord dispatching office.

"On or about October 26, 1931, another force reduction in the Concord dispatching office resulted in Mr. Learned losing his trick dispatcher position, whereupon he again exercised his seniority by displacing Mr. F. H. Willard from and taking the Third Trick Assistant Chief Dispatcher position in that office.

"Mr. Learned held and filled this position until August 1934, when Management removed him therefrom to make way for Mr. Pearson, a junior man, whose position in the Passenger Traffic Department had been abolished, and

whom Management permitted to return to the dispatching service with seniority unimpaired by reason of his absence therefrom, and whereupon Mr. Learned, in order to retain a position, displaced Mr. J. F. Ellis, his junior but also senior to Mr. Pearson, from his position as trick dispatcher and forcing Mr. Ellis out of a regularly assigned position and on the extra list."

In its submission the carrier stated the facts as follows:

"An agreement exists between the Boston and Maine Railroad and the American Train Dispatchers' Association, which agreement became effective, as to certain rules, on January 5, 1929, and as to balance of rules on April 5, 1929.

"Paul H. Pearson entered service as Spare Operator and Tower Man in June 1905, became a Relief Train Dispatcher June 5, 1912; Regular Train Dispatcher November 25, 1912; Assistant Chief Train Dispatcher August 24, 1917, and Assistant to Passenger Traffic Manager on April 1, 1927. The latter position was abolished on or about August 1, 1934, and Pearson resumed his former position as Assistant Chief Train Dispatcher at Concord, N. H., on August 15, 1934, which affected the men in the office as shown below:—

Pearson	displaced	T. P. Learned	as	Asst. Ch. Train Dispatcher.
Learned	"	W. H. Bonner	as	Regular Relief Dispatcher.
Bonner	"	H. E. Mann	as	Third Trick Dispatcher.
Mann	"	J. F. Ellis	as	" " " "

Ellis became Spare Trick Dispatcher, by choice. He could have displaced the youngest regularly assigned dispatcher on the system.

"Decision in case rendered by highest officer of Railroad designated to handle such cases on September 5, 1934, and nothing more heard from case until letter from General Chairman dated August 9, 1935."

An agreement between the parties bearing effective date of January 5, 1929, as to some of its provisions and of April 5, 1929, as to the remainder was placed in evidence, and articles 1 and 5 of this agreement, as set forth above, were specifically relied upon as bearing upon the disposition of this dispute.

POSITION OF EMPLOYEES.—The contentions of the employees were stated as follows:

"We contend that, in view of the intent of the last paragraph of Article 5-(d), quoted in our Statement of Facts, which permits an assistant chief dispatcher to retain, accumulate and exercise seniority only in the manner that trick dispatchers are permitted to retain, accumulate, and exercise seniority, Mr. Pearson had no right to displace Mr. Learned who was senior to Mr. Pearson as an employee as well as a train dispatcher.

"We question the propriety of Mr. Pearson being permitted to exercise any seniority as train dispatcher if the literal intent of Article 5-(d), second paragraph, is to apply, because the rules permit an assistant chief dispatcher to retain, accumulate, and exercise seniority only in the manner that this is permissible to be done by trick dispatchers.

"Under the provisions of Article 5-(c), hereinbefore quoted, a trick dispatcher may retain, accumulate, and exercise seniority only if he performs service as a train dispatcher, as that term is defined in Article 1 of the agreement at least once in a 90-day period, unless not used as such due to lack of work, in case of sickness, or he holds and is filling an official position, or is on a proper leave of absence. Mr. Pearson had failed to comply with any of those requirements as stipulated in Article 5-(c). And further, if assistant chief dispatchers may retain, accumulate, and exercise seniority only in the manner as are trick dispatchers, then it follows that the several requirements imposed by the rules upon trick dispatchers in the premises must be the yardstick in determining the circumstances or conditions necessary for assistant chief dispatchers to retain, accumulate, and exercise seniority.

"Even though Mr. Pearson had fully complied with the stipulated requirements of the schedule-agreement governing the manner in which he might retain, accumulate, and exercise seniority, we contend that he should not have been accorded privileges, namely—displacing a senior man, which are

denied to others by the rules of the agreement. Mr. Pearson being permitted by Management to do so, however, forced the senior displaced man (Mr. Learned) to displace others who also are senior to Mr. Pearson.

"For reasons hereinbefore set forth, all of which have been discussed between the parties, we contend that Mr. Pearson should not have been permitted to displace Mr. Learned, that he should not have been nor hereafter be accorded privileges which the rules of the schedule-agreement deny to others with respect to seniority, and that those who were displaced because Mr. Pearson displaced Mr. Learned be compensated for all monetary loss sustained by them by reason thereof, and we respectfully ask this Board to so decide."

POSITION OF CARRIER.—The contentions of the carrier were stated as follows:

"We first raise question as to jurisdiction of National Railroad Adjustment Board when there has been no recorded claim made by the organization of any violation of specified rules of the agreement.

"It is our opinion that the Adjustment Board has jurisdiction only over disputes growing out of the interpretation or application of contracts or rules entered into between the employees' and employers' representatives. That there being no rule or contract between the parties which covers the appointing of an Assistant Chief Train Dispatcher, there is nothing which the Third Division can properly hear and decide under Section 3 (i) of the Railway Labor Act as Amended.

* * * * *

"Should the Board decide they have jurisdiction and will hear and decide the case on its merits, then we contend that the position involved—that of Assistant Chief Train Dispatcher—is an appointive position, and does not come within the scope of the Agreement of 1929, as indicated by Article 1 of the agreement where it states—'provided that Articles 5 and 8 of the Train Dispatchers' Schedule shall not apply to Assistant Chief Train Dispatchers with the exception of the last paragraph of Section D of Article 5.'

"Article 5 is captioned 'Seniority,' and the last paragraph of Section D provides—'Chief and Assistant Chief Dispatchers shall retain and accumulate seniority and shall be permitted to exercise the same on their home division in the same manner as are Trick Dispatchers.'

"Article 8 is captioned 'Discipline.'

"When Mr. Pearson left position of Assistant Chief Dispatcher at Concord to become Assistant to Passenger Traffic Manager in 1927, the Train Dispatchers were working under an agreement of December 1921, and there was no requirement in that agreement that rosters should be prepared and posted each year or that any leave of absence should be secured by dispatchers promoted to official positions in order to preserve seniority rights, so that the fact that Mr. Pearson's name did not appear on roster while he was an official of the Railroad, or that he did not have a formal leave of absence cannot properly be used as reasons for preventing him from going back as a Train Dispatcher with all his seniority as such.

"When the matter of rosters was under discussion with General Chairman of A. T. D. A. in 1928, he stated in substance that any of those serving in an official position should not lose their roster rating even if not then on the roster.

"On all three divisions we have Assistant Chief Dispatchers who are not the senior dispatchers.

"On the Portland Division a man who had been Train Master for several years went back as Assistant Chief Train Dispatcher and displaced a man in same manner as Pearson displaced in this case.

"On the Fitchburg Division there have been several changes in Assistant Chief Train Dispatchers since present agreement took effect. Men placed on such positions were appointed—positions were not bulletined and filled under provisions of Article 5 of Agreement, as it was recognized that that article does not apply to position of Assistant Chief Train Dispatcher, except the second paragraph of section (d). So far as the rules are concerned we are privileged to fill such positions from men from other divisions or other railroads, but in this case all we did was to put Mr. Pearson back on same position which he was filling at time he was called to headquarters for

special work. Other men in office gained something by his absence, and later official appointment, from dispatching service for over seven years.

"The request that Mr. Pearson be removed and men affected be restored to the positions which they held prior to August 15, 1934, cannot be granted in view of foregoing.

"The request that men affected be compensated for all monetary loss sustained by them cannot be granted in view of our position that Pearson was properly appointed to the position in August 1934, and, furthermore:—

"(a) As the claim is too indefinite—it does not state men involved—other than Mr. Learned, or approximate monetary loss.

"(b) As no claim for monetary loss was made in correspondence or conferences on the property.

"(c) The Organization is responsible for about eleven months' delay in progressing the case to the National Railroad Adjustment Board as decision of designated officer of the Railroad was given on September 5, 1934, and nothing further was said by Organization until August 9, 1935.

"(d) As Ellis, the junior Regular Dispatcher in Concord Office was privileged under Article 5 of the Agreement to displace junior Regular Dispatcher on the System, which privilege he waived and preferred to do spare work at Concord."

OPINION OF BOARD.—Since this dispute involves an interpretation and application of articles 1 and 5 of the agreement, there can be no question as to the propriety of the Board's assuming jurisdiction. The Board is concerned, however, not with whether the appointment of assistant chief dispatchers ought from the standpoint of policy to be subject to seniority rules, which is entirely a matter of negotiation between the parties, but with whether the prevailing rules, as negotiated and incorporated in the current agreement, impose seniority restrictions upon the carriers power of appointment of assistant chief dispatchers.

Article 1 provides that the term train dispatcher as used in the agreement shall be understood to include assistant chief dispatchers, but it expressly stipulates that article 5 (Seniority) and article 8 (Discipline) shall not apply to assistant chief dispatchers, with the exception of the last paragraph of Section (d) of article 5. In other words, article 1 excludes assistant chief dispatchers from the restrictions upon appointment and removal to which the carrier is subjected by the agreement with respect to train dispatchers, except insofar as the last paragraph of Section (d) of article 5 may modify this exclusion. This paragraph provides that assistant chief dispatchers "shall retain and accumulate seniority and shall be permitted to exercise the same on their home division in the same manner as are trick dispatchers." It is obvious that this language accords rights to assistant chief dispatchers which can be asserted only if in compliance with the governing seniority rules, rather than imposes obligations upon the carrier which require adherence to these seniority rules. When assistant chief dispatchers attempt to exercise the seniority which they have retained or accumulated they must be permitted to do so in the same manner as are trick dispatchers, and failure to observe the relevant requirements would deprive them of their rights; but there is nothing in this paragraph which requires, as against the general exclusion by article 1 of assistant chief dispatchers from the operation of the seniority rules, that the carrier's appointments to these positions, as in case of trick dispatchers, "should be determined upon the basis of seniority." It would do violence to the manifest intent of the parties, as indicated by the express language of the agreement as well as by the nature of the negotiations which preceded its adoption and the usual practice which has characterized its execution, to hold that the seniority rules as a whole are applicable to the appointment of assistant chief dispatchers, in face of the definite and unambiguous stipulation that only the second paragraph of Section (d), which imposes no restrictions whatever upon the carrier's freedom of action, shall be applicable to assistant chief dispatchers.

Accordingly, the appointment of Pearson as assistant chief dispatcher involved no violation of the relevant rules of the agreement, and those who were displaced as a result of his appointment have no valid claim to compensation for monetary loss sustained by reason of his appointment. It is unnecessary to determine in this case whether Pearson has in fact properly safeguarded his seniority rights, since he has made no attempt to exercise them; should he assert these rights in the future, the parties to this dispute would be free to present that issue, without prejudice, in light of the facts then prevailing and the rules of the agreement applicable thereto.

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 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 facts of record disclose no violation of the relevant rules of the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division.

Attest: H. A. JOHNSON
Secretary.

Dated at Chicago, Illinois, this 12th day of February, 1937.