Award No. 1852
Docket No. TD-1558

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim for the reinstatement of title and restoration of position of Night Chief Dispatcher in the Carbondale, Pa., office, which title and position were abolished by the Carrier effective March 16, 1940, and that all those who were thereby adversely affected be reimbursed by the Carrier for all monetary loss sustained.

EMPLOYES' STATEMENT OF FACTS: For many years and up to March 16, 1940, certain duties had existed, and had been performed in the Carbondale, Pa., office by the incumbent of a position theretofore titled Night Chief Dispatcher, at a rate of pay of $305.00 per month.

Although the work theretofore performed by the Night Chief Dispatcher in Carbondale continued to exist, the Carrier abolished the title and the rate of pay effective March 16, 1940.

For approximately two years prior to March 16, 1940, it had been the duty of the Night Chief Dispatcher in Carbondale, in addition to his regular duties as such, to also perform duties of trick train dispatcher, which meant that one of the two dispatching districts in the Carbondale office was handled by the Night Chief Dispatcher in conjunction with his duties as Night Chief Dispatcher.

Concurrently with the abolishment by the Carrier of the Night Chief Dispatcher position in Carbondale, the Carrier established a second regular third trick train dispatcher position, one dispatcher position to be responsible for and handle all business and train movements on the south half of the division, the second dispatcher position to be responsible for Carbondale Yard and the north half of the division, and by instructions from the Carrier it devolved upon the incumbents of these two third trick train dispatcher positions, in addition to performing the actual duties of trick train dispatchers, to perform the work and assume the responsibilities of the Night Chief Dispatcher position, but at the rate stipulated in the agreed upon schedule of rates of pay for trick train dispatcher, that of $260.00 per month.

The position of Night Chief Dispatcher had, for several years prior to March 16, 1940, been held by T. P. Crowley.

On March 14, 1940, Mr. Crowley was notified by Chief Dispatcher Lyden, verbally, and which was forty-eight hours advance notice, that the position of Night Chief Dispatcher was abolished, effective March 16th, and that he should assert his seniority. Being senior to the incumbent of the first trick dispatcher position, Mr. Crowley thereupon displaced on that position with

and no such position was listed. Therefore, request in this case is for an additional position in the Carbondale dispatching office of Night Chief Train Dispatcher under Article 1 (a) and (b) and Article 7 (d) and (e).

The Management contends that no employe in the Carbondale dispatching office is now performing or has performed since March 16, 1940 any work which could be considered the duties of a Night Chief Train Dispatcher. The Management further contends that the only duties performed by the Night Chief—South End Dispatcher from July 1, 1938 to March 16, 1940 which might be classed as Night Chief Dispatcher's duties were two reports which were prepared by the Night Chief Dispatcher previous to July 1, 1938. Effective March 16, 1940 with the abolishment of the Night Chief Dispatcher title and rate, one of these reports was discontinued and the other which consumed about forty-five minutes was prepared by the report clerk.

For the information of the Board, at the present time no Night Chief Dispatchers are employed on the Delaware and Hudson Railroad. At one time Night Chief Dispatchers were employed at Carbondale, Pa., Oneonta, N. Y., Albany, N. Y., and Plattsburg, N. Y. The position at Carbondale was abolished March 16, 1940. The position at Oneonta was abolished February 1, 1938. The position at Albany was abolished October 16, 1936. The position at Plattsburg was abolished October 1, 1940.

The Management denies that Trick Train Dispatchers in the Carbondale office have performed any duties which might be considered Night Chief Dispatcher's duties since March 16, 1940 and further states that the only work performed by Trick Train Dispatchers is as described under duties in Management's Statement of Facts above.

OPINION OF BOARD: For the purpose of this award it becomes necessary to segregate the above claim into (a) restoration of position and title, and (b) reimbursement of monetary losses.

(a) There can be no question but that the position and title of Night Chief Dispatcher will have to be restored. The evidence is undisputed that there was such an office, and that it required numerous duties ordinarily incumbent upon such an office and that it was filled by a night chief dispatcher for a period of over ten years at a monthly salary of $305.00 prior to its attempted abolition. It is also admitted that there has been a respectable increase in business in late years. It is also not seriously disputed that, when the Carrier did abolish the position, most of the duties devolving upon it were assigned to two trick dispatchers being paid $260.00 per month. It is the contention of the employes that this is in violation of Art. 1 of the Agreement which reads:

> "(a) The term 'Train Dispatcher' as hereinafter used shall be understood to include Night Chief, Trick, Relief and Extra Dispatchers.
>
> (b) Where payroll classification does not conform to foregoing section, any employe performing service as specified therein shall be reclassified in accordance therewith."

There is no need for further statement of fact, or position of either side in this case because as far as the restoration of the position and title is concerned, this docket is controlled by Awards Nos. 1828 and 1831, the latter involving a parallel situation on the same carrier except for one fact which we shall presently come to.

(b) The claim for reimbursement for monetary losses cannot be sustained. In Award No. 1831 it is stated, "We must assume from the fact that at the time the agreement with its appended schedule was entered into, necessity did exist at Plattsburg for the position of night chief dispatcher, otherwise the position would not have been included." We have here the same agreement and the same "Schedule of rates of pay for positions covered by **this agreement**" except that the position of "Night Chief Dispatcher" is

excluded. This schedule is approved by the two principal officers of the employes' organization. In explanation of this apparent dilemma, it was argued —with commendable frankness—that the reason for the exclusion was that the representatives of the employes were working under pressure to "get the agreement signed." We think there is some truth in this but it is not such an excuse as the law will recognize as a mutual mistake of fact.

From this it might be argued that the employes have foreclosed themselves from a restoration of the job, but that would not follow as a matter of law as we have indicated in (a) and for the further reason that it would be very inconsistent and produce an unnecessarily irreconcilable result to restore the position on the Plattsburg property of this Carrier and not on the Carbondale property.

It is unfortunate to penalize the particular employes involved but they must stand charged with the actions of their duly chosen representatives.

Therefore, it is the opinion of the Board that the claim be sustained as to the restoration of title and position but denied as to monetary reimbursements.

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 claim should be sustained as to the restoration of title and position with attendant rate of pay as of July 15, 1942, with no reimbursement of monetary losses.

AWARD

Claim sustained in part and denied in part as indicated in above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of June, 1942.

DISSENT TO AWARD NO. 1852, DOCKET TD-1558

Paragraph (a) of the Opinion in this Award begins with the arbitrary declaration that "There can be no question but that the position and title of Night Chief Dispatcher will have to be restored." The Opinion then proceeds to recitation of facts to the effect that there was such an office which required numerous duties ordinarily performed in such an office and that it was filled by a night chief dispatcher for a period of over ten years.

Those facts are not disputed as facts; the elements in respect to them which presented the question in this case were that those facts related to a position of Night Chief Dispatcher in the Carbondale office which had ceased to exist because of its discontinuance three (3) months before the parties to this first and current agreement had executed it, upon which execution they

mutually agreed to make it retroactive to a date (April 1, 1940) fifteen days after this position had ceased to exist. And this agreement with its established effective date of April 1, 1940 was thus mutually entered into without including in the list of positions with their respective rates of pay made a part of the agreement, this position at Carbondale and without any reservation in respect to the position or the applicability of the agreement thereto.

Ignoring these essential elements of the facts, i. e., the non-existence of the position at the time the agreement was made effective, the non-inclusion of the position in the list of positions identified separately therein with respective rates of pay, and the non-reservation of any character as to the applicability of the agreement to the position or to the question of the coverage by the agreement of the position (which question had concurrently with the negotiation of the agreement been a subject of discussion between the parties), the Opinion prefaced its incomplete recitation of the facts,—incomplete because of the omission of the essential element of their non-existence at the time and in the period of the effectiveness of the agreement,—by declaring "there can be no question but that the position and title of Night Chief Dispatcher will have to be restored."

Can arbitrary decision reach further extreme? Naught but sound legal determination on the question thus arbitrarily disposed of was required. Does the declaration of this award represent sound legal determination of that question?

It ill behooves a group of laymen to express their opinion as to the soundness of such legal declaration. But it is not amiss for them to contrast that which has heretofore appeared in consistent upholding in successive awards from this Division rendered by Referees of legal attainments with this single contrary decision in the face of such essential elements of facts controlling in sound construction of contracts which were before the Referee who rendered the Award in this case.

The following declarations covering identical elements, here ignored, appear in these preceding Awards:

AWARD NO. 383:

> "The current agreement contains * * * a list of the agencies and their rates of pay as agreed upon by the parties. The agencies here in dispute were excluded from this list, * * *; they were deliberately excluded, although the subject of controversy for many years, because the Carrier was unwilling to accede to their inclusion. * * * In this case, there was no violation of the agreement, and it is not within the authority of this Board to grant the relief sought, which would extend the scope of that agreement."

(A reading of the full paragraph including the omissions from which the above is extracted and of the entire Award will but give emphasis to the finality of the expression in this Award.)

AWARD NO. 1290:

> "* * * As shown by the record it was the practice of the parties to this dispute to negotiate into their agreements, the current agreement included, a list of positions and their rates of pay. However, the three tower positions at Bricelyn were omitted from the current agreement. It has been the uniform holding of this Board that the scope of an agreement may be made as broad or narrow as the parties may stipulate. Cf. Awards 383, 389, and 1230. It has further been the constant holding of this Board that it cannot make a new agreement for the parties so as to include positions not covered in the agreement the parties themselves have made. Cf. awards above cited and in addition 42, 871, 1079, 1100, 1102, 1116, and 1149.

"Under the facts presented in this case it must be held that the failure to negotiate into the current agreement the three tower positions at Bricelyn left these positions outside the scope of that agreement. The restoration of these positions is not within the authority of this Board."

AWARD NO. 1843:

"As a premise for further discussion, and decision on the claim it will be stated as a controlling principle that in the Clerks' Agreement consummated on September 1, 1936 the parties contracted with reference to positions as they existed on that date and such as were to be created or adjusted thereafter and not with reference to situations or positions which had ceased to exist before completion of the agreement, unless some right or rights were reserved for treatment or disposition under the new agreement. It must not be understood that this Division assumes to hold that the new agreement disposed of pending questions which had previously arisen, if there were such. Such matters were for disposition, agreeable to the pre-existing relationship of reservations in the new one. Also resort may not be had to pre-existing conditions or practices to modify change or explain the operation or effect of the September 1, 1936 Clerks' Agreement where the terms and implications of the agreement in pertinent respects were complete, plain and unambiguous. This is but a statement of fundamental principle in contractual interpretation and application.

"This brings us to the point where we are required to state, for the purposes of this case, that no adjustment of the position here involved, whether it may have been by addition of duties to, subtraction of duties from, change of title, or any other change, which took place before September 1, 1936, requires consideration. We must start from that date and consider what happened thereafter."

This Division with its lay membership will write no new law for the country; it may be trite to say it, but it cannot be gainsaid that our decisions will stand or fall as measured by fundamental law and legal precept, as thereby they will be judged by those of legal and judicial competency so to do. We leave this decision on the essential elements of facts in this case to be thus judged in contrast with the uniform consistent and contrary decisions in the three awards from which the above quotations were taken as well as in the various other preceding awards to the same effect to which reference was made in the Opinions of those three awards.

The Opinion of this award next after noting the contention of the employes by quoting Article 1 of the Agreement (an agreement of course that became an agreement only after the position here in dispute had ceased to exist) gives its only other reason for the award in the third paragraph of the Opinion by declaring "this docket is controlled by Awards Nos. 1828 and 1831 etc."

Here again is ignored the absolute distinguishments of those two respective cases and awards from the instant case, all of which were before the Referee who rendered this award. In both of those two preceding cases the positions were covered by the agreements, as indicated by their listings in schedules of rates of pay governed by the terms of those agreements, and the coverage of the positions when they existed was conceded by the Carriers; this in complete contra-distinguishment from the position involved in the instant case which did not even exist to be covered and though a question in dispute when negotiating the agreement, was not included in the given list of positions, nor was a reservation made as to the agreement applying or to be applied to the disputed question or the involved position.

In further distinguishment, the agreement in Award 1828 included precisely that which the instant agreement lacked in that the former's scope rule gave specific description of the duties attaching to a night chief dispatcher's position thus definitely identifying that which constituted such a position. The agreement in the instant case had absolutely no description of a night chief dispatcher's duties and absolutely no provision therein which would warrant the assumption that the description of such duties in some other agreement or document would represent the duties of such a position as agreed upon by these parties.

Quite to the contrary this record showed that as of the effective date of the instantly involved agreement such duties as were of the particular character of a night chief dispatcher's duties had been previously either discontinued or assumed by other officers and employes, and that as of that same effective date of the agreement the duties of the occupant of the trick dispatcher's position from which the night chief dispatcher's duties had been removed, who previously also had assumed other duties of the former night chief dispatcher's position, was performing the same character of duties as had been previously and, at the time of the effective date of the agreement, was being performed by the other trick dispatcher in the same office.

The situation and the agreement provisions here involved essential to a decision of the case were the opposite of those in Award 1828, and thus necessarily led to an opposite award. The very law of reason is defiled by concluding that contrary bases and contract provisions lead to the same results and decision.

Similarly as to Award 1831 which, it is stated in the instant award, involves "a parallel situation on the same carrier except for one fact which we shall presently come to."

The Opinion came to that fact presumably in its notation, in the next succeeding paragraph of the Opinion, of the exception "that the position of 'Night Chief Dispatcher' is excluded" from the Schedule of listed positions and rates of pay therefor. The exception doubtlessly refers to the Night Chief Dispatcher position at Carbondale here involved. It was an exception and a notable one,—being a deliberate omission as contrasted with the position at Plattsburg involved in Award 1831 which equally as deliberately was included in the agreement by mutual understanding and action of the parties.

But how does the Opinion in the instant award deal with its observation of the exception and its contrast with the position at Plattsburg? It, the Opinion, in its next succeeding or third from last paragraph, declares the restoration of the job has not been foreclosed "as a matter of law as we have indicated in (a),"—(a) being the paragraph of the Opinion giving its arbitrary declaration that the position will have to be restored and giving its facts of omitted essential elements of non-existence of position, non-inclusion in agreement and non-reservation in respect thereto, with which this dissent in its preface has dealt.

Paragraph (a) of this Opinion is a distortion of law unless all previous awards heretofore noted dealing with the same legal question are distortions. And that question again we leave to the competent legal minds who may in their opportunities and in turn have occasion to review this award and those previous ones.

The Opinion concludes the reasons for this award in the third from last paragraph "for the further reason that it would be very inconsistent and produce an unnecessarily irreconcilable result to restore the position on the Plattsburg property of this Carrier and not on the Carbondale property."

Here we have for justification of the award that which appears equitable. This Board is without authority to base an award upon equitable results unless the agreement has provisions that bring forth such results,—no matter what

equitability or desirability of results we may find in situations on other properties or in situations at other locations on the same property.

At Plattsburgh on this same property where the desirable result of a restoration of a similar position accrued from another award it has been clearly demonstrated and it is supremely evident that it arose from a situation of complete distinguishment as to circumstance and agreement coverage, as heretofore shown. The decision gave no impression that it was based upon results, equitable or otherwise. Whatever agreement or disagreement there may be with that decision it must be apparent that it was an award giving its interpretation of the contract and its reasons therefor based alone on the provisions of the contract.

The contrast in that respect as well as the contrast of this case with the situations and agreement coverages in the respective awards, Nos. 1831 and 1828, inexorably condemn the present award as an unwarranted and unsound award.

/s/ C. C. Cook
/s/ R. F. Ray
/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. P. Dugan