

Award No. 3131

Docket No. TD-3094

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: (1) Claim by the American Train Dispatchers Association that the Erie Railroad Company did not comply with the intent of Article 5-(i) of the Agreement between the Erie Railroad Company and the Train Dispatchers represented by the American Train Dispatchers Association when the carrier failed to give the consideration intended by that provision by retaining on, or promoting a train dispatcher from the seniority territory of the Mahoning Division to the position of chief train dispatcher in the Youngstown office of that Division.

(2) That the Carrier, on November 1, 1943, acted contrary to the intent of Article 5-(i) of the Agreement, by appointing one J. E. McNelis, who held no seniority on the Mahoning Division nor was he employed as train dispatcher by the Erie Railroad Company, to the position of Chief Train Dispatcher on the Mahoning Division, without giving due consideration based on length of service, fitness and ability, to train dispatchers on the seniority territory involved and, by that act, removed from his position of Chief Train Dispatcher M. Swartz whose many years of service in that capacity had demonstrated his fitness, ability and qualifications.

(3) Train Dispatchers on the seniority roster of the Youngstown, Ohio, office of the Mahoning Division shall now be given consideration for promotion to the position of Chief Train Dispatcher in accordance with the provisions of Article 5-(i) and any and all wage loss to the dispatchers of this seniority territory, because of violation of Article 5-(i) shall be paid from November 1, 1943, until such a time as the Carrier restores the position of Chief Train Dispatcher at Youngstown, Ohio, to the train dispatchers of that seniority territory.

EMPLOYEES' STATEMENT OF FACTS: There is an agreement, effective April 8, 1942, between the Erie Railroad Company and their train dispatchers represented by the American Train Dispatchers Association, governing the hours of service and working conditions, the pertinent sections in the instant case, reading as follows:

"ARTICLE 1—Scope

"The term 'Train Dispatcher' as used hereinafter is mutually understood to include Trick, Relief, and Extra Dispatchers."

"ARTICLE 5

"(a) **Seniority Datum.** Seniority as Train Dispatcher shall date from the time service as such was first performed after last

ment of the Carrier in removing Swartz from this position because of his inability to satisfactorily perform the duties of the position. Neither has Swartz protested such action.

ITEM No. 3

"Train dispatchers on the Seniority Roster of the Youngstown, Ohio office of the Mahoning Division shall now be given consideration for promotion to the position of Chief Train Dispatcher in accordance with the provisions of Article 5-(i) and any and all wage loss to the dispatchers of this seniority territory, because of violation of Article 5-(i) shall be paid from November 1, 1943, until such a time as the carrier restores the position of Chief Train Dispatcher at Youngstown, Ohio, to the train dispatchers of that seniority territory."

Carrier's Reply: The Carrier reiterates position taken in Item No. 1 that due consideration was given to Article 5-(i) of the agreement dated April 8, 1942 and that all of the dispatchers in the seniority district involved were given consideration based on length of service, fitness and ability and therefore there was no violation of Article 5-(i). In the progress of this claim the employees have never shown or claimed that any certain train dispatcher in the seniority district involved was qualified to handle the position; therefore there can be no claim for pay to any individual and inasmuch as the position was filled in accord with the rules of the agreement April 8, 1942, the request that Train Dispatchers on the Mahoning Division shall now be given consideration for promotion to the position of Chief Train Dispatcher is not justified.

OPINION OF BOARD: The narrow issue here involved is whether Claimants have shown that Carrier violated Article 5-(i) of the Agreement which reads:

"(i) Train dispatchers shall be in line for promotion to chief dispatcher positions. When such vacancies occur, all train dispatchers will be given consideration on the basis of seniority, fitness and ability. In filling such positions, consideration will first be given to train dispatchers on the seniority territory involved."

The position of Chief Dispatcher was an excepted position under the Agreement. Under Rule 5-(i) Carrier is not required to select a Chief Dispatcher from the same Seniority District. However, Carrier is required, when vacancies occur, to give consideration on the basis of seniority, fitness, and ability, to all train dispatchers; and further, in filling such positions consideration must first be given to train dispatchers on the seniority territory involved.

The rule leaves the final determination in the selection of the employee to the judgment of the Carrier. We cannot read into the Agreement a requirement that discussion must first be had with dispatchers or consent be first obtained from them before Carrier is justified in making the appointment. That does not mean that the Carrier may act arbitrarily, and under the pretense of giving consideration, select an employee from another district without consideration of seniority, fitness and ability.

If Claimants have proved that such consideration was not given in the instant case, then there is a violation of the rule.

It appears from the record that McNelis is an employee of considerable experience, having been a former dispatcher on the Wyoming Division, later General Yardmaster for eight years and for two years and eight months prior to November 1943, on leave of absence, serving the Ordnance Plant of the Atlas Powder Company at Ravenna, Ohio, on the staff of their Superintendent of Transportation.

In the face of this record we do not believe that Claimants have proved that consideration was not first given to the dispatchers here involved within the meaning of the rule.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of March, 1946.