Award No. 7575

Docket No. TD-7633

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISIION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Southern Pacific Company (Pacific Lines), hereinafter referred to as "the Carrier," violated the currently effective Agreement between the parties to this dispute, including Article 1 Sections (a) and (c) of the current Agreement, when on Thursday, July 15, 1954, it required or permitted Assistant Trainmaster, R. A. Bamburg, an employe not covered by that Agreement, to be primarily responsible for the Westward movement of the Vanguard Local Freight Train with engine 1504 from Vanguard to Armona; establish a meeting point with an Eastward Local Freight Train with engine 1770 and Engine extra 1518 East at Armona and also to be primarily responsible for the Eastward movement of the Vanguard Local Freight Train with engine 1518 from Armona to Vanguard.

(b) Carrier shall now compensate Extra Train Dispatcher D. F. Ringler an available and qualified extra train dispatcher, a day's pay at pro rata rate for Thursday, July 15, 1954, a day that he was deprived of train dispatcher work to which he was contractually entitled, under the Rules of the Agreement but which, instead, was performed by R. A. Bamburg.

EMPLOYES' STATEMENT OF FACTS: There exists an Agreement between the parties to this dispute effective April 1, 1947, on file with your Honorable Board and by this reference made a part of this submission as though it were fully set out herein.

The Agreement effective April 1, 1947, among other rules, contains the following:

"Agreement between the Southern Pacific Company (Pacific Lines) and its train dispatchers represented by the American Train Dispatchers Association.

"Article 1—Section (a). SCOPE:

"This agreement shall govern the hours of service and working conditions of train dispatchers:

movement of trains on a division or other assigned territory, involving the supervision of train dispatchers and other similar employes; to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work.

"Section (c). Definition of Trick Train Dispatchers' Positions. The above class includes positions in which the duties of incumbents are to be primarily responsible for the movement of trains by train orders, or otherwise; to supervise forces employed in handling train orders; to keep necessary records incident thereto; and to perform related work."

As established by Carrier's Statement of Facts, the local freight train was flagged from Vanguard to Armona owing to the urgency of obtaining as quickly as possible empty iced refrigerator cars for Huron and the delay that would have been caused had train order been obtained at either Huron or Lemoore. It has always been the practice to flag a train between points where the urgency of the situation or conditions necessitate that it be resorted to, without exception being taken thereto by the organization. Under the circumstances it is obvious that neither Section (a), which merely states that the agreement shall govern the **hours of service and working conditions of train dispatchers,** nor Section (c), Article 1, of the current agreement was violated.

Award No. 6885 involves an entirely different situation and does not in any respect support the claim submitted.

The petitioner is simply attempting to secure through an award of this Division a new agreement provision and penalty over and above that which was agreed to by the parties. Inasmuch as the petitioner's position cannot be sustained by any rule of the agreement, the carrier respectfully submits that within the meaning of the Railway Labor Act, the instant claim involves request for change in agreement, which is beyond the purview of this Board. It is a well-established principle that it is not the function of this Board to modify an existing rule or supply a new rule when none exists. To accept petitioner's position in this docket would definitely be tantamount to writing into the agreement a provision which does not appear therein and was never intended by the parties.

CONCLUSION

The carrier asserts that the claim in this docket is entirely lacking in either merit or agreement support; therefore, requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The factual situation giving rise to this claim is not in dispute. About 10:30 A. M., on the claim date the Train Dispatcher in Carrier's Bakersfield office, whose territorial assignment included the Coalinga Branch, was advised by a Trainmaster that the Branch had been taken out of the Train Dispatcher's control. The Train Dispatcher was further advised that an Assistant Trainmaster, an employe not covered by the

Scope Rule, had been instructed to arrange by means of flagging, for the movement of a westward local freight train used for switching from Vanguard to Hanford, a distance of 15.6 miles, and for a return trip of that train to Vanguard. Actually this local freight train was held at Armona, some three miles east of Hanford, because another local freight train hauling empty iced refrigerator cars for delivery in the vicinity of Vanguard had already departed Hanford. In order to effect the two train movements it was necessary to restrict the movement of other trains for both eastward and westward moves without authority from the Train Dispatcher on duty at Bakersfield, who had already issued train orders for the other trains on the Coalinga Branch. The record does not disclose the method or manner of the restrictions. At the time the moves were made Armona was an open train order office. An attempt was made by the Train Dispatcher to issue train orders for the westward move Armona to Vanguard but he was advised by the operator there that the Assistant Trainmaster had made arrangements to flag the switcher freight back to Vanguard. The Dispatcher was never asked to issue train orders authorizing any of the above moves nor was he contacted as to the flag moves until after arrangements for the moves were made.

The Coalinga Branch on the Carrier's San Joaquin Division is located in a territory producing large quantities of perishable farm products including cantaloupes. The peak of the cantaloupe shipping season is during the month of July each year. During that period the Carrier operated a local freight train to handle empty iced refrigerator cars for cantaloupe loading in the vicinity of Vanguard and a local freight train to perform the switching in that territory.

The employes maintain that the Carrier acting through its Trainmaster removed the Coalinga Branch from the jurisdiction of the Bakersfield train dispatchers; established a temporary mobile train dispatcher position on this Branch on the day in question and assigned an Assistant Trainmaster to fill this temporary position. This is alleged to be in violation of the Scope Rule, specifically Article 1, Section (c) and the Memorandum of Understanding dated September 13, 1937 with respect to the application of Article 1 (c) of the Agreement as hereinafter set forth:

> "In connection with the provisions of Article 1 (c), Train Dispatchers Agreement reading:
>
> > 'DEFINITION OF TRICK TRAIN DISPATCHERS' POSITIONS.
> >
> > 'The above class includes positions in which the duties of incumbents are to be primarily responsible for the movement of trains by train orders, **or otherwise**; to supervise forces in handling train orders; to keep necessary records incident thereto; and to perform related work.'
>
> "It is understood that the basic principle involved, in determining the classification of a position as that of train dispatcher, is whether or not the incumbent is 'primarily responsible for the movement of trains' **regardless of the method employed**; example, an employe who handles any form of mechanical device controlling the movement of trains, **under the direction of the train dispatcher covering individual moves**, is not primarily responsible for the movement of trains, and therefore is not a train disaptcher; **on the other hand if such movements over main line territory between stations are made independent of and without instructions from the train dispatcher the operator of such devices or methods, is primarily responsible for the movement of trains, and comes under the 'train dispatcher' classification.** It is understood that, yard and terminal movements controlled by towers, do not fall within the Train Dispatcher classification." (Emphasis supplied.)

Employes also contend that "flagging" performed by the Carrier's Assistant Trainmaster fell within the "or otherwise" phrase as used in Article 1,

Section (c) above and that as a result a person not covered by the scope rule was made "primarily responsible" for the train movements in question. In addition to the Rule and Memorandum cited employes urge that Award 6885, involving the same parties and the same property is controlling.

Carrier implies that the Assistant Trainmaster was made a member of the crew of the local freight train and became a "flagman" for that train and therefore performed no work of a train dispatcher. That a Train Dispatcher cannot be responsible for the movement of a train moving under a "flag". Carrier also maintains that the "or otherwise" phrase above referred to means only movements by centralized Traffic Control. Carrier also contends that the movement here was on a branch line and therefore not within the purview of the examples shown in the Memorandum of Understanding herein set forth. On behalf of the Carrier there is asserted the existence of an emergency although in its submissions Carrier advances the theory of urgency or delay. Finally, Carrier contends that even if the claim were valid, which of course it denies, the regularly assigned Train Dispatcher would have performed the work and no extra man, the claimant herein, would have been needed.

Treating the Carrier's contentions seriatim we hold:

1. That whether or not Carrier considered the Assistant Trainmaster a "Flagman" and a member of the crew the fact remains that it made him primarily responsible for the train movement and we find this to be a violation of Article 1 Section (c) and not a situation where either the "proper province of management" or any contrary "practice" controlled.

2. Whether or not a Train Dispatcher can be responsible for the movement proceeding under a "flag" is a question not before us. What we are concerned with is solely, was this move initially Train Dispatcher's work under the scope rule. We find that it was regardless of the method finally employed to make the move. The Memorandum of Understanding is abundantly clear in this connection. The character of the work and not the method of its performance controls.

3. Award 6885 disposes of the question that the "or otherwise" phrase refers only to Centralized Traffic Control. This Board there disagreed with the Carrier's contention and we affirm that decision. The work there, as here, was held to be tantamount to the issuance of train orders and within the "or otherwise" phrase "regardless of the method employed." The only possible distinction, and that not one in principle, between the two cases would only relate to territory and that difference cannot affect our decision here. As this Division has previously stated the vitality and usefulness of this Agency largely depends upon its consistent record for putting an orderly end to controversies. Unless palpably wrong, and we do not find it to be so here this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous award construing the identical provisions of their Agreement.

4. We find no merit in Carrier's attempted distinction that this was a branch line movement. This was a move on a track extending through a yard and between stations operated by train orders and clearly within the purview of the Memorandum of Understanding.

5. The facts in this record will not support a finding of urgency or considerable delay, much less the existence of an emergency which could permit the removal of work from the Agreement and its delegation to the incumbent of an accepted position.

6. The Carrier's contention that if this work had been done by a Train Dispatcher it would have been performed by the Dispatcher on duty and not the claimant is sound and we agree. However if that had been done this claim would not be before us. We find here that the Agreement was violated by Carrier's unilateral action and will adhere to the principle that a penalty

must be imposed in order that the Agreement provisions be maintained and violations thereof be discouraged.

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 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 Agreement was violated.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1956.

DISSENT TO AWARD NO. 7575, DOCKET NO. TD-7633

The majority finds and holds—

> "4. We find no merit in Carrier's attempted distinction that this was a branch line movement. * * *"

The reason for such a statement is beyond comprehension as the Claimant and the Defendant have each attested in the Record that this was a **Branch Line Movement.**

Employes state: "The territory involved in the instant claim is located on Carrier's Coalinga Branch, Fresno Sub-Division, San Joaquin Division. * * *"

Carrier states: "The Carrier's Coalinga Branch, which is here involved is on the San Joaquin Division, * * *."

The majority elsewhere in its Opinion also clearly states that the movement involved was on Carrier's Coalinga Branch.

The majority then rules that the Memorandum of Understanding, dated September 13, 1937, applies to a move "on a track extending through a yard and between stations" on a **Branch Line.**

With proper consideration given to the provisions of that Memorandum of Understanding, it is clearly apparent that it has no application to **Branch Line** movements but applies solely to **Main Line** movements.

As to the imposition of a claim for penalty. It must be conceded that the Agreement does not contain a specific provision for penalty in case of non-performance. This Division of the National Railroad Adjustment Board is limited by the Railway Labor Act, Amended 1934, to the interpretation of agreements. *This Division is lacking in authority to impose a "penalty"* where none has been specified in the Agreement. Consequently, the measure

of damages for the breach of a collective bargaining agreement is an appropriate finding of damages, if any exist, and directing the payment thereof.

Here, there is a clear finding of no damages.

The Award is in serious error with respect to its interpretation of the applicable rules as applied to the facts of Record and unsound with respect to the imposition of a "penalty" or "fine".

We dissent.

/s/ **J. E. Kemp**
/s/ **W. H. Castle**
/s/ **R. M. Butler**
/s/ **C. P. Dugan**
/s/ **J. F. Mullen**

SPECIAL CONCURRENCE TO AWARD 7575—DOCKET TD-7633

A Special Concurrence or a Dissenting Opinion by a Labor Member is, as the records of this Division disclose, filed only in rare instances where such an opinion is clearly warranted and dictated.

The minority's dissent herein is such that this Special Concurrence is dictated.

The substance of the minority's major premise for dissent is that there is some undefined distinction between train movements on a "branch line" and a "main line", a contention which the minority well know to be as fallacious as it is ridiculous. For, as the minority well know, or should know, the terms "main track" and "main line" are used in the industry as synonymous terms. While such long-established usage may not be technically correct, the fact is that the terms are so used and understood.

The minority's dissent understandably ignores two material facts:

First, the issue here in reference was NOT made an issue by the parties. It was one of two or more raised ONLY in the Carrier Member's brief.

Second, the Agreement makes no distinction between the primary responsibility for the movement of trains, irrespective of where or how operated, or the terminology used to describe the tracks over which such operations are made.

That the Coalinga Branch, here involved, is a "main track", or, if you will, a "main line", in accordance with Carrier's rules is not disputed. Nor is it disputed that trains were operated over that main track, that it was within the territorial jurisdiction of the Train Dispatchers at Bakersfield, that those Train Dispatchers issued train orders affecting those train movements.

For the minority to single out but two words in a Memorandum Agreement and come here making any such contention as is set out in its dissent is as silly as it is specious.

R. C. Coutts
Labor Member—Third Division
NRAB

Chicago, Illinois
January 8, 1957