Award No. 10618
Docket No. TD-10611

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(a) The Elgin, Joliet and Eastern Railway Company, hereinafter referred to as "the Carrier" violated the currently effective Agreement between the parties to this dispute, particularly Article 1-(a) and letter of understanding dated April 3, 1944, when it refused and failed to fill the position of Chief Train Dispatcher in its Joliet, Illinois train dispatching office on Thursday, February 6 and Friday, February 7, 1958.

(b) The Carrier shall now compensate claimant train dispatchers as follows:

1. Mr. J. A. Schiltz the difference between what he earned as trick train dispatcher and what he would have earned as chief train dispatcher on Thursday, February 6, 1958.

2. Mr. Glen Cowger the difference between what he earned as trick train dispatcher and what he would have earned as chief train dispatcher on Friday, February 7, 1958.

3. Mr. R. L. Tatroe the diffierence between what he earned in telegraph service and what he would have earned as trick train dispatcher on Thursday, February 6 and Friday, February 7, 1958.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties, effective April 1, 1944, on file with your Honorable Board and by reference is made a part of this submission as though it were fully set out herein.

refers specifically to rest days, vacation, leave of absence or sick leave, and since none of these situations existed on the dates in question the Organization's contention cannot be held to be valid.

If a regular trick dispatcher had been called to fill the position of Chief Train Dispatcher on either of the dates in question, there would have been no Chief Train Dispatcher's work for the relief man to perform since it already had been handled by the regular incumbent. Also, if a relief Chief Train Dispatcher had been called on these dates, there actually would have been two Chief Train Dispatchers filling the single position at the same time, and they both would have been physically present in the same office for at least part of each day involved. This very fact is indicative of the lack of merit in this case.

III. CONCLUSION

On February 6th and 7th, 1958, the Chief Train Dispatcher was not on one of his rest days, he was not on vacation, he was not on sick leave and he was not on leave of absence. Therefore, the letter of agreement dated April 3, 1944, cannot be applicable. Since there is no other rule of the agreement which will support the position of the Organization, the claim must be denied. In view of the foregoing, the Carrier asks that the claim be denied in its entirety.

The material included herein has been discussed with the Organization by correspondence.

OPINION OF BOARD: Chief Train Dispatcher J. D. George, who normally works from 7:30 A. M. to 3:30 P. M. Monday through Friday at the Joliet Station, Illinois, was in Chicago on Carrier business on February 5, 6, and 7, 1958. On Wednesday, February 5th, the Carrier placed Relief Dispatcher J. A. Schiltz in the Chief Train Dispatcher's position, but on February 6th and 7th the Carrier did not fill Mr. George's position.

According to Mr. George's own statement, on the property, he was in his office lining up the work on February 6th and 7th from 5:45 A. M. to 7:45 A. M. The record on the property does not indicate that Mr. George was in or contacted his office after 7:45 A. M. on February 6th and 7th. There is also in the record the Organization's uncontradicted statement that Mr. George was in his office on February 5th for approximately the same hours as on February 6th and 7th.

Both parties place reliance on Article 1(a) of the Scope Rule of the April 1, 1944 Agreement and the Letter of Agreement dated April 3, 1944, both of which are set forth below:

"**Article I**

SCOPE — CLASSIFICATION

"(a) **Scope**

This agreement shall govern the hours of service and working conditions of employes in the train dispatcher class as defined in Ex Parte 72 of the Interstate Commerce Commission, reading:

'This class shall include chief, assistant chief, trick, relief, and extra dispatchers, excepting only such chief dispatchers as are actually in charge of dispatchers and telegraphs and actual control over the movement of trains and related matters, and have substantially the authority of a superintendent with respect to these and other activities. This exception shall apply to not more than one chief dispatcher on any division.'

"NOTE: It is agreed and understood that the chief train dispatcher (first trick) at Joliet is excepted from the provisions of this agreement subject to the terms of letter dated April 3, 1944, from the Vice President of the Railway Company to the General Chairman of the Association."

* * * * *

Letter of Agreement:

"April 3, 1944

Mr. F. O. Morse
General Chairman, A.T.D.A.
464 Florence Avenue
Joliet, Illinois

Dear Sir:

In connection with the 'NOTE' in Article 1(a) of the schedule agreement effective April 1, 1944, assurance is hereby given that the weekly rest day and relief service, vacation and sick pay provisions of said agreement, also relative pay adjustments applicable to those not so excepted, shall also apply to the excepted chief train dispatcher position at Joliet. Also, that temporary vacancies due to such weekly rest days, vacation, leave of absence or sick leave, in that position will be filled by a qualified train dispatcher on the seniority roster, if one is available.

Yours truly,

/s/ T. D. Beven
Vice President"

The Scope Rule establishes the fact that Mr. George's position was excepted from the Agreement subject to stipulations contained in the Letter of Agreement dated April 3, 1944. To support its position, the Carrier cites the last sentence of the Letter of Agreement — which reads as follows:

"Also, that temporary vacancies due to such weekly rest days, vacation, leave of absence or sick leave, in that position will be filled by a qualified train dispatcher on the seniority roster, if one is available."

The Carrier contends that the Chief Train Dispatcher was not on one of his rest days, not on vacation, not on leave of absence and not on sick

leave. Therefore, the Carrier maintains the Letter of Agreement has no application whatsoever in this case.

The Organization, on the other hand, maintains that the Letter of Agreement contemplates that the Chief Train Dispatcher's position would be filled by a qualified train dispatcher from the seniority roster during the absence of the excepted incumbent.

The pertinent portions of the first sentence of the Letter of Agreement reads as follows:

> ". . . assurance is hereby given that the weekly rest day and relief service, . . . of said agreement, . . . shall also apply to the excepted chief dispatcher position at Joliet."

The words "relief service" give strong support to the Organization's position and its claim that the obvious intent and meaning of the above sentence is that relief service would be provided for the Chief Train Dispatcher on February 6th and 7th.

The Organization further strengthens its position when it maintains — without a denial from the Carrier — that:

1. The Carrier's action in failing to fill the Chief Dispatcher's position on February 6th and 7th was without precedent in the lifetime of the Agreement between the Carrier and the American Train Dispatcher's Association;

2. The Carrier filled the position with a train dispatcher on February 5, 1958, under circumstances practically identical to those which existed on February 6, 1958 and February 7, 1958.

In regard to point 2 above, it must be noted that in the entire record the Carrier makes only one fleeting reference to the fact that it (Carrier) filled the Chief Train Dispatcher's position on February 5, 1958.

Although further evidence is not needed to justify the Organization's position — the record, nevertheless, could still provide it by the Organization's statement — which the Carrier neither contradicted, denied nor explained — which reads as follows:

> "Petitioner further submits that Chief Train Dispatcher George knowing he would be required to return to Chicago on February 6 and 7, 1958, instructed that relief be provided for him on these dates, these instructions were later cancelled and no relief was provided as claimed herein."

In keeping with the Agreements cited and the evidence set forth above, we must conclude that the Carrier violated the effective Agreements and issue a sustaining Award and direct the Carrier to pay the Claimants the compensation set forth in the Statement of Claim.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10618, DOCKET TD-10611

The decision reached by the Majority in Award 10618 is palpably wrong. It is impossible to understand how the Majority so completely missed or ignored the pertinent issues in the case. The decision does not reflect mature judgment nor rational consideration.

The following is an extract from the decision:

> "The Organization, on the other hand, maintains that the Letter of Agreement contemplates that the Chief Train Dispatcher's position would be filled by a qualified train dispatcher from the seniority roster during the absence of the excepted incumbent.
>
> "The pertinent portions of the first sentence of the Letter of Agreement reads as follows:
>
> > '. . . assurance is hereby given that the weekly rest day and relief service, . . . of said agreement, . . . shall also apply to the excepted chief dispatcher position at Joliet.'
>
> "The words 'relief service' give strong support to the Organization's position and its claim that the obvious intent and meaning of the above sentence is that relief service would be provided for the Chief Train Dispatcher on February 6th and 7th."

The words relief service would have given strong support, indeed, complete support, **if the Chief Train Dispatcher had been relieved. He was not relieved.** The record clearly shows that he performed all the duties of the position necessary to be performed on the claim dates, and he was com-

pensated for such service. A "relief service" provision is applicable only when there is a need for relief, and there was no such need here.

The decision continues as follows:

> "The Organization further strengthens its position when it maintains — without a denial from the Carrier — that:
>
> 1. The Carrier's action in failing to fill the Chief Dispatcher's position on February 6th and 7th was without precedent in the lifetime of the Agreement between the Carrier and the American Train Dispatcher's Association;
>
> 2. The Carrier filled the position with a train dispatcher on February 5, 1958, under circumstances practically identical to those which existed on February 6, 1958 and February 7, 1958.
>
> "In regard to point 2 above, it must be noted that in the entire record the Carrier makes only one fleeting reference to the fact that it (Carrier) filled the Chief Train Dispatcher's position on February 5, 1958."

It is well understandable that the Carrier did not deal at length with "Point 2." **February 5, 1958 was not one of the claim dates.** There was no reason to expound on something which was not involved in the case.

The Majority states that Point 1 is "without a denial from the Carrier". Let us see if that is true. The following are a few excerpts from the record in this case, and each is a statement made by the Carrier:

Record, page 20:

> "(D) The position of Chief Train Dispatcher is occupied by an official of the Carrier and his duties at times require that he be present on company business during regular working hours at places other than his office."

Record pages 21-22:

> "There are numerous instances in which the Chief Train Dispatcher is required to perform duties related to his position which require his attendance at a location other than that of his office. For example, train rules examinations require his presence and these often take at least half of a normal work day. In the past when something of this nature has arisen which required that he be absent from his office for part of the day, it has been normal for him to perform his duties in the same manner in which they were performed on the dates in question in this claim. That is, he would perform necessary duties in the office for a portion of the day and then leave instructions for his subordinates to govern their work in his absence."

Record page 37:

"1. On Page 3 the Organization states that the position of Chief Train Dispatcher has always been filled by a qualified train dispatcher '— in each and every instance when the Chief Train Dispatcher was absent from his office, in identical or similar circumstances to those herein stated . . .' This is not an accurate statement of fact. As was noted by the Carrier on pages 5 and 6 of its submission the Chief Train Dispatcher often is required to be absent from his office for substantial periods of time during his normal work day and it has not always been the practice to fill the position during such absences."

Record pages 38-39:

"4. On Page 9 the Organization states:

'Therefore relief should have been provided as claimed herein. Furthermore, it is a well established fact that under any and all circumstances since April 1, 1944 to and including February 5, 1958, the Carrier has, when the excepted chief train dispatcher was absent from his office, furnished a qualified train dispatcher to fill this position.'

"As we noted previously, this statement is inaccurate. There have been numerous occasions on which the Chief Train Dispatcher was absent from his office for a substantial period of his normal work day when the position was not filled. These occasions have been caused by train rules examinations, staff meetings and other conferences which require the presence of the Chief Train Dispatcher."

The most charitable conclusion we may draw (and it imputes grave error to the Majority) is that the author of the decision not only failed to read the record, but failed to pay any heed to the oral argument or the brief of either Board Member. In addition to the above denials by the Carrier being pointed out by the Carrier Member, the Labor Members' Brief says:

"The Organization has never claimed that the Chief must be present in his office for every minute of his normal working hours and concedes that in many instances a Chief may be in staff meeting or conference for a considerable length of time."

The absurdity of the decision is further amplified by reference to the allegation that the Chief Train Dispatcher thought he was going to be relieved. He was not relieved, and what he thought might happen is entirely irrelevant.

The decision was adopted by the Majority in the certain knowledge that it was rife with error. This is evidenced by a "Revised" version which was submitted subsequent to the one actually adopted. The "Revised" version omitted some of the errors, but was so wildly and irresponsibly written that it raised the ire of at least one Labor Member to such an extent that the author of the two "decisions" again took the entire matter under consideration for several days. The end result was the withdrawal of the "Revised" decision and reinstatement of the Original, to which this dissent is directed.

It should be obvious to any person of average or better intelligence that the decision is absurd and that it constitutes a nullity.

/s/ O. B. Sayers

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ W. F. Euker

/s/ G. L. Naylor

LABOR MEMBERS' REPLY TO CARRIER MEMBERS' DISSENT TO AWARD 10618, DOCKET TD-10611

The dissent is completely irresponsible and replete with misleading statements.

Any response concerning the incorrectness of the Award or concerning the alleged lack of "mature judgment" or "rational consideration" on the part of the Majority will of necessity have come from the Referee.

The reply is directed particularly to only two points of the dissent.

FIRST:

The dissent quotes an excerpt from Labor Member's brief. Understandably and in line with Carrier Members' penchant for quoting only that which seems to support their contentions, the quotation is not a complete paragraph.

While labor member's brief did make the concession referred to on Page 4 of the dissent, it is only fair that the remaining portion of the paragraph be here quoted as follows:

> "In such instances the whereabouts of the Chief is usually known and he can readily be contacted if a decision is necessary on an operational matter. Further in most instances these absences are a matter of being in another office in close proximity to the dispatching office and certainly not 30 miles away as in the instant claim."

SECONDLY:

At Page 4 the dissent states:

> "The decision was adopted by the Majority in the certain knowledge that it was rife with error"

Not only does the dissent by the Minority attempt to speak for the "certain knowledge" of the Majority, which surely cannot be done but also seeks to infer that the Majority deliberately adopted an Award which was "rife with error", which statement is without basis in fact.

The dissent then continues to refer to a "Revised Award" and infers that one Labor Member's objection to the "Revision" was because of error

or because it "was so wildly and irresponsibly written that it raised the ire of at least one Labor Member".

The reasons for the presentation of a "Revised" Award; the reasons for a Labor Member's objection to some of the language; the reasons for its subsequent retraction by the Referee; and the reasons for the adoption of the Original Award are well-known to all the members of the Supplemental Board including Labor and Carrier Members and the Referee. It is therefore surprisingly indeed that the author of the dissent and the signatories thereto would even mention such "Revised" Award.

The objection by the Labor Member to some of the language of the "Revised" Award was directed to the point that criticism of ANY Board Member is not properly part of an Award.

The dissent by its reference to the "Revised" Award now necessitates that this "Revised" Award become a matter of public record and the text of the Opinion of the Board is here quoted as follows:

> "The Referee received and granted a rehearing request based on his proposed award.
>
> "The Referee, in this revised award, will first deal with the misinterpretations of statements.
>
> "Let us quote from the Rehearing Brief:
>
> '. . . let us examine the proposed award and discuss some of its fallacies. The first paragraph of the Opinion reads as follows:
>
> > "Chief Train Dispatcher J. D. George, who normally works from 7:30 a.m. to 3:30 p.m. Monday through Friday at the Joliet Station, Illinois was in Chicago on Carrier business on February 5, 6, and 7, 1958. On Wednesday, February 5th, the Carrier placed Relief Dispatcher J. A. Schiltz in the Chief Train Dispatcher's position, but on February 6th and 7th the Carrier did not fill Mr. George's position."
>
> 'Mr. George was in Chicago for only a part of each date mentioned, and the statement, "but on February 6th and 7th the Carrier did not fill Mr. George's position" is not correct. The Carrier did fill the position. Mr. George filled it. He reported at the office on each date of claim.'
>
> "According to the record on the property, Mr. George left his Joliet Office to go to Chicago on February 5th, 6th, and 7th at 7:45 a.m. and did not again return to or communicate with his office. — So it is stretching the truth somewhat when the Carrier contends he 'was in Chicago for only a part of each date mentioned.'
>
> "If the Carrier filled the position on February 6th and 7th with Mr. George then the Carrier **doubly** filled it on February 5th

when Mr. George had **filled the position,** and at the same time he had also had a replacement. The Carrier's allegations in this situation represents sheer rationalization and strains the credulity of thinking people. (Emphasis supplied).

"On Page 2 (of the rehearing brief several wasted paragraphs are expended to build up irrelevant data. In fact one wonders why so many forceful, righteous statements need be set forth on areas in which there is no dispute or disagreement whatsoever.

"For example — the Rehearing Brief states:

> '. . . there is not one iota of evidence that such work was not done, nor that it was improperly performed.'

"This is fine phraseology, but to what purpose? No one has made any claim to the contrary.

"The Rehearing Brief further states:

> '. . . the Petitioner has no right whatsoever, **nor does this Board,** to say how many or how few hours and minutes a day the incumbent may be in his office.'

"Again — there has been no attempt to say how many hours an incumbent must be in his office; so where is the pertinence and why the inclusion of this paragraph?

"The Rehearing Brief still further states:

> 'Petitioner doesn't contest the Chief Dispatcher's right to be "absent" — they simply contend they (Petitioner) have the right to say **where** he can go, how long he can stay, etc.'

"This statement has **no basis** in **fact.** (Emphasis supplied) No such contention has been stated or at any time implied. The absurdity of any such contention would be immediately apparent to even the uninitiated and only gross misrepresentation could attribute it to an experienced person. In this situation, the Referee is left with the impression that the Carrier is tilting with windmills.

"The number of hours employees work — where not restricted by an Agreement — is, of course, management's prerogative. **BUT** negotiated documents, entered into voluntarily are binding on **both** the Carrier and the Organization, and the problem here is not so much what hours, how many hours or where the hours are spent, but in the observance of a mutually binding document providing for 'relief service.' (Emphasis supplied)

"According to the Rehearing Brief relief service was needed on February 5th but not on February 6th and 7th. The incumbent, on the latter dates, reportedly 'filled the position to the satisfaction of Management.' Is the 'satisfaction of the Management' the sole criterion whereby 'relief service' is to be furnished?

"If the Carrier takes the position that the Carrier is the sole *determinant of the need for relief service, why did the Carrier negotiate* the Letter of Agreement dated April 3, 1944?

"The Rehearing Brief statement — 'The Letter Agreement relating to relief service only applies when there is a requirement for relief service.' — is redundantly specious. The letter, mutually negotiated and accepted, is obviously a guide and directive for determining **what constitutes** a **requirement** for relief services, and cannot, therefore, be so summarily dismissed.

"The Carrier contends that 'The position of Chief Train Dispatcher is occupied by an **official** of the Carrier . . .' (Emphasis supplied) Since the 'official' comes under the terms of the Letter of Agreement this contention serves little purpose other than to point up inconsistencies.

"If the Chief Train Dispatcher is an official of the Carrier, one wonders why his instructions for relief service on February 6th and 7th were cancelled without explanation. Surely, it is not the custom of the Carrier to dismiss the instructions of **all** Carrier officials as 'hopes, wishes, conjecture and other intangibles . . .' (Emphasis supplied)

"The Rehearing Brief concludes with an eloquent, powerfully written paragraph:

> 'If the claim is not denied, we shall have exceeded our statutory authority, as well as having shown our disregard for the General Purposes of the Railway Labor Act.'

"Eloquence, however, is a poor substitute for logic or fact, and the fact unalterably remains that a most important function of the Board is to **interpret labor agreement.** (Emphasis supplied)

"Since this case is solely concerned with the interpretation and applicability of pertinent portions of the Letter of Agreement, it is not logical to assume that honest, sincere, conscientious, impartial interpretation and application of that Letter of Agreement is in complete accord with the General Purposes of the Railway Labor Act?

"Now that we have disposed of the Carrier's Rehearing Brief — let us turn to the Record in this case.

"At the risk of oversimplification, we might sum up the Carrier's position as follows:

> '1. The number of hours a Chief Train Dispatcher works is Carrier's prerogative;
>
> '2. The work in question was satisfactorily performed on February 6th and 7th — so there was no need for relief service;

'3. February 5th — is no part of the present situation, therefore, it should be deleted;

'4. The Letter of Agreement does not apply because the Chief Train Dispatcher was not on rest days, vacation, leave of absence, or sick leave . . .'

"Here let me say that we must not lose sight of the forest for the trees.

"The problem here is not concerned with the WHY — WHEN — WHERE — or HOW the work was done. (Emphasis supplied) To dwell on picayune questions like 'Where can the Chief Dispatcher go?' 'To what matters can he attend?' 'How far he can go?' 'How long can he be "absent from his office"?' — is to become submerged in minutiae to the loss of all perspective. (Emphasis supplied)

"The problem here is concerned with the interpretation of a **mutually negotiated bilateral document** and its applicability to the solution at hand. (Emphasis supplied)

"The carrier states Mr. George is an official of the Carrier and was hence excepted from the terms of the Agreement but subject to the terms of the Letter of Agreement dated April 3, 1944.

"The Letter of Agreement then becomes of significance to the solution of this case.

"The Carrier contends that the Chief Train Dispatcher was not on one of his rest days, not on leave of absence and not on sick leave. Therefore, the Carrier maintains the Letter of Agreement has no application whatsoever in this case.

"It must be noted, however, that the Letter of Agreement in listing the above circumstances for relief service does not specify **in these listed circumstances and only these circumstances** shall relief service be supplied.

"The document merely states 'temporary vacancies due to **such** weekly rest days, vacation, leave of absence or sick leave . . .' (Emphasis supplied) There can be no doubt that the Letter of Agreement has, therefore, not attempted to spell out every situation wherein its provisions apply. The Letter of Agreement has said 'such . . . days', and obviously has included several examples by way of illustration or sample. The Letter of Agreement, therefore, can and must be interpreted in its broad sense — not in a narrowly restricted one. To limit its application merely to the illustrations therein contained — especially since the Letter itself does not so restrict its application — would be to distort and possibly destroy the original purpose or intention of the document.

"The Carrier takes the position that the February 5th date is not at all involved in this claim, but the facts indicate situations precisely similar on February 5th, 6th, and 7th — yet the Carrier's action on February 5th was completely dissimilar to its action on the two latter dates. Consideration of the three dates — February

5th, 6th, and 7th — is, therefore, necessitated by the circumstances. To dismiss occurrences on February 5th as irrelevant would be the same as to relegate all precedent to the Limbo of oblivion — and that our democratic processes of justice are not inclined to do. (Emphasis supplied)

"Based on the facts cited above and in keeping with the provisions of the Letter of Agreement, we must conclude that the Carrier violated the Agreement and direct the Carrier to pay the Claimants the compensation set forth in the Statement of Claim."

No conclusions will be drawn by this member and the reader may now judge whether either proposed Award is "rife with error" or wildly and irresponsibly written."

R. H. HACK
Labor Member

REFEREE'S RESPONSE TO CARRIER'S DISSENT TO AWARD 10618, DOCKET TD-10611

The ill-considered classification of this decision as "rife with error' and "wildly and irresponsibly written" is in itself an outstanding example of a dissent "rife with error" and "wildly and irrespsonsibly written".

The Carrier's disent, unfortunately, constitutes a vindictive though unsubstantiated, hollow, and unjust denunciation of the majority of the Board Members.

The Labor Member's response, however, clearly points up its fallacies, distortions and misrepresentations resulting from qouting out of context isolated bits of the decision. Calling black white does not make it so — nor can wishful, deliberate distortion of right make it wrong.

One need only compare the decision, the Carrier's dissent and the majority's response to the dissent — to be convinced of the fairness and logic of the decision. Thus, the Referee sees no need to carry coals to Newcastle.

Name calling is a childish and immature business, and the Referee is not concerned with the juvenile comments written in childish pique against him personally.

Referees, fortunately, by virtue of profession, personality and preference are above partisanship and prejudice. They are also tolerant of human weaknesses, and this Referee, always sympathetic to the loser, knows well that disappointment often leads to indignation and vituperation.

Vindictiveness and vehemence are a powerful combination — but they are weak and totally inadequate substitutes for facts — and the facts in this case, when separated from the sham and camouflage, are obvious and irrefutable, as is the justice and the logic of the decision to the impartial observer.

(signed) J. Harvey Daly
J. Harvey Daly, Referee

September 12, 1962

CARRIER MEMBERS' ANSWER TO LABOR MEMBERS' AND REFEREE'S RESPONSE TO CARRIER MEMBERS' DISSENT TO AWARD 10618, DOCKET TD-10611.

The only comment we have here with respect to the Labor Member's Reply is that we had thought it well not to exhibit for public distribution the contents of the proposed "Revised" decision in this case, which, of course, was never adopted. Our decision not to make it a part of the Award was based solely on our declination to embarrass the author thereof. It speaks for itself and now necessitates attachment hereto of the Memorandum of April 10, 1962, submitted on behalf of the Carrier Members requesting the Majority to reconsider the original decision in the case, which we submitted was palpably wrong.

The document last described above and attached hereto will serve to answer the Referee's Response. As is true of the Carrier Members' Dissent, their April 10, 1962 Memorandum contained no vindictiveness; no juvenile comments; no comments written in childish pique; or did either document enter into personalities. Thus, we close our Answer by pointing out the obvious — the Referee's Response set out some admirable precepts applicable to Referees, without any explanation as to why they were not observed in this case. Nor was any explanation made as to how or where the "impartial observer" is to find the "justice and logic of the decision". We agree that the facts in the case are "obvious and irrefutable", but must again point out, as the record clearly shows, that the decision is erroneous, and one reason therefor is the inescapable fact that it is based on a complete misunderstanding or misstatement of those obvious and irrefutable facts.

/s/ O. B. Sayers

/s/ G. L. Naylor

/s/ R. E. Black

/s/ W. F. Euker

/s/ R. A. DeRossett

CARRIER MEMBERS' BRIEF AT REHEARING

DOCKET TD-10611

REFEREE J. HARVEY DALY

Held April 10, 1962

Request for rehearing in this Docket was requested because the Majority's decision in the proposed Award (released April 3, 1962) is palpably wrong. It should be reconsidered and corrected before an Award is rendered.

Rather than repeat the arguments made in the record, the Carrier Members' Panel Brief and Panel discussion, let us examine the proposed Award, and discuss some of its fallacies. The first paragraph of the Opinion reads as follows:

> "Chief Train Dispatcher J. D. George, who normally works from 7:30 a.m. to 3:30 p.m. Monday through Friday at the Joliet

Station, Illinois, was in Chicago on Carrier business on February 5, 6 and 7, 1958. On Wednesday, February 5th, the Carrier placed Relief Dispatcher J. A. Schiltz in the Chief Train Dispatcher's position, but on February 6th and 7th the Carrier did not fill Mr. George's position."

Mr. George was in Chicago for only a part of each date mentioned, and the statement, "but on February 6th and 7th the Carrier did not fill Mr. George's position" is not correct. The Carrier did fill the position. Mr. George filled it. He reported at the office on each date of claim. He performed all the service required by the Carrier to be performed on the position, and there is not one iota of evidence that such work was not done, nor that it was improperly performed.

On a position without assigned hours, especially one such as the one here at issue, the Petitioner has no right whatsoever, **nor does this Board,** to say how many or how few hours and minutes a day the incumbent must be in his office. In fact, there is no requirement he even be in an office, or even have an office. Many Chief Dispatcher duties are performed outside what might be called his office.

Mr. George did fill his position on the dates of this claim, and, this fact simply cannot be refuted. The Petitioner's argument in connection with the use of another man on February 5th only shows that the Carrier furnishes relief for the position when needed, and has nothing whatsoever to do with the claim, which is for the 6th and 7th.

On page 4 of the proposed award, we find the following:

"The words 'relief service' give strong support to the Organization's position and its claim that the obvious intent and meaning of the above sentence is that relief service would be provided for the Chief Train Dispatcher on February 6th and 7th."

The words "relief service" do not give any support to the Organization's position. The exact opposite is true. On the 5th, relief service was needed and properly furnished. On the 6th and 7th, relief service was not needed, and was not furnished. The incumbent filled the position to the satisfaction of Management. The letter Agreement relating to relief service only applies when there is a requirement for relief service.

On page 4 of the proposed award, we find the Majority saying:

"The Organization further strengthens its position when it maintains — without a denial from the Carrier — that:

1. The Carrier's action in failing to fill the Chief Dispatcher's position on February 6th and 7th was without precedent in the lifetime of the Agreement between the Carrier and the American Train Dispatcher's Association;

2. The Carrier filled the position with a train dispatcher on February 5, 1958, under circumstances practically identical to those which existed on February 6, 1958 and February 7, 1958.

"In regard to point 2 above, it must be noted that in the entire record the Carrier makes only one fleeting reference to the fact that it (Carrier) filled the Chief Train Dispatcher's position on February 5, 1958."

We do not understand how the Petitioner could make the contention listed as 1, supra, when on page 7 of their Referee Brief they state:

"The Organization has never claimed that the Chief must be present in his office for every minute of his normal working hours and concedes that in many instances a Chief may be in staff meeting or conference for a considerable length of time."

Petitioner doesn't contest the Chief Dispatcher's right to be "absent" — they simply contend they (Petitioner) have the right to say **where** he can go, how long he can stay, etc. Their contention is, of course, absurd. We further cannot comprehend the Majority's saying that 1, supra, is "without a denial from the Carrier", because the record will positively show exactly the opposite. For instance, at record page 20, the Carrier says:

"(D) The position of Chief Train Dispatcher is occupied by an official of the Carrier and his duties at times require that he be present on company business during regular working hours at places other than his office."

and at record pages 21-22:

"There are numerous instances in which the Chief Train Dispatcher is required to perform duties related to his position which require his attendance at a location other than that of his office. For example, train rules examinations require his presence and these often take at least half of a normal work day. In the past when something of this nature has arisen which required that he be absent from his office for part of the day, it has been normal for him to perform his duties in the same manner in which they were performed on the dates in question in this claim. That is, he would perform necessary duties in the office for a portion of the day and then leave instructions for his subordinates, to govern their work in his absence."

and at record page 37:

"1. On Page 3 the Organization states that the position of Chief Train Dispatcher has always been filled by a qualified train dispatcher '. . . in each and every instance when the Chief Train Dispatcher was absent from his office, in identical or similar circumstances to those herein stated . . .' This is not an accurate statement of fact. As we noted by the Carrier on pages 5 and 6 of its submission the Chief Train Dispatcher often is required to be absent from his office for substantial periods of time during his normal work day and it has not always been the practice to fill the position during such absences."

Carrier again disputes the Petitioner's contention at record page 39.

It is clear that the proposed award is completely in error up to this point, and the error is compounded by their accepting as relevant conten-

tion 2, supra, relative to filling the position on the 5th. There was no reason for Carrier to make even a "fleeting" reference to that date. It is not involved in this claim. The very same is true with respect to Mr. George's **alleged** plan to be relieved of his duties on the 6th and 7th. Maybe he hoped he would be. Maybe he has wished the same thing on other occasions when he spent part of the day other than in "his office". When facts appear, hopes, wishes, conjecture and other intangibles must give way thereto. The **fact is,** he was not relieved, and there was no requirement for "relief service".

Since the Agreement between the parties clearly fails to support the proposed award, it is one which we have no authority to render. Furthermore, it is easy to direct a Carrier to pay out its money, but issuing an award which can be complied with is yet another matter. In view of the admissions by both parties that the Chief Dispatcher can go some places, for some distances, and for some lengths of time without creating a relief service requirement, how could we logically sustain this claim? How could the Carrier comply with the award in the future? Where can the Chief Dispatcher go? To what matters can he attend? How far can he go? How long can he be "absent from his office"? If we have not the authority to draw those line (**and we have not**) then we are in error when we attempt to sustain this claim. We are attempting to take over managerial functions from Management. Worse yet, we are, in this instance, "second guessing" Management and attempting to say in 1962, that they did not afford sufficient supervision at Joliet on two days in 1958. We cited a few of the many awards of this Division which have recognized this to be a managerial prerogative.

To have had a claim here, the Petitioner had the burden of showing by competent evidence that relief service was required on the claim dates, or that such service was improperly afforded. They proved neither, and the record clearly shows that neither was the case.

If the claim is not denied, we shall have exceeded our statutory authority, as well as having shown our disregard for the General Purposes of the Railway Labor Act. A sustaining award would be a nullity and could result only in embarrassment to the Board.

A denial award should be rendered.

Respectfully submitted,

O. B. Sayers,
For the Carrier Members.