Award No. 11519
Docket No. TD-13440

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE LEHIGH AND HUDSON RIVER RAILWAY COMPANY

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

(a) The Lehigh & Hudson River Railway Company, (hereinafter referred to as "the Carrier"), violated the currently effective schedule agreement between the parties, including but not limited to Articles 1(a) and 3(f) thereof, when beginning September 1, 1960 and continuing through September 12, 1960, it required and permitted the individual claimants specified in paragraph (b) next following, to direct and control the movements of trains and/or track motor cars over the facilities of another carrier.

(b) The Carrier shall be required to compensate each of the following named individual claimants one day at pro rata rate of train dispatcher, for each of the specified dates:

M. R. Pierson, September 2, 3, 4, 9, 10, 11, 1960

T. R. Carr, September 3, 4, 5, 10, 11, 1960

F. J. Percival, September 1, 2, 5, 6, 7, 8, 9, 12, 1960

W. T. Wintermute, September 1, 2, 3, 6, 7, 8, 9, 10, 1960

C. H. LaRue, September 1, 4, 5, 6, 7, 8, 11, 12, 1960

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties, copy of which is on file with this Board, and by this reference the same is incorporated as a part of this Submission as though fully set out herein.

For the ready reference of the Board Articles 1(a) and 3(f) of the Agreement, referred to in the Statement of Claim, provide:

There is no dispute on this article as the control of the trains was by a Dispatcher.

Article 3 (f), also cited by the claimants, reads as follows:

"Combining Territory for Relief"

> "The combining of territory, duties, or responsibilities for relief purposes will not be permitted."

Inasmuch as "relief" was in no way involved, the Carrier did not violate this article. Further, there was no combination of territory, duties or responsibilities, as the Carrier has only one territory; but rather this territory was extended.

At a conference on January 30, 1962, the Carrier recognized the additional work involved due to the extension of territory and, as stated in Mr. P. S. Campbell's (Assistant to President and General Manager) letter of January 31, 1962 (Exhibit C) offered an increased rate. General Chairman Pierson in his letter of February 6, 1962, Exhibit D, states:

> "This is to further advise that we will accept nothing less than settlement in full on our claim as presented."

The Carrier's Agreement with the Pennsylvania Railroad Company permits it to run trains over the Pennsylvania Railroad between Belvidere, N. J. and Phillipsburg, N. J., and the work stoppage on the Pennsylvania Railroad made these trains the only ones operating over this territory. Therefore, the claimants controlled trains and/or track cars exclusively over territory which the Carrier is privileged to operate by Agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: As a result of a system-wide strike against the Pennsylvania Railroad Company between September 1, 1960 and September 12, 1960, that Carrier — which is not a party to this dispute — abandoned its train operations during such period of time.

It is perhaps necessary to narrate some of the circumstances that are pertinent to this Claim, if the decision herein is to be construed in the context of its factual setting, and if our Award serves some purpose in addition to merely allowing or denying the relief petitioned for by the grievants.

One of the reasons this dispute arose was because of the fact Carrier had the contractual right to operate its trains on approximately twelve miles of track owned by the Pennsylvania Railroad Company, a legal status which had existed since 1889. The record does not fully reveal the terms of the contract between the two Carriers, but it does disclose it was based upon an exchange of considerations — the **quid pro quo** element of the contractual relationship being clearly present. This Carrier paid for the use of the trackage, and in a number of respects it had a lessee type of status. The Carrier owner of this track had at all times prior to and after the strike controlled the movements of all trains thereon, including those of this Carrier; jurisdiction in this regard was vested in it; and its employes performed all of the dispatching work in reference thereto. In regard to the controlling of the dispatching, in one respect, the Pennsylvania Railroad Company was rendering the Lehigh and

Hudson River Railway Company a service; in another, it was exercising its paramount rights in regard to the control of its property.

Immediately prior to the strike, the Carrier issued the following notice:

"The Lehigh and Hudson River Railway Company

Warwick, N.Y.

Circular Notice August 31, 1960

Effective 12:01 A. M., September 1, 1960

The Pennsylvania Railroad will suspend all operations over the Belvidere Delaware Branch and only Lehigh and Hudson River Railway Company trains will operate between 'G' Tower (Belvidere) and L&HR Junction (Easton). Lehigh Valley transfer movements will operate between L&HR Junction and Hudson Yard.

All switches between 'G' Tower (Belvidere) and L&HR Junction (Easton) will be set and spiked to permit only the above movements.

Operation of the interlocking plant and block station at "G" Tower will be suspended as well as all signals except the dwarf signal which controls movements from the L&HR westbound track to the PRR track.

Block stations at 'G', 'DY' and 'CR' will be out of service. Passing siding at 'CR' will be out of service.

To move from Hudson Yard to L&HR Junction (Easton) L&HR crews must obtain permission from L&HR Dispatcher at Warwick.

To move from L&HR Junction (Easton) to Hudson Yard crews will be governed by signal indication. Leaving L&HR Junction Operation at 'PU' Tower will obtain permission from L&HR Dispatcher at Warwick before allowing movement from L&HR Junction (Easton) to Hudson Yard.

All crews reaching Hudson Yard in both directions must report 'clear' to L&HR Dispatcher at Warwick by telephone.

Crews of eastbound trains preparing to leave Hudson Yard must telephone the Dispatcher at Warwick for instructions.

NO PENNSYLVANIA RAILROAD TRAFFIC WILL BE HANDLED BY THE LEHIGH AND HUDSON RIVER RAILWAY DURING THE PERIOD THIS IS IN EFFECT.

Effective 12:01 A. M., September 1, 1960 until further notice.

Approved:

/s/ H. W. Quinlan
President & General Manager

/s/ P. W. Early

Superintendent"

Following this notice, the grievants — all employes of Carrier and train dispatchers in Carrier's Warwick, New York train dispatching office — performed the functions delegated to them pursuant to the quoted Circular Notice.

The Organization contends that Carrier's action in this regard was violative of both the Railway Labor Act and the Collective Bargaining Agreement of the Parties.

As to the Railway Labor Act, the Employes allege that Section 2, Seventh thereof was breached. This part of the Act provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employes, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."

And the Organization then refers to Article 11 of the Agreement of the Parties, which, in effect, requires that either party desiring to revise or modify the rules of the Agreement shall give thirty days' written notice containing the proposed changes and to confer in respect thereto within thirty days thereafter unless another date is mutually agreed to.

The Employes contend Carrier unilaterally effected a change in the working conditions of claimants — flaunting the Railway Labor Act and said Article 11.

We respect the argumentation of the Organization in this regard, but, considered in the light of the facts in the present case, we do not believe it is correct.

Here, the Pennsylvania Railroad strike was not a matter subject to the control of this Carrier. We cannot assume that it was in a position to direct the actions of that Carrier. It obviously had no control whatsoever over the train dispatcher employes of that Company. The Carrier had the immediate problem of continuing its operations over the twelve miles of leased trackage. The thirty days' written notice provision was inapplicable to the situation which arose. The Board has often held that except insofar as it has restricted itself by the Collective Bargaining Agreement, the assignment of work necessary to its operations is the prerogative of the Carrier. Award 10950 — among many others.

Both statutes and contracts should be interpreted with the realization that reasonable results were intended. It is well known that many of the issues presented to the Board are of the peripheral variety; and, in these cases, there is no requirement that common sense be disregarded in contractual interpretation.

Moreover, in our opinion, the Carrier did not violate any Article of the effective Agreement.

Article 1 is a scope rule defining the classes of train dispatchers. Carrier's complained of action enhanced to some degree the work of its Warwick dispatchers, but it did not, in any event, result in their doing work outside the bounds of their scope classification. Their work was for their own Carrier, and we find little merit in the allegation that they were required to work on "another facility". As previously stated, the Carrier had had a lessee interest in this particular trackage for more than sixty years. It had regularly used

these facilities in the operation of its trains, although the Pennsylvania Railroad Company had had control of all train movements over the trackage. During the period of the strike a very different situation arose in regard to train movement. The Pennsylvania Railroad Company was not operating; we cannot assume that it could have provided dispatching service to the Carrier in reference to the twelve miles of track during the strike period, if it had wished to: and if in this respect it breached its contract with the Carrier, then the cause of action would be vested in the Carrier.

Article 3 pertains to "combining of territory, duties, or responsibilities for relief purposes." We cannot conclude Carrier did any of the "combining" alleged. Having no control over the employes of the other Carrier, it did not have the power to effect a combination in reference to the two sets of employes. Perhaps the phrase, **for relief purposes**, is of additional help in disposing of this issue. As far as we can ascertain from the record, the Carrier was not in the process of doing anything **for** the lessor Carrier; it was simply taking action to avoid the discontinuing of its own operations on its own leased tracks.

Article 4 pertains to the seniority rights extended to the train dispatchers on the Lehigh and Hudson River Railway Company. We agree that such rights are very important, but we fail to find any evidence that the claimants' seniority status was diminished to any degree on this Carrier; nor can we conceive their acquiring any new seniority status on the property of the Pennsylvania Railroad Company.

We recognize the fact that the claimant dispatchers had a slight increase in their work and responsibility over a time period of approximately one week. It may well be that each of them was entitled to some increase in compensation over such period; however, we cannot pass upon the merits of that matter, for such a claim is not before us.

The Claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1963.

LABOR MEMBER'S DISSENT TO AWARD 11519, DOCKET TD-13440

Despite an extensive and clearly presented record, supported by voluminous and undenied evidence, and in utter disregard of basic principles many times reaffirmed by this Board, and despite thorough presentation to the Referee, including supplemental written statement directing attention to applicable further precedent, the majority has here adopted a prime example of an Award so palpably erroneous that it is little short of sheer stupidity.

It should be unnecessary to point out, as was done in the presentation of this case to the Referee, that claims submitted to this Board must be adjudicated strictly on the basis of the record properly before it. To proceed on any other basis is to transgress this Board's authority. Yet that is precisely what was done in this instance.

Were this dissent to point out every respect wherein Award 11519 evidences incredible disregard of undisputed facts of record, and the woeful inattention to established principles for which abundant authority was cited, the length of the dissent would exceed that of the Opinion in this Award.

This Labor Member's comment will, therefore, confine itself to two very basic issues which were repeatedly called to the Referee's attention — both in the record and in the presentation thereof.

First: The Opinion evidences an incredible disregard of the undisputed fact that the Pennsylvania Railroad Company was under a contractual liability to provide the joint facility service over the facilities involved, and in respect to which that carrier's operating timetable, rules and special instructions were at all times in effect. The Opinion further ignores the undisputed fact that the Pennsylvania Railroad fulfilled its joint facility commitments at other points during the same period here in question — a fact which is at no place denied in the record. Finally, the Opinion accords no weight whatever to long-established authority cited to the Referee and in respect to which this Labor Member pointed out, there is no contrary and subsequent authority. Clearly, Awards 180, 323, 331, 360 and 951 have materiality in this case yet have been completely ignored.

Second: The Opinion improperly urges that the seniority rights of the claimant employes were not "diminished to any degree" and that they did not acquire "any new seniority status on the property of the Pennsylvania Railroad Company." No such issue was raised in the record as even a cursory reading thereof by anyone fairly conversant with the Rules of this Board would readily perceive. The issue that IS clearly raised in the record is that the Carrier, by its unilateral action, which it expressly admits, required the claimant employes to perform train dispatcher work within a seniority district in which at no time prior to the time in question, nor since, have established any seniority rights. Indeed, the claimant employes, by the Carrier's own admission, performed work within a seniority district of an entirely different carrier and subject to the terms of a different collective agreement! In the record and in the presentation of this case to the Referee his attention was repeatedly directed to the long-established principle, many times reaffirmed by this and other Divisions of the Board, that work within one seniority district cannot be delegated to and performed by employes within another seniority district, absent some mutually negotiated agreement. In a supplemental statement the Referee's attention was also directed to Award 1527 wherein this Board held, and for which no contrary authority has been developed, that

the rights of employes under a collective bargaining agreement are not to be deemed subservient to a carrier's rights under a joint facility agreement. Further, in the same statement, the Referee's attention was dircted to Award 5246 which correctly and unqualifiedly holds that:

> ". . . the Scope Rule of an agreement on one property does not cover like work on another property not under the control of the specific carrier. On the other hand, all of the work of the type embraced within a collective agreement belongs to the employes thereunder . . ."

Despite all this and despite the undisputed facts of record and in complete disregard of cited canons of contract construction to which this Board must, and long has, adhered, the Referee displays ill-advised if not fatuous naivete in his expression of "opinion" that "the Carrier did not violate any Article of the effective Agreement."

There have been few, if any, previous examples of such inaccurate conclusions during the almost thirty years' history of this Division.

The Award is completely, obviously, almost shamefully erroneous and stands completely devoid of any precedent value.

H. C. Kohler

ANSWER OF REFEREE TO DISSENT TO AWARD 11519, DOCKET TD-13440

This neutral referee sincerely believes that this Award, considered in the context of the full record, will withstand the test of any impartial investigation of its correctness.

Wesley Miller