# Award No. 14918
# Docket No. TD-15830

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

## (Supplemental)

David L. Kabaker, Referee

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## PARTIES TO DISPUTE:

## AMERICAN TRAIN DISPATCHERS ASSOCIATION

## THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Pennsylvania Railroad Company (hereinafter referred to as "the Carrier"), violated and continues to violate the currently effective Agreement between the parties, dated June 1, 1960, especially Regulation 2-B-1 (Part III) thereof, when on August 26, 1964, it issued an improper bulletin notice, purportedly under some agreement not then effective, which failed to designate in such bulletin notice the "Headquarters and Location" as required by the agreement.

(b) Having failed to reissue proper bulletin notice in accordance with the Agreement, the Carrier shall now be required to compensate at pro rata Power Director rate, on each calendar day since August 28, 1964, and continuing until such time as the violation ceases, the power director eligible for performance of service on the abolished position, in accordance with seniority and availability from among the following named claimants: A. Boyd, C. E. Moore, W. A. Rost, E. B. Williams, T. L. Bair, C. G. Lort, J. S. Rine, L. M. Boynham, F. C. Baker and D. R. Pyle, the amount of compensation due each individual Claimant to be ascertained by joint check of the Carrier's records.

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

For the Board's ready reference, that part of Regulation 2-B-1 (Part III) applicable to the instant dispute is here quoted:

"2-B-1. Advertisement Of and Assignment To. (a) Permanent vacancies, or new positions and temporary vacancies when known to be of more than thirty (30) days' duration, will be bulletined within five (5) days from the dates they occur to all Load Dispatch-

ization and a Carrier representative of the pertinent records to ascertain the amount of compensation due the claimants in accordance with foregoing claim."

The claim was denied by the Supervisor, C&S, by letter dated October 15, 1964, a copy of which is attached as Exhibit 4.

Following denial of the claim by the Supervisor, C&S, the Vice General Chairman listed the claim with the Superintendent, Personnel who denied the claim by letter dated October 28, 1964.

The Vice General Chairman then requested that a Joint Submission, a copy of which is attached as Exhibit 5, be prepared for progression of the case to the Manager, Labor Relations, the highest officer of the Carrier designated to handle disputes on the property, and the General Chairman, A.T.D.A.

The Manager, Labor Relations denied the claim by letter dated March 11, 1965, a copy of which is attached as Exhibit 6.

Thus, so far as the Carrier is able to understand the basis of the Employes' claim, the questions to be decided by your Board are whether the claim is so indefinite, vague and confusing as to preclude assumption of jurisdiction of your Board, whether the notice posted on August 26, 1964, abolishing three (3) positions violated the provisions of Regulation 2-B-1, whether the fact that headquarters and locations were omitted from the advertisement of the two (2) new Power Directors acted to the detriment of of aggrieved in any way any of the ten (10) named Claimants and whether any of the ten (10) named Claimants are entitled to the compensation claimed.

(Exhibits not reproduced.)

**OPINION OF BOARD:** This claim arose as a result of a notice issued by the Carrier on August 26, 1964, wherein it abolished the positions of Power Director (Zone 9) 4:00 P. M. to Midnight, Power Director (Zone 8) 4:00 P. M. to Midnight, and Power Director (Relief No. 1). In the same notice, two new positions were advertised: Power Director, Relief No. 1, Harrisburg Zones 8 and 9, and Power Director, Harrisburg Zones 8 and 9.

The Employes contend that the notice is not in proper form in that it did not comply with the requirements of Regulation 2-B-1 of the Agreement by stating in the advertisement the "headquarters" and "location" of the positions.

Carrier asserts that the notice was in substantial compliance with Regulation 2-B-1. It further represents that Claimants sustained no loss or damage and, therefore, a monetary award in their favor would amount to a penalty.

The record reveals that the claim is based upon the failure to include the "headquarters" and "location" of the positions advertised. Employes claim that the inclusion of the words "The Long Island Railroad Company" in the heading invalidates the notice. We think not. The Agreement referred to in the notice is between The Pennsylvania Railroad Company and The American Train Dispatchers Association. The inclusion in the heading of the addi-

tional words "The Long Island Railroad Company" is surplusage and does not constitute a violation of the Agreement.

Although the notice does not state the exact headquarters and location of the new positions, it does identify them with sufficient clarity by stating "Harrisburg, Pa." so that applicants would be informed which positions are being bulletined. However, a strict interpretation of Regulation 2-B-1 would force the conclusion that while the failure to list "headquarters" and "location" is not a fatal omission, it is a technical violation of the regulation.

The finding that there was a technical violation of Regulation 2-B-1 does not, however, support the conclusion that the abolition of the old positions and the establishment of the new positions are invalid. The abolition of the old positions are not governed by the requirements of 2-B-1, nor is there any contractual obligation that requires the notice of abolishment to be in any given form. In regard to the validity of bulletin notice of the new positions the wording of the notice sufficiently identifies the position being advertised.

The finding must, therefore, be that the failure to list on notice "headquarters" and "location" did not invalidate the abolition of the old positions nor invalidate the advertisement of the new positions.

The further question presented is whether the technical violation, herein found to exist, justifies a monetary award.

The record does not show that the Claimants suffered any damage. Under those circumstances a monetary award would actually constitute a penalty even if the award were for nominal damages.

The referee herein is well aware of the holding of the United States Court of Appeals for the Tenth Circuit in Brotherhood of Railroad Trainmen v. Denver and Rio Grande Western Railroad Company, 338 F. (2nd) 407, wherein the Court held the Board to be without jurisdiction to assess a penalty. It held, however, that nominal damages were proper.

Referee Dorsey in Award 13958, in reviewing that case, stated the following:

> "Upon reflection, we are of the opinion that the holdings in the **Trainmen** case are contradictory. Labeling a monetary award as 'nominal damages', where such damages have not been proved, makes such an award no less a **de facto** and **de jure** penalty."

We must concur with Award 13958 and conclude that any award of nominal damages in the instant case, where no damage has been proven, would constitute a penalty.

There is no need to dwell at length on the question of the authority of the Board to award a penalty in the light of the numerous awards of this Board which have held the Board to be without jurisdiction to assess penalties.

It is, therefore, the conclusion that paragraph (a) of the Claim must be sustained, and paragraph (b) of the Claim must be denied for the reasons set forth herein.

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 violated.

AWARD

Paragraph (a) of the Claim is sustained.

Paragraph (b) of the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of November 1966.

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