Award No. 15460
Docket No. TD-15682

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SAVANNAH & ATLANTA RAILWAY COMPANY

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

(a) The Savannah and Atlanta Railway Company (hereinafter referred to as "the Carrier"), violated the effective schedule agreement between the parties, Articles 1, 4(a), 4(d) and 11 thereof in particular, when, effective at 12:01 A.M. September 6, 1964, and continuing thereafter, all train dispatcher positions in the Carrier's Savannah, Georgia, train dispatching office were abolished and all work within the scope of the said schedule agreement was delegated to and has since been assumed and performed by employes of another carrier, and by employes and/or officers of The Savannah and Atlanta Railway Company, who are not within the scope of the said agreement.

(b) The Carrier be required to restore said train dispatcher positions and all work relating thereto as the said positions existed prior to September 6, 1964, and restore the same to the claimant employes who were assigned thereto as of September 5, 1964.

(c) The Carrier be required to compensate each individual claimant at the pro rata rate of the position to which assigned on and prior to September 6, 1964, for each day he has been, and is now being, deprived of his right to perform service thereon; beginning September 6, 1964 and continuing until said violations cease; the said individual claimants being: M. H. Howard, J. E. Hall, J. W. Waters and H. D. Maxwell.

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

For ready reference, Articles 1, 4(a), 4(d) and 11 of said Agreement referred to in the Statement of Claim herein, are quoted in full:

"ARTICLE 1.

(a) Scope. The term 'Train Dispatcher' as herein used shall include chief, assistant chief, trick, relief and extra dispatchers.

entered into" after the Commission proceedings had commenced and was not made in contemplation of or in any way in relation to any aspect of that transaction. Indeed, it does not contain any provisions which could in any way reasonably be construed to be applicable to any of the consolidations of facilities or any other actions included within the authorization granted by the Commission.

E. CORRESPONDENCE ON THE PROPERTY

The correspondence on the property pertaining to this alleged unadjusted dispute is attached hereto as Carrier's Exhibit D.

(Exhibits not reproduced.)

OPINION OF BOARD: The instant claim arose out of the abolishment of all train dispatcher positions in the Carrier's Savannah, Georgia train dispatching office and the simultaneous transfer of train dispatching work to the Southern Railroad's train dispatching office at Macon, Georgia, effective September 6, 1964. Petitioner contends that the Savannah and Atlanta Railway Company, Carrier herein, violated the Scope Rule and other applicable rules of the existing collective bargaining Agreement between the parties when it transferred or "contracted" out train dispatching duties, without consultation or agreement with Petitioner, to employes of another Carrier and officials of the Savannah and Atlanta Railway Company. Carrier's primary defense is that this Board is wholly without jurisdiction to consider the claim, which arose out of the acquisition of the Central of Georgia, and, its subsidiaries and affiliates including the Savannah and Atlanta Railway Company, by the Southern Railroad Company pursuant to the authorization and approval of the Interstate Commerce Commission. Specifically, Carrier avers that the Interstate Commerce Commission prescribed conditions for the protection of employes adversely affected as a result of that transaction as required by Section 5 of the Interstate Commerce Act and that paragraph (11) of Section 5 of the Act makes the authority conferred on that Commission exclusive and plenary. Hence, Carrier asserts that this Board has no authority to add to or detract from the conditions imposed by the Interstate Commerce Commission.

The record reflects that Southern Railroad Company, hereinafter called "Southern", acquired control of Central of Georgia Railway Company, hereinafter called "Central", on June 17, 1963. These Carriers abolished positions at Central, as well as its affiliates such as the Savannah and Atlanta Railway Company, and transferred the work here involved to employes of the Southern as alleged in paragraph (a) of the Claim. This particular claim and numerous others of a similar nature were filed by the Petitioner and other collective bargaining representatives of employes of the Central and its affiliates such as the Savannah and Atlanta Railway Company.

A number of actions in Federal District Courts were instituted by the various collective bargaining representatives on behalf of their affected members. The action filed on July 9, 1963 by the Railway Labor Executives' Association is of paramount significance because the Petitioner sought to set aside, annul and suspend the conditions prescribed by the Interstate Commerce Commission for the protection of employes on the ground that the failure to impose certain conditions contained in the Washington Job Protection Agreement of 1936 brought the ICC order into conflict with

Section 5(2)(f) of the Interstate Commerce Act. The lower Court upheld the validity of the conditions prescribed by the Interstate Commerce Commission; however, the Supreme Court on appeal in a per curiam opinion (379 U.S. 199) remanded the case to the District Court with the following instructions to the Interstate Commerce Commission on further remand from the District Court:

> "to amend the report and order as necessary to deal with appellants' (RLEA) request that Section 4, 5 and 9 (of the Washington Agreement) be included as protective conditions, specifically indicating why each of these provisions is omitted or included."

The matter is now pending before the Interstate Commerce Commission, which previously had issued a Supplemental order and Report on February 17, 1964, for the purpose of clarifying the relationship between the conditions imposed and the Washington Job Protection Agreement.

The basic dispute was also submitted to the arbitration committee established pursuant to Section 13 of the Washington Job Agreement and assigned Docket No. 141. On July 22, 1966, the referee concluded that the Carriers had violated Sections 4 and 5 of the Washington Agreement, which he found were neither abrogated nor modified by Sections 5(2)(f) or 5(11) of the Interstate Commerce Act, nor by the ICC orders in Finance Docket No. 21400. Moreover, the referee fashioned a remedy in his Award, which could be applied to all adversely affected employes encompassed in the consolidation of the Carriers and their affiliates.

In the present dispute, Petitioner primarily relies on a violation of Rules 1, 4(a), 4(d) and 11 of the effective Agreement between the parties apart from Sections 4 and 5 of the Washington Agreement.

The pertinent provision of said Rules are as follows:

"ARTICLE 1.

(a) Scope. The term 'Train Dispatcher' as herein used shall include chief, assistant chief, trick, relief and extra dispatchers.

An employe directing traffic by centralized traffic control, or any other similar agency, is to be classified as a train dispatcher.

(b) Definitions of Chief, Night Chief and Assistant Chief Dispatchers' Positions. These classes shall include positions in which the duties of incumbents are to be responsible for the 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.

(c) Definition of Trick Train Dispatchers' Positions. This 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.

(d) Retitling Positions. Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work, which will have the effect of reducing rates of pay or evading the application of these rules.

NOTE: It is agreed that one chief dispatcher position on the territory under the jurisdiction of one Superintendent shall be excepted from the provisions of this agreement, other than the weekly rest day, relief service and vacation provisions thereof.

Incumbents of such excepted positions who are, under the rules of the agreement, entitled to seniority as train dispatcher shall retain and accumulate such seniority on the territory where such seniority was established, and in filling such positions senior train dispatchers on the roster involved who have the necessary ability and capacity will be given due consideration."

"ARTICLE 4.

(a) Seniority Date. If accepted as train dispatcher, seniority shall date from the time service as such was first performed after last entrance in service as train dispatcher.

(d) Seniority Limits. Seniority rights shall extend to all train dispatcher positions on the System."

"ARTICLE 11.

Effective Date. This Agreement is effective June 1, 1944, and will remain in force until revised in accordance with procedure required by the Railway Labor Act, as amended."

In the first instance, Petitioner avers that the Savannah and Atlanta Railway Company is a separate and distinct corporate entity and, therefore, a separate and distinct Carrier under the provisions of the Railway Labor Act, as amended. However, the record reflects that the acquisition by the Southern of the Central included its subsidiaries and affiliates such as the Savannah and Atlanta Railway, that the consolidation approved by the Interstate Commerce Commission encompassed such subsidiaries and further that their employes are covered by the protective conditions imposed by the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act. Accordingly, we find that the Carrier's primary defense of preemption by the Interstate Commerce Commission is germane.

Recent Awards of this Board have concluded that we have jurisdiction over railroad-employe disputes arising out of the interpretation and application of existing collective bargaining agreements between these merging Carriers (Central and Southern) and collective bargaining representatives of employes adversely affected by various "coordinations", which have been implemented by said Carriers subsequent to the authorization and approval

of the merger by the Interstate Commerce Commission in Finance Docket 21400. Awards 15028 and 15087. Carrier's submission in the instant dispute contains essentially the same defense previously presented to and considered by this Board in these earlier awards and no material changes have transpired by operation of law resolving the existing differences between the parties concerning the proper interpretations of the relevant provisions of the Interstate Commerce Act. We have carefully considered such earlier Awards, including the vigorous dissents filed by the Carrier members and must conclude that neither Award 15028 nor 15087 are palpably in error as to the jurisdiction of this Board. Under the doctrine of Stare Decisis, where a point of law has been settled by decision, it forms a precedent which should ordinarily be strictly adhered to unless overriding considerations of public policy demand otherwise. Our authority is derived from Section 3, First (i) of the Railway Labor Act, as amended, and we reaffirm our previous position that at the minimum this Board has concurrent jurisdiction with the Interstate Commerce Commission over disputes of the nature involved herein. (Award 15087.) Accordingly, until our jurisdiction is explicitly and definitely superseded in such matters by appropriate constitutional courts having jurisdiction over all indispensable parties and the subject matter, this Board must exercise its statutory powers by resolving disputes growing out of the interpretation and application of collective bargaining agreements.

We concur with Carrier's contention that this Board has no power to interpret pertinent sections of the Interstate Commerce Act as to Congressional intent or to interpolate the authorities which it cites in support of its defense of pre-emption by the Interstate Commerce Commission. The ultimate disposition of these jurisdictional issues requires final judicial resolution. In the interim, we should exercise our specific and limited jurisdiction expressed in Section 2 of the Railway Labor Act, as amended. Therefore, we will invoke our jurisdiction and consider the merits of the instant claim.

As earlier noted, the basic jurisdictional dispute involved herein was also submitted to the arbitration Committee established pursuant to Section 13 of the Washington Job Agreement and the referee fashioned a remedy in his award. (Docket No. 141.) Carrier further contends that under the circumstances considerations of comity make it desirable that we refrain from action in this case and dismiss the claim. We do not agree, inasmuch as Petitioner's particular claim rests primarily on Carrier's alleged violation of the collective bargaining agreement between the parties and was not submitted to said arbitration committee. Both Central and Southern admit that the Washington Job Agreement has not been complied with in these coordinations and its terms are irrelevant in the instant claim. Awards 11590 and 15028.

As to the merits of the claim now before us, Carrier admits that all train dispatcher positions in the Savannah, Georgia train dispatching office of the Savannah and Atlanta Railway Company were abolished as alleged in paragraph (a) of the Claim, and that all train dispatching work was transferred to employes of Southern without negotiation with Petitioner. A prima facie case has been presented by Petitioner that the work of train dispatching has been exclusively performed by Savannah and Atlanta Railway employes covered by the existing Agreement between the Savannah and Atlanta Railway Company and the American Train Dispatchers Association. Thus, we find that the Carrier violated Rules 1, 4(a), 4(d) and 11 of said agreement by unilaterally withdrawing the work from the bargaining unit.

Paragraph (b) of the Claim urges that Carrier be required to restore said train dispatcher positions and all work relating thereto as well as restore the same to the claimants herein, who were assigned thereto as of September 5, 1964. It is well established by many Awards of this Board that it is the prerogative of management to determine the manner in which work shall be performed. Accordingly, we will not order restoration of the abolished positions, but will direct that claimants be awarded that amount of money which will make them whole for such loss of wages and expenses incurred as each may have suffered because of the violations. Awards 6967, 11489, 13807, 13840, and others. The record discloses that each of the claimants has been treated in accordance with the employe protective provisions imposed in Interstate Commerce Commission Docket No. 21400, and that one claimant resigned from the service of Carrier on October 30, 1964, at which time he requested and received a lump sum settlement. Therefore, the Claimants are entitled to that amount of money which will make each whole from the date of the violation alleged in paragraph (a) of the claim to the date of voluntary retirement or the date of this award, whichever occurs earlier, less what each actually earned in that period as well as such amounts received from Carrier allegedly in accordance with the employe protective provisions contained in Interstate Commerce Commission Report in Finance Docket 21400.

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 Carrier violated the Agreement.

AWARD

Paragraph (a) of Claim is sustained.

Paragraph (b) of Claim is denied.

Paragraph (c) of Claim is sustained as modified by the Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April 1967.

CARRIER MEMBERS' DISSENT TO AWARD NO. 15460, DOCKET NO. TD-15682

The Carrier Members respectfully dissent from so much of the award as is concerned with the majority's assumption of jurisdiction. While we would commend the Referee for his recognition of the doctrine of stare decisis, we nevertheless feel compelled to point out why we are convinced that this Division's decisions in Awards 15028 and 15087 should not control the jurisdictional question presented to the Board in this present matter.

In so doing, we are aware that the innumerable conflicting decisions of this Board have exposed it to justifiable criticism. For this reason, we would be inclined to look with favor upon any effort to supply consistency to our interpretive decisions by adherence to concepts of precedence under the rule of stare decisis. Such a rule, however, cannot supply jurisdiction where such is lacking.

We must disagree with the Referee's conclusion that neither Award 15028 nor Award 15087 is palpably in error. While it is not the purpose of this dissent to consolidate the dissents which were filed in those two instances, so much of each dissent as attacks the exercise of this Board's jurisdiction is hereby adopted by reference for the purpose of explaining why these decisions are so clearly incorrect as to be in effect no precedent at all. As noted in the dissent to Award 15087, upon which the Referee relies to establish the Board's minimum, concurrent jurisdiction, the Board bases its finding of jurisdiction upon a construction of Section 5 of the Interstate Commerce Act, 49 USC §5 (1964), which is founded upon a grossly and clearly erroneous application of settled and basic rules of statutory construction.

The Referee seems to express some doubt as to the final judicial outcome of the question of Board jurisdiction over labor disputes arising out of these Section 5 consolidations, a question on which the opinion invites further litigation. To allow this Board its minimum, concurrent jurisdiction with the Interstate Commerce Commission would be to strip that latter body of its necessarily exclusive power to deal with labor-related problems always inherent in railroad consolidations and mergers. It could not have been the congressional purpose to establish a mandate in a body without allowing that agency the necessary power to successfully carry out its responsibilities under the law. To share such power is to destroy it and to render its very grant meaningless. This, we do not think, the law intends.

P. C. Carter
R. E. Black
G. L. Naylor
T. F. Strunck
G. C. White

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 15460, DOCKET TD-15682

The Carrier Members' dissent is nothing more than a repeat of the Carrier's Submission to this Board.

The Dissent points to Awards 15028 and 15087 as not proof this Board had jurisdiction in rendering Award 15460. These three Awards were decided by the majority with three separate Referees sitting with the Division. This should be conclusive proof this Board had jurisdiction.

The reference in the Dissent to "congressional purpose" is interesting, due to the fact that had Congress intended the authority of the Interstate Commerce Commission to exceed our statutory authority, it would have been simple to place such language in the Interstate Commerce Commission Act.

George P. Kasamis
Labor Member

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