



Award No. 16556
Docket No. TD-16881

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)

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

(a) The Norfolk & Western Railway Company (NYC&StL), hereinafter referred to as "the Carrier", violated the effective schedule agreement between the parties, Article 1 thereof in particular, when on January 19, 1966 through and including January 23, 1966, it required or permitted those not within the scope of the said agreement to perform work covered thereby.

(b) The Carrier be required to compensate the senior available extra train dispatchers, as specified in paragraph (c), one day's compensation at rate of Assistant Chief Train Dispatcher because of the violation referred to in paragraph (a) hereof.

(c) Named claimants as referred to in paragraph (b) above on specific dates as referred to in paragraph (a) above are identified as follows:

Name	Status	Date	Hrs. Pro Rata
L. W. Swiger	Extra	January 19	8
L. W. Swiger	Extra	January 20	8
G. D. Pollock	Extra	January 21	8
G. D. Pollock	Extra	January 22	8
G. D. Pollock	Extra	January 23	8

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

No question is involved with respect to the applicability of the said Agreement and the following history thereof is recounted as information to the Board.

Bellevue, Ohio, is the major terminal on the Carrier's Lake Region and is at the intersection of the Lake Erie, Pittsburgh and Scioto Divisions. From this terminal trains are operated in six directions, under the jurisdiction of the superintendents of the several divisions, and handled by dispatching forces at several offices.

The particular trains involved in the five claims were operated out of Bellevue and over the territory of the Division Superintendent at Muncie, Indiana. They were handled by dispatching forces who are under the supervision of the chief and assistant chief dispatchers at Muncie. Additionally, trains operate out of Bellevue over territory handled by dispatching forces at Conneaut, Ohio; Fort Wayne, Indiana; Brewster, Ohio; and Portsmouth, Ohio.

The instant dispute was handled on the property in the usual manner. Attached hereto, as Carrier's Exhibits A, B and C, are the exchange of letters reflecting the handling given the dispute at the highest level on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: A few years ago the Norfolk and Western Railway Company merged with the New York, Chicago and St. Louis Railroad Company, as a consequence of which the Norfolk entered into an agreement with various organizations representing certain employees of the latter Company including the American Train Dispatchers Association. That Agreement provided that Norfolk and Western would assume all contracts, agreements etc., between the New York, Chicago and St. Louis Company and the labor Organizations in effect at the time of the consummation of said merger.

The Train Dispatchers Association has filed the instant claim against the Carrier on the grounds that the Scope Rule of their Agreement has been violated. The principal fact determinative of this case is that subsequent to the merger, Carrier established the position of "Power Supervisor" the principal duties of which were previously performed by the Dispatchers.

The Scope Rule reads as follows:

"ARTICLE 1.

(a) - Scope.

The rules of this agreement shall govern the hours of service, compensation and working conditions of train dispatchers. The term 'train dispatcher' as hereinafter used shall include assistant chief, night chief, trick, relief, and extra train dispatchers.

There shall not be more than one chief train dispatcher on any division or other assigned territory.

(b) - Definitions.

**1. Assistant Chief Train Dispatchers
Night Chief Train Dispatchers**

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 employees; to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work.

2. Trick Train Dispatchers Relief Train Dispatchers

These classes shall include 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." (Emphasis ours.)

The Dispatchers argue that this is a specific Scope Rule as distinguished from a general type Scope Rule, that as such it describes the work belonging to the Dispatcher and does not merely list the positions etc. as we so often see in many general Scope Rules.

The Carrier on the other hand propounds the theory that the Organization, in order to be successful in their claim, must prove that the work involved has been done exclusively by the Dispatcher over a long period of time. This is the principal argument advanced by the Carrier.

We agree with the Dispatchers in this case. The Scope Rule is clear, precise and unambiguous. The language is not susceptible to mis-construction. They additionally have presented several affidavits from various Dispatchers attesting to the fact that for over 20 years, the work has been performed by them as provided in the afore cited Scope Rule. The evidence submitted by the Dispatchers in this case is substantial, whereas the defense raised by the Carrier, that is, that employes other than Dispatchers have performed the work and consequently the so called doctrine of exclusivity must govern, is not persuasive. It is an argument presented by Carrier, but without any evidence to support this contention, we must reduce it to a mere assertion. We will sustain paragraph (a) of the claim.

Paragraph (b) of the claim demands that Carrier, because of the violation, be required to compensate the senior available extra train Dispatchers, listed in paragraph (c) one day's pay at the rate of Assistant Chief Train Dispatcher. We have searched this record in vain to ascertain why this claim has been submitted on behalf of the extra employes rather than the regular incumbent of the position affected. We have again searched this record to ascertain how the extra men have been adversely affected by the violation. No evidence is contained in the record on this point. We must accordingly deny paragraphs (b) and (c) of the Claim for lack of substantial evidence.

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 in accordance with Opinion expressed herein.

AWARD

Paragraph (a) of Claim — sustained.

Paragraph (b) of Claim — denied.

Paragraph (c) of Claim — denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of August 1968.

SPECIAL CONCURRING OPINION OF LABOR MEMBER

AWARD 16556, DOCKET TD-16881

In holding that the Carrier is in violation of the Agreement, Award 16556 forthrightly, unqualifiedly and in unmistakably clear terms holds that the Scope Rule of the Agreement is "clear, precise and unambiguous" and that the "language is not susceptible to mis-construction." This clear and correct holding by the majority is implicit recognition of and renewed affirmation in respect to the basic principles that it is the character of the work and not the method of its performance that controls, that work may not be removed from the scope of an agreement and delegated to others under the guise of creating new positions with fabricated titles to perform that delegated work, and that when the rules or directives of a Carrier are in conflict with the terms of a Carrier's covenants with its employees it is the latter which must prevail. In so holding, and by clear implication reaffirming these basic principles, the majority, as it has in many previous Awards, again fulfills its prime responsibility of upholding and enforcing the integrity of collective agreements.

However, by denying the reparations claimed in paragraphs (b) and (c) of the Statement of Claim Award 16556 is clearly and seriously in error. That holdings is in obvious disregard of extensive authority cited in the record. The basis for denying the claimed and clearly warranted reparations is premised on the statement that:

" . . . We have searched this record in vain to ascertain why this claim has been submitted on behalf of the extra employees rather than the regular incumbent of the position affected. We have again searched this record to ascertain how the extra men have been adversely affected by the violation."

The claim was asserted on behalf of the extra train dispatchers for the obvious reason that it was they who were deprived of their right to perform the work in question. There is nothing new or novel about asserting claims on

behalf of extra rather than assigned employees. Literally hundreds of Awards of this Division attest this fact. And the record herein cites illustrative cases. Moreover, this Division has repeatedly held that the identity of the individual claimant or claimants is an immaterial incident to the claim.

The holding of Award 16556 with respect to reparations is also in disregard of extensive authority of record in Docket TD-16881 which holds that when an agreement has been breached a remedy must follow. For otherwise that agreement could be breached with impunity. The record in the docket also points to a long line of authority which holds that when an agreement makes no express provision for the measure of reparations to be awarded for a breach of agreement rules then the appropriate basis, as was claimed herein, is one day's compensation.

Therefore, the holding of Award 16556 with respect to paragraphs (b) and (c) of the Statement of Claim is earnestly dissented to.

George P. Kasamis
Labor Member

August 23, 1968