NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19794
THIRD DIVISION Docket Number TD-19851

John H. Dorsey, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Southern Pacific Transportation Company
(Texas and Louisiana Lines

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

(a) The Southern Pacific Transportation Company (Texas and Louisiana Lines), hereinafter referred to as "the Carrier", violated the Agreement in effect between the parties, Rule 2 (b) thereof in particular, when on August 17, 23, 27, September 1, 3, 9, 16, 22, 23, 24 and 27, 1971 it required and/or permitted an officer, supervisory employes and others not within the scope of said Agreement to perform work covered thereby.

(b) The Carrier shall now compensate Train Dispatchers V. F. Kapczynski, E. J. Moltz, W. R. Whittington, W. R. Stewmon, W. R. Whittington, T. E. Malcolm. C. L. Frost, W. R. Stewmon, W. R. Whittington, C. Stewart, P. Cain, W. R. Whittington, C. L. Frost and V. F. Kapczynski respectively one day's compensation at Chief Dispatcher's penalty rate for said violations.

(c) The individual Claimants identified in paragraph (b) were observing rest days on the corresponding dates identified in paragraph (a) and were available for service.

(d) Violations and Claimants referred to in paragraphs (a) and (b) above on specific dates are as follows:

(1) V. F. Kapczynski, August 17, 1971 - Division Superintendent E. F. Winterrowd, Lafayette, instructed the conductor of Train No. 58 as follows: "Pick up at Scott SLSF mty box and bring to Lafayette."

(2) E. J. Moltz, August 23, 1971 - Supervisory Agent H. D. Girouard, Lafayette instructed the crew of Train No. 58 at Crowley, Louisiana as follows: "Pick up at Duson CNW 141140 mty box for Lafayette Yard."

(3) W. R. Whittington, August 27, 1971 - W. J. Savannah, Agent, Strang, Texas instructed the crew of the Texas City Switcher at Englewood as follows: "Pick up GATX 29815 mty tank on Deer Park team track."

(4) W. R. Stewmon, September 1, 1971 - A. J. Manofsky, Supervisory Agent, Beaumont, Texas instructed the Extra South Port Arthur Local at Beaumont as follows: "Pick up at Mobil Chemical Viterbo MOBX 94517 ACFX 54682 Chem for Fiberton NC, Weigh at Beaumont."

(5) W. R. Whittington, September 3, 1971 - R. Keenan, Agent AT&SF Railroad, Kountze, Texas instructed SP Train No. 160 at Lufkin, Texas as follows: "Pick up one car lumber at Georgia Pacific Lbr Kountze car No. SP 509636 and handle to Beaumont for weighing, list and bills in box at Kountze."

(6) T. E. Malcolm, September 3, 1971 - H. D. Girouard, Supervisory Agent, Lafayette, Louisiana instructed the crew of Train No. 58 at Crowley, Louisiana as follows: "Pick up MKT 6950 mty box at Bob Farm & Garden Scott also EFCX 2355 feed and bring to Lafayette."

(7) C. L. Frost, September 9, 1971 - A. J. Manofsky, Supervisory Agent, Beaumont, Texas instructed the crew of Extra South as follows: "Pick up at Mobil Chemical Corp, Viterbo, Texas NATX 24710 mty tank Freeport Texas via SP BMT MP."

(8) W. R. Stewmon, September 9, 1971 - A. J. Manofsky, Supervisory Agent, Beaumont, Texas instructed Extra South as follows: "Pick up at Mobil Chemical Corp., Viterba, Texas ACFX 54683, MOBX 94500, MOBX 94531 Chems for Fiberton NC via SP NOR SOU. Weigh at Beaumont."

(9) W. R. Whittington, September 16, 1971 - W. J. Savannah, Agent, Strang, Texas instructed the Texas City Turn at Englewood, Texas as follows: "Pick up GATX 66204 mty tank no" on Pasadena team track."

(10) C. Stewart, September 22, 1971 - A. J. Manofsky, Supervisory Agent, Beaumont, Texas instructed the crew of Train No. 69 as follows: "Pick up at International Harvester Co. Amelia, Texas LN 24170 mty flat."

(11) P. Cain, September 22, 1971 - H. D. Girouard, Supervisory Agent, Lafayette, Louisiana instructed the crew of Train No. 58 at Crowley, Louisiana as follows: "Pick up at Scott Feed Store, Scott, La. SP 174118 mty box for Lafayette Yard."

(12) W. R. Whittington, September 23, 1971 - A. J. Manofsky, Supervisory Agent, Beaumont, Texas instructed the crew of the Port Arthur Local as follows: "Pick up at Mobil Chem Viterbo ACFX 54683 MOBX 94509, MOBX 94514 Chem to Fiberton NC weigh at Beaumont."

(13) C. L. Frost, September 24, 1971 - F. A. Cunningham, Trainmaster StLSW Railroad, Shreveport, Louisiana instructed the crew of SP Train No. 217 at Shreveport, Louisiana as follows: "At Keithville, La. KCS 1 4571 empty box. Pick up."

(14) V. F. Kapczynski, September 27, 1971 - R. Keenan, Agent AT&SF Railroad, Kountze, Texas instructed the crew of a local freight at Lufkin, Texas as follows: "Pick up one car lumber at Georgia Pacific Kountze Car No. SP 509240 goes to Beaumont for weighing and forwarding list and bill at Kountze."

OPINION OF BOARD: In paragraph (d) of the Claim the Organization sets forth the facts of occurrences on 14 specified dates, which facts it alleges, in paragraph (a) of the Claim, prove that Carrier, in each instance, violated Rule 2 (b) of the Agreement. The facts are undisputed.

Rule 2 (b), with emphasis supplied, reads:

> "(b) Chief Dispatchers' 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 employee.; to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work."

Organization admits that in past practice on the property, employes other than Chief Dispatchers and Assistant Chief Dispatchers issued instructions of the type setforth in paragraph (d) of the Claim; but, it contends eve* if such practice had "existed 'since time immemorial' if that practice is in conflict with the provision of an Agreement between the parties, the Employes have a right to insist upon compliance with the clear and unambiguous provisions of the controlling Agreement, which shall prevail over such conflicting practice." We agree with that principle as stated. But the principle is applicable only when its proponent satisfies its burden of proof that Rule 2 (b) clearly and unambiguously vests exclusive right to the involved work in employee classified as Chief Dispatchers or Assistant Chief Dispatchers.

The Awards of this Division have consistently held that classification provisions identical to or in substance the same as Rule 2 (b) have consistently denied claims that Dispatchers have an exclusive right to issue instructions to local trains concerning the picking up or setting out of cars. This body of case law has precedential value in the absence of proof that its premise is empirical and/or its reasoning sophistry. We find no such defects in the precedent Awards; nor, do we find that the clause emphasized in Rule 2 (b), supra, expressly vests an exclusive right in Chief Dispatchers and Assistant Chief Dispatchers to issue instructions to local trains concerning the picking up or setting off of cars.

In the resolution of this dispute we find no aid in the definition of "equipment" in the publication titled "Official Railway Equipment Register."

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 Carrier did not violate the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E A Zeller
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1972

LABOR MEMBER'S DISSENT TO AWARD NO. 19794, DOCKET TD-19851
REFEREE DORSEY

Award No. 19794 evades the issue and fails to contribute anything toward the General Purposes of the Railway Labor Act, specifically Section 2 thereof reading "The purposes of the Act are: . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay. rules, or working conditions. "

The Employes plainly identified the subject of the dispute, stating in their submission:

> "Rule 2 of the Agreement provides in paragraph (b) thereof, that the duties of the incumbents of Assistant Chief Dispatcher positions will include, among others (1) being responsible for the movement of trains on a division or other assigned territory, and (2) to supervise the handling of trains and the distribution of power and equipment incident thereto. (Emphasis added)
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> It is on the above emphasized Agreement provisions that the instant dispute is based, in its entirety."

Award No. 19794 quotes the rule in question. stating:

"Rule 2 (bj, with emphasis supplied, reads:

> '(b) Chief Dispatchers' and Assistant Chief Dispatchers' Positions. Those classes shall include positions in which ths duties of incumbents are to be responsible for the movement of trains on a division or other assigned territory, invclving the supervision of train dispatchers end other similar employes; to supervise the handling of trains and the distribution of power ond equipment incident thereto; and to perform related work.'"

rho emphasis supplied section of the rulo cited in the award broadens the clearly identifiod subject or scope of the dispute by including tho words "and to perform related work".

With this inclusion it was reasonable to assume the Award, for some reason, deomed it nocessary to rulo on or interpret the phrase "and to perform related work" and/or equated the actual issuance of instructions to be related work. Thor fore, in re-argument tho specific question was asked if the record clearly showed the supervision rather than the issuance of instructions was the issue in question The affirmative response that the basic issue was recognized to be the handling of trains is confirm-d two places in the Award where thewords "to local trains concerning ths picking up or setting off of cars" are used.

The basic issue, and in fact the only issue, in dispute was the duty of the positions contained in the separate clause of the rule reading "to supervise the handling of trains and the distribution of power and equipment incident thereto; . . .". While the duty contained in the clause "and to perform related work." could be construed to require collateral information or consideration to determine the intent, the duty contained in the clause "to supervise the handling of trains and the distribution of power and equipment incident thereto" in crystal clear language describes the work in question.

Award No. 19794 overlooks the language contained in the clause describing the duty and searches for collateral information, stating:

> ". . . But the principle is applicable only when its proponent satisfies its burden of proof that Rule 2 (b) clearly and unambiguously vests exclusive right to the involved work in employes classified as Chief Dispatchers or Assistant Chief Dispatchers.
>
> The Awards of this Division have consistently held that classification provisions identical to or in substance the same as Rule 2 (b) have consistently denied claims that Dispatchers have an exclusive right to issue instructions to local trains concerning the picking up or setting out of cars. This body of case law has precedential value in the absence of proof that its premise is empirical and/or its reasoning sophistry. We find no such defects in the precedent Awards; nor, do we find that the clause emphasized in Rule 2 (b), supra, expressly vests an exclusive right in Chief Dispatchers and Assistant Chief Dispatchers to issue instructions to local trains concerning the picking up or setting off of cars."

The requirement that an exclusive right to perform the work be proven by history, custom, or practice or otherwise is unwarranted and improper for the clause defining the duty sets out the work in question. The time-worn, often mis-used exclusivity theory, i.e. burden of proof, has no place in the adjudication of a dispute under a clear and concise rule. While the Railway Labor Act provides for settlement of disputes covering both the interpretation or application of Agreements, when the rule is clearly worded, what is required is an interpretation of the written words; not whether the written words have application and/or meaning. The Third Division has so ruled on many occasions, for example:

Award No. 11526, Dolnick:

> "The Agreement between the parties is system-wide. It is not confined solely to Sacramento or to West Oakland or to any one of the Carrier's Divisions. It includes them all. While it is true that the Employes do not have access to all of Carrier's records, and that it is sometimes difficult to know all that is happening in the system, it is nevertheless,

> the obligation of the Employes to make certain that the work belonging to Signalmen is specifically set out in the Agreement. If it is not so set out, then the work belongs to them only if by practice, custom and usage of on the property, work has been done system-wide exclusively by Signalmen. See Awards 6207 (McCoy), 5404 (Parker), 7806 (Carey) and 4208 (Robertson)."

Award No. 13336, Dorsey:

> " . . . And, reasonable men may differ as to whether 'maintenance' of signal equipment is an exclusive grant of the work of snow removal from such equipment. Consequently, the principle, that when we find ambiguity in a scope rule the burden is upon petitioner to prove that historically and customarily the work involved has been exclusively performed by employes covered by an agreement, is applicable."

Award No. 18471, O'Brien:

> "In order to sustain their contention, the Organization has the burden of proving that the Agreement clearly grants it exclusive right to the work complained of by saying that such work is reserved to the Organization, or, in the absence of such a Rule, it must prove, by probative evidence, that the work is of a kind that has been historically, customarily, and exclusively performed by employes covered by the Agreement."

When you have a rule defining the work or duty, proof of exclusive right is not apropos. This must be true, otherwise the exclusive right theory could destroy any rule in an Agreement by a single violation or deviation regardless of the circumstances. The exclusive right theory has application only when the work or duty is not defined or the definition is ambiguous. The clause "to supervise the handling of trains and the distribution of power and equipment incident thereto" is not ambiguous and collateral evidence is not required to determine its intent or meaning.

Award No. 19794 searches for precedential support of the Opinion rendered, stating:

> "The Awards of this Division have consistently hold that classification provisions identical to or in substance the same as Rule 2 (b) have consistently denied claims that Dispatchers have an exclusive right to issue instructions to local trains concerning the picking up or setting out of cars. This body of case law has precedential value in the absence of proof that its premise is empirical and/or its reasoning sophistry."

The finding in Award No. 19794 and other awards of this Division adjudicating disputes involving the duty "to supervise the handling of trains and the distribution of power and equipment incident thereto" on the basis of proving the exclusive right to such work, clearly and plainly reserved in the Agreement rule, is empiricism pure and simple for the rule language is not interpreted or considered.

In closing, the Award states:

> "In the resolution of this dispute we find no aid in the definition of 'equipment' in the publication titled 'Official Railway Equipment Register.'"

In each of the occurances in paragraph (d) of the Statement of Claim in the Award, the number or numbers of a certain car or cars are shown and in the Official Railway Equipment Register you find these cars listed. The register should have aided and does establish that the car or cars identified in each occurance is "equipment" as that word is used in the rule.

Considered together, the finding in Award No. 19794 denying the claims stating in part "to local trains concerning the picking up and setting off of cars", and the clause "to supervise the handling of trains and the distribution of power and equipment incident thereto" describing the duty, are a classic example of sophistry. Award No. 19794 requires sophistication to the degree that you must either accept that "locals" are not trains or that equipment is not equipment when moving on a local train or both.

The dispute was not over "classification provisions" but a clear-cut duty defined in the Agreement, i.e. "to supervise the handling of trains and the distribution of power and equipment". Award No. 19794 has nullified the instant claims by evading the issue and failing to consider and/or interpret the rule. Therefore, Award No. 19794 is in error and I must dissent.

J. P. ERICKSON
LABOR MEMBER