

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 20136
Docket Number TD-20069

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(**St.** Louis-San Francisco Railway Company

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

(a) The St. Louis-San Francisco Railway Company (hereinafter referred to as "the Carrier"), violated the effective Agreement between the parties, Articles III, Section 2(e), IV(d), IV(e) and IV(l)3 thereof in particular, by its failure to call Claimant Extra Train Dispatcher **C. E.** Doggett to perform service on Position No. 1 on December 8, 1971.

(b) Because of said violation, Carrier shall now be required to **compensate** Claimant C. E. Doggett one (1) day's compensation at the pro-rata rate applicable to Chief Dispatchers for December 8, 1971, which he would have earned had he performed the service on Position No. 1 to which he was entitled on that date.

OPINION OF BOARD: The Organization has submitted four claims which arise from the same facts but has filed each claim separately, bearing docket numbers TD-20069, TD-20070, TD-20071 and TD-20073. It is required therefore that the result in each claim be determined separately according to the record as handled on the property.

The facts are as follows: An excepted Chief Dispatcher was off on Tuesday, Wednesday and Thursday, December 7, 8 and 9. A regularly assigned relief position dispatcher requested that he be allowed to protect the vacancy and he was assigned for the three days. None of the days in dispute were rest days of the Chief Dispatcher. Claimant is an extra train dispatcher.

The Organization's position is that claimant was the senior qualified and available extra train dispatcher who should have been used to fill the three day temporary vacancy according to Article IV of the applicable Agreement. Article IV, entitled "Seniority", in paragraph **(d)** headed "Extra Work", states the following: 'The senior extra train dispatcher who is qualified will be called and used for train dispatcher service whenever he is available. The senior extra train dispatcher will be considered available if he can fill the vacancy without violating the Hours of Service Law, and is so situated that he can get to the point where the train dispatcher's office is located in time to begin work at the starting time of the vacant shift.' The claimant qualified for the vacancy as stated in this paragraph.

The Organization also maintains that the claimant was entitled to the position under Article IV, paragraph (e), (k) and (l). Paragraph (e), headed "Filling Positions" states: "In filling vacancies in positions of train dispatchers, seniority, fitness and ability shall govern. **Fitness** and ability being equal, seniority shall prevail." Paragraph (k), headed "Temporary Vacancies" so far as it is relevant, states: 1. Temporary vacancies--of sixty (60) days' duration or less may be filled without bulletining--." Paragraph (l), headed "Moving From One Assignment to Another", as far as it is relevant states: "3. A train dispatcher will not be permitted to move from his regular assignment to fill a temporary vacancy under the provisions of Section (k) of this Article unless it is known **such** vacancy will be for five or more days." and "4. The provisions of --3 of this Section (l) will not apply when there are no qualified extra train dispatchers available at the pro rata rate."

The Organization has concluded that since claimant met the requirements of these contract provisions to wit, qualified, **senior**, extra, available to fill a three day vacancy at the pro rata rate, he was entitled to fill the vacancy. It has further concluded that the regularly **assigned** dispatcher **was** not permitted to move to a vacancy of less than five days duration.

The Carrier, on the other hand, has argued that none of the seniority provisions apply and that it may select an **employee** for the vacancy subject only to the limitations that he hold seniority under this Agreement. In support of this contention, the Carrier relies upon the following: "Article I, (a) SCOPE, this agreement shall govern the hours of service and working conditions of train dispatchers. The term 'train dispatcher' **as** hereinafter used, Shall include night chief, assistant chief, trick, relief and **extra** train dispatchers. **It** is agreed that one chief dispatcher in each dispatching office shall be excepted from the scope and provisions of this agreement. Note (1): Positions of excepted chief dispatcher will be filled by **employees** holding seniority under this agreement."

The record includes a letter agreement dated August 6, 1948, Exhibit TD-R-1, made between the Carrier and the General Chairman. The letter recited the revision of the scope rule **as** quoted above and the addition of the footnote as quoted above, to be effective September 1, 1948. In addition the letter of agreement stated the following: "It is **understood** in the application of this note it is not required that **employees** used to fill excepted chief dispatcher positions be taken on a seniority basis and they may be taken from any seniority district."

The Carrier **also** referred to a letter dated November 19, 1952 in support of its position insofar **as** it states: "3. The **question** as to who shall fill the excepted Chief Dispatcher position on days Chief Dispatcher is off **shall** be determined in each office in the best interests of men and company alike, with the understanding that in the event there is disagreement, the right of **selecti** rests with the company."

The Organization contends that neither letter is relevant to the question in this case, because the **letters** referred to the granting of one rest day a week to Chief **Dispatchers** in 1948, and to two rest days each week in 1952. Since this case does **not involve rest** days of the Chief Dispatcher, the Organization insists that these Letter agreements may not be used to resolve this case.

We do not brush off the Letter agreements of August 6, 1948 and November 19, 1952 as lightly as does the Petitioner. The Schedule Agreement between the parties was effective on September 1, 1924. A revision of that Agreement was effective on September 1, 1948. The August 6, 1948 letter agreement referred to a letter agreement reached in 1924 regarding the fact that for the first time trainmasters would take one day off each week. The position, it was agreed would be filled by trick dispatchers. No reference was made to seniority.

When the scope rule **was** revised in **1948**, the letter agreement of August 6, 1948 changed the term "all **trainmasters**" used in 1924, to the phrase "excepted chief dispatcher". The letter also referred to the revised scope rule to which had been added the footnote quoted above. The next paragraph of the letter clarified the reference to seniority in the NOTE, by stating that **employees** used to fill the excepted Chief Dispatcher positions did not have to be taken on a seniority basis and could be taken from any seniority district. The letter agreement of November 19, 1952, made it clear again, that the Carrier had the right to select the train dispatcher who would relieve the excepted Chief Dispatcher, "On the days Train Dispatcher is relieving excepted Chief Dispatcher."

We cannot give credit to the Organization's interpretation that the two letters could apply only to vacancies on rest days. This would create a condition where the **manner** of selection of train dispatchers to be used on rest days of the excepted Chief Dispatcher would be specified but there would be no agreement on how to apply the Scope rule for vacancies on other than rest days. There is no provision in the Seniority Article IV that it will not apply on rest days but will apply on other days when the position of excepted Chief Dispatcher is vacant.

It would be just **as** unrealistic to assume that the parties believed that excepted Chief Train Dispatchers would only be off on rest days and that the positions would never be vacant on other days for any reason. We can safely **assume** that when the parties conferred and reached the Letter agreements in 1948 and in 1952 that they knew, as we know, that positions may be vacant due to illness, emergencies **and** other circumstances.

The Carrier has made this point on page 11 of its submission referring to the letter agreement of November 19, **1952 as follows:** "Item 3 effectively allows the Carrier to approve or disapprove **an** application for the Relief Position covering the rest days of the excepted Chief Dispatcher and applications for **any** other relief on this position without regard to the seniority of the

applicant." This point was not contradicted by the **Organization. in** the record. On pages 3 and 4 of its Rebuttal, the Organization discussed statements on page 11 of Carriers Submission but was silent with regard to the Carrier's contention **as** quoted herein.

The issue to be determined **as** stated in the claim is whether or not the Carrier violated the Agreement by failing to call claimant to perform service in the excepted Chief Dispatcher's position on December 8.

It is not necessary to discuss other arguments made by the Organization or to determine whether or not the **employee** who was selected by the Carrier should have been chosen. If the Carrier had the right to make its selection from among employees holding seniority, then the restrictions of Seniority Article IV do not apply. We believe that the Carrier had the right to do so.

We have reviewed the prior Awards submitted by the parties including **PLB** No. 300, Cases No. 4, 12 and 27. Nearly all of them deal with the question of appropriate compensation and do not discuss the choice of the train dispatcher who worked in the position of excepted Chief Dispatcher. Prior Award of this Division 3131 **involved a promotion**. It does hold that the Carrier has the right of selection. Third **Division** Award 10735, was also a promotion case and follows the reasoning of Award 3131. It does refer to Award 6816 cited by **employees** but only on the **question** of "full and unprejudiced consideration", in the selection for promotion to a temporary vacancy. Supplemental Award 11110 of the Third **Division** reviewed prior Awards and concluded that the position of Chief Train Dispatcher is excepted from the Agreement. Third Division Award 15506 also held that filling the position of Chief Train Dispatcher is at the discretion of the Carrier. It is noted that the Labor Members' Dissent in this case attacking the Concurring Opinion of a Carrier Member, did not disagree with the Findings.

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 **Employees** involved in this dispute are respectively Carrier and **Employees** 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

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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: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this **15th** day of February 1974.

Labor Member's **Dissent** to Awards 20136, Docket **TD-20069**,
20137, Docket ID-20070 and 20139, Docket **TD-20073**

(Referee Bergman)

Award 20136 is the pilot award in these Dockets With Awards 20137 and 20139 adopting the Opinion contained in Award 201.36. These Awards not only failed to consider the **main** issue in these disputes but show the decision rendered **was** not based on a thorough study of the record **and**, therefore, these Awards **are palpably** erroneous.

Award 20136 **endorses** an excerpt from the record as a **point in Carrier's** favor largely because the Organization did not contradict this point but **was** silent with regard to this Carrier's Contention **stating**:

"The Carrier has made this point on page 11 of its submission referring to the letter agreement of November 19, 1952 **as follows**: 'Item 3 effectively **allows** the Carrier to approve or disapprove an application for the Relief Position covering the rest **days** of the excepted Chief Dispatcher and applications for **any** other relief on this position **without** regard to the seniority of the applicant.' This point was not **contradicted** by the Organization **in** the record. **On pages 3 and 4** of its Rebuttal, the Organization discussed statements on page 11 of Carriers **Submission** but **was** silent with regard to the Carrier's contention as quoted herein."

The **acceptance** of this **point** as supporting **Carrier's** position as the result of the **Organization's** default is not just specious reasoning but is unmistakable error resulting **in** erroneous adjudication. The neutral did **not** peruse the Docket to a **sufficient** degree to ascertain that this "**Item 3**", **accepted as** a point or contention **favorable to** the Carrier, was, **in fact**, a direct quote **from the Employes' Ex Parte Submission in Docket TD-18768, Award 18419**. This Referee has placed the Organization **in** the untenable position of **being** faulted for not attempting to impeach its **own** testimony.

The language **in** this Item 3 is not **confusing** or **ambiguous** but deals with the Carrier being **allowed** to approve or disapprove an application for the Relief Position covering the rest days of the excepted Chief Dispatcher or other relief on the position of the excepted Chief Train Dispatcher. **Carrier's** being allowed to approve or disapprove an **application to perform** relief work in the stead of the excepted Chief **Train** Dispatcher Was an issue in the dispute adjudicated in Award 20138 but **was** not an issue in the disputes **adjudicated** in Awards 20136, 20137 and 20139.

Labor Member's Dissent to Awards **20136**, Docket **TD-20069**,
20137, Docket **TD-20070** and **20139**, Docket **TD-20073** (Cont'd)

Award **20136** shows the Referee was not cognizant of the exact Issue in the **dispute** nor the position taken by the Organization when it states "The Organization also maintains that the claimant **was** entitled to the position under Article IV, **paragraph** (e), (k) and **(1)**." Paragraph (k) is headed "Temporary Vacancies" and paragraph (1) is headed "Moving From One Assignment to Another" as Award **20136** states. The Organization did not maintain the **Claimant** was entitled to **work** this position under the terms of paragraphs **(k) or (1)**. The **Organization** did maintain the train dispatcher who did perform the relief **work** on the claim dates involved in **Awards 20136, 20137** and **20139** was not entitled to nor should he have been allowed to either make application for or **move** onto this specific temporary vacancy under the terms and conditions of Paragraph (k) and (1). Award **20138** sustains the claim for time and one-half compensation for the train dispatcher filling this vacancy on that train dispatcher's rest day. The Carrier submitted a common **Ex Parte** Submission to cover the disputes involved in **Awards 20136, 20137 and 20139** and in addition to cover the dispute involved in Award **20138**. Notwithstanding, the common **Ex Parte Submission** by the Carrier to cover **four** Dockets, the Referee should have been aware the contention raised by the **Employees** in the instant **Awards** was the claimant, an extra train dispatcher, has not used on a **temporary** vacancy which, under the **instant** circumstances and the specific terms of the Agreement, **was** extra **work** and should have been filled by the senior extra train dispatcher as provided in **paragraph (d)**. Such senior **extra** train dispatcher had to be both qualified and available as provided in **paragraph (d)** and Award **20136** found that "the **claimant** qualified for the vacancy as stated in this **paragraph**."

Award **20136** states "Third Division Award **15506** also held that **filling** the position of Chief Train Dispatcher is at the discretion of the Carrier. It is **noted** that the Labor Members' Dissent in the case attacking the Concurring Opinion of a Carrier **Member**, did not disagree with **the Findings**." This statement is also found to be specious and/or **irrational** when Award **15506**, the Concurring Opinion of the Carrier **Members** in Award **15506** and the Labor Member's Response to Carrier **Members'** Concurring Opinion in Award **15506** are read and considered in their entirety. The decision in Award **15506** was based on a special **Memorandum** of Agreement between the parties holding:

"We find that filling this position **during** the absence of the incumbent is at the discretion of the Carrier agreed to by the parties as set forth in the **Memorandum** of Agreement, effective April 1, 1947."

Labor Member's Dissent to Awards 20136, Docket TD-20069,
20137, Docket TD-20070 and 20139, Docket TD-20073 (Cont'd)

The **Carrier** Members in their Concurring **Opinion** to **Award 15506** did not actually concur with the basis for the decision though they approved the denial of the claim. This Concurring opinion said the "claim should have been dismissed on other grounds **which** go to the jurisdiction of the **Board**.", i.e. **Chief** Dispatchers are "**officials**" and that this Board **has no jurisdiction** to adjudicate a **claim** to **an** official position. This contention had been presented by the Carrier involved **and was rejected** in **Award 15506** which proceeded to and did **adjudicate** the dispute on the merits. The labor Member did not dissent to **Award 15506** as **Award 20136** **mistakenly states**. The Labor Member in **Award 15506** made a Response to Carrier Members' Concurring Opinion and, of course, confined this response to the statements or **contentions** made in Carrier Members' Concurring Opinion. The Referee in **Award 20136** **fails** to **recognize** the difference between a dissent **and** a response to a **concurring** opinion and/or the basis for the decision reached in **Award 15506**.

Award 20136 states: "**Supplemental Award 11110** of the Third Division reviewed prior **Awards** and concluded that the position of Chief Train Dispatcher is excepted from the **Agreement**." The Dissent to **Award 11110** points to the errors in that **Award** and the fallacy of the **statement** quoted above considering the **award** authority followed (**Awards 7027** and **10705**) was palpably incorrect. This Dissent also pointed to a **precedent** set by **Awards 2943, 2944, 2986, 3096, 3344, 4012, 5202, 5244, 5371, 5559, 5716, 5829, 5904, 5975, 6292, 6581, 6583, 6746** and **7914** in which it has been held that the exception of the Chief Dispatcher from the **Agreement** applies **ONLY** to the one **appointed incumbent**. **Award 20136** failed to consider these **Awards** cited in the Dissent to **Award 11110** and awards subsequent to **Award 11110** which were presented to the Referee for consideration. For example -

Award 11560:

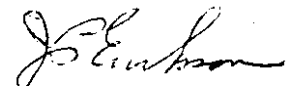
"It is true that the **Agreement** does not cover wage **rates** or working conditions of Chief Dispatchers. They **are** generally outside the Scope of that **Agreement**. We have held, however, that only the **occupant** of the position of Chief Dispatcher is excepted **and** that T-rain Dispatchers relieving him, for **any** reason, are entitled to **all** the benefits of the **Agreement** and to the **Chief Dispatcher's** monthly rate. **Awards 5371 (Elson), 5904 (Daugherty) and others. ***"**

Labor Member's Dissent to Awards 20136, Docket TD-20069,
20137, Docket TD-20070 and 20139, Docket TD-20073 (Cont'd)

Award 18070:

"There is a long line of awards by this Board holding that although the occupant of the position of Chief Dispatcher is excepted from the schedule agreement, Train Dispatchers relieving him are entitled to all of the benefits of the Agreement. ***"

Awards are only as sound as the reasoning used in arriving at the decision rendered. Award 20136, and Awards 20137 and 20139 following 20136, indicate such a shallow review of the record was made that neither the issues involved nor the contentions or positions of the parties ever became clarified enough to permit meaningful, sound adjudication of the dispute. Awards 20136, 20137 and 20139 are palpably erroneous and I must dissent.



J. P. Erickson
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT
TO
AWARDS 20136, 20137, AND 20139

(Referee Bergman)

Notwithstanding the long-winded dissent, there was but one issue involved in each of the disputes covered by Awards 20136, 20137, and 20139, and that was whether Carrier was obligated to fill a temporary vacancy on the Chief Dispatcher position under the seniority rules of the Agreement, when the only restriction in the Agreement is that such positions "will be filled by **employees** holding seniority under this Agreement". Award No. 20136 is well reasoned, fully supported by the Agreement and precedent awards of the Division. The dissent does not detract from the soundness of the Awards.

Quite apropos here are the **comments of dissenter's** predecessor on this **Board** in **answer** to Carrier Members' dissent to Award 15590 (Volume No. 167 of Third Division Awards):

"Like a latter-day Don Quixote the author of the so-called 'dissent' rides off in all directions, thundering like a parish elocutionist, and evidencing **an** Incredible disregard for the issue presented by the docket. * • * what is captioned as a 'dissent' is given over to **an** attempt to reargue a record which the apparent author of the 'dissent' had **already twice** argued to the Referee. The 'dissent' is a somewhat sonorous if not sniveling **Blackstonian** discourse which may be intended to impress those who **its** author may patronizingly **regard** as less informed in the **complex** field of jurisprudence."

and continuing:

"Further, this respondent would express the hope - vain though it may be - for the fulfillment of that **assurance** In the **Good Book** 'And the wind ceased and there was a great calm.' For assuredly surcease from this sort of distorted, inaccurate and **overwindy** drivel is long overdue in the **interest** of the Intended functioning **of** this Board."

Carrier Members' **Answer** to Labor Member's dissent to
Awards 20136, 20137 and 20139. (Ccnt'd)

P. C. Carter

H. B. Jones

Ham T. Edwards

G. M. Gordon