

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award **Number** 20212
Docket Number TD-20212

Joseph A. Sickles, Referee

(American Train Dispatchers Association
PARTIES TO DISPUTE: (
(Burlington Northern Inc.

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

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier"), violated the effective Agreement between the parties, Article 1(a) and 1(b) thereof in particular, when it required and/or permitted a person not **within** the Scope of said Agreement to **perform** work covered thereby on March 20, 1971.

(b) For the above violation, the Carrier shall now be required to compensate the senior available extra train dispatcher in Carrier's Minneapolis, Minnesota train dispatching office one day's compensation at the pro-rata rate of pay applicable to assistant chief dispatchers for March 20, 1971.

(c) In the event no extra train dispatchers were available for service for said assignment, the Carrier shall then be required to compensate the senior available regularly assigned train dispatcher in the Minneapolis, **Minnesota** office observing his assigned weekly rest day at the time and one-half rate of pay applicable **to** assistant chief dispatchers for March 20, 1971.

(d) The identity of the respective individual claimants shall be determined by a **joint** check of the Carrier's records.

OPINION OF BOARD: The Organization alleges that Carrier violated its Scope Rule when an employee, not covered by the agreement, issued a message which required that three cars be distributed from **Mandan**, North Dakota. One car was to go to **Medina** and two cars to Windsor.

Claimant cites a number of Awards which have sustained its position, such as 1015, 1828, 2316, 14219 and 14911. It also notes a number of Awards rendered by Public Law Board No. 588 (**Dolnick**), and Awards of this Division by the same Referee which are to the contrary. **However**, the Organization suggests that a study of the adverse rulings **demonstrates** that the Referee interpreted the wrong language, ignored appropriate language, and contradicted himself. In addition, Claimant invites our attention to its dissents in recent Awards 19908 (**Blackwell**) and 20016 (**Lieberman**).

Carrier argues (**among** other defenses) that the instant case has been settled in its favor. In addition to citing the numerous Public Law Board and Third Division Awards of Referee Dolnick, Awards 19794 (Dorsey) and 19908 (**Blackwell**); Carrier notes that Referee Lieberman, in Award 20016, considered the **same** Rule of these same parties, as well as the same arguments and same cited authority, and denied the claim. Accordingly, Carrier suggests that the doctrines of Stare **Decisis** and Res **Judicata** are **dispositive** of the issue. The Scope Rule states:

"(a) SCOPE

This agreement shall govern the hours of service and working conditions of train dispatchers.

The term 'train dispatcher' as herein used shall include all train dispatchers except one chief train dispatcher in each dispatching office who is not regularly assigned to a shift performing train dispatchers' work.

NOTE: A weekly rest day shall be assigned to each excepted chief train dispatcher position as a part of the weekly schedule of work for any train dispatcher assignment.

Relief of excepted chief train dispatchers for their annual vacation, and other temporary periods of absence from their positions, shall be made by qualified train dispatchers from the office involved.

Any permanent appointment to the position of excepted chief train dispatcher shall be made from train dispatchers holding seniority as such, on the same seniority district.

(b) DEFINITION OF **CHIEF** AND **ASSISTANT** CHIEF DISPATCHER POSITIONS.

Positions of chief and assistant chief train dispatchers 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;"

The parties have submitted a multitude of Awards and detailed argument for our guidance, all of which has been considered **at length**, including the vigorous dissents in Awards 19908 and 20016.

In Award 19908, the Board considered an instruction to pick up cars. In viewing the Scope Rule in the "...most favorable view possible to Petitioner's case.", the Board was "...not persuaded to Petitioner's viewpoint." The Board concluded:

"It is our view that, as a matter of language interpretation, the foregoing Public Law **Board** and Third Division Awards concluded that work instructions to pick up cars were not covered by the language now before us. **And** while we observe that the conclusion of these prior awards is not self-evidently the only conclusion that could have been reached, we believe the **same** statement could be made if a contrary conclusion had resulted. Thus, while the decision of these prior Awards is one on which reasonable minds could disagree, we do not believe those Awards are so palpably erroneous as to render them of no precedential value. Consequently, while we have viewed Petitioner's case in its most favorable light, we are nonetheless constrained to conclude that the work of issuing instructions to pick up cars is not distribution of equipment incident to the supervision of handling the train as provided in Rule **2(b)**. For a similar result, also see Award 19794 (**Dorsey**)."

In Award 20016, concerning these **same** parties, the Board considered a message to pick up empty cars. The Board noted that:

"Petitioner asks us to reverse the reasoning in a long series of Awards all of which hold that issuing orders for picking up and setting out cars is not work which belongs exclusively to Train Dispatchers under the Scope Rule quoted above. The Organization cites Awards No. 43 and 45 of Public Law Board No. 588, among others, in support of its position. We note that in both of those Awards the messages **were** specifically not ordinary and customary messages to pick up and set out cars, as was the case in the matter before us.

A review of the prior decisions and the arguments presented by Petitioner do not persuade us that our reasoning in all the earlier cases was in error. In **our** judgment the messages

"involved herein were neither train orders nor did they involve distribution of power **and** equipment; **sending** messages to set out or pick up cars is not work which belongs exclusively to Train Dispatchers under the Scope Rule above (See Award No. 4 of Public Law Board No. 588, Award No. 5 of Public Law Board No. 629, Award 19794 and many others."

In the Dissent to Award No. 19908, the Organization noted the absence of a complete endorsement of the conclusions reached in the **Dolnick** Awards, and stated that an in-depth study should have been made to resolve the issue and/or conflict.

A similar dissent was appended to Award 20016.

The Board, in this Docket, has thoroughly reviewed - at length - all Awards, arguments and contentions advanced by both parties. We note that the more **recent** Awards have not concurred with the Organization's position, even though Train Dispatchers' Scope Rules are identical or very similar on all carriers.

The Organization asserts that this Docket is factually different than Awards 19908 and 20016. Here, the message required a car distribution, whereas the issue in Awards 19908 and 20016 was confined to picking up **cars**. As we view the language of the Scope Rule before **us**, the factual differences do not aid the Organization, and we do not concur that they constitute a valid basis for us to distinguish this case from the prior Awards.

After considering all portions of the Scope Rule, we are **un-**able to find that this Docket presents concepts which have not been advanced to, and thoroughly considered and rejected by, this Board in numerous recent determinations; the most recent **of** which concerning this Carrier.

We are unwilling to overturn the precedents, absent a showing that the rulings are palpably erroneous. We are not able to make such a finding in this case.

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 not violated.

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 11th day of April 1974.

Labor Member's Dissent to Award 20212, Docket TD-20212

(Referee Sickles)

The Majority has failed to comply with **the** requirements of the **Railway Labor** Act which created the Adjustment Board for the express purpose of settlement of **disputes** growing out of the interpretation or application of Agreements.

Award 20212 bottoms its decision on **Awards 19908** and **20016** which involved claims **factually** different from the instant claim. **Award 20212** recognizes this difference stating "Here, the message required a car distribution, whereas the issue in **Awards 19908** and **20016** **was** confined to picking up cars".

The Agreement language before the Board in Docket **TD-20212** for **interpretation** was "to supervise the **handling of trains and the distribution** of power and equipment incident thereto". (**Emphasis supplied**)

Notwithstanding **Award 20212** recognizing the claim **in** Docket **TD-20212** presented a question or issue involving "car (equipment) **distribuion**", the claim was denied on the precedent of Awards wherein the Board held that picking up and setting out **cars** was not distribution of equipment. (See the Dissents to Awards **19908** and **20016** wherein the conflict within Third Division and Public Law Board No. 588 Awards is pointed out **along** with clear evidence that the ultimate, though not universal, holding that picking up **and** setting out cars is not distribution of equipment was an erroneous determination).

The Majority **in Award 20212** In its zealous disposition of the claim on the basis of prior Awards, which are not applicable, has either failed to perform the Board's function, which **is** to settle disputes by interpreting the Agreement, or exceeded the jurisdiction of the Board granted by the Railway Labor Act by removing **language** from the Agreement which **is** not a duty, function or purpose of the National Railroad Adjustment Board under the provisions of the **Railway Labor** Act, as amended.

Award 20212 is, at the very best, a nullity and **I** most vigorously dissent.



J. P. Erickson
Labor Member