NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20375
THIRD DIVISION Docket Number TD-20147

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Soo Line Railroad Company

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

(a) The Soo Line Railroad Company (hereinafter referred to as "the Carrier") violated the effective Agreement between the parties, Rule 10 (c) thereof in particular, when it failed to bulletin a vacancy known to be of seven (7) working days and no more than ninety (90) working days' duration such vacancy to be considered temporary.

(b) The Carrier shall now compensate J. P. Erickson (hereinafter referred to as "the Claimant") for the amount of difference between the applicable. rate of Assistant Chief Train Dispatcher's position and Chief Train Dispatcher's position for Hay 31, June 1, 2. 3. 4, 5, 7, 8, 9, 10, 11, and 12, 1971, respectively.

OPINION OF BOARD: The parties agree on the fact that the Chief Train dispatcher went on vacation from May 31 through June 12, 1971. They also agree that the Agreement applicable to the dispute herein is the one dated March 1, 1961 between the Soo Line Railroad Company and its Train Dispatchers represented by the American Train Dispatchers Association, effective March 20, 1961.

Petitioner claims that pursuant to Rule 10 (c) of the applicable agreement, the vacancy existing while the Chief Train Dispatcher was on vacation should have been posted. If it had been posted, claimant as the senior qualified train dispatcher would have been assigned to fill the vacancy. Rule 10 (c) so far as it pertains to this dispute reads as follows: "Vacancies---known to be of seven (7) working days and no more than ninety (90) working days duration shall be considered temporary. Notice of such temporary---position shall be posted in the office where existing---and assigned to the senior qualified applicant regularly assigned in that office--."

The Carrier selected a train dispatcher regularly assigned in the office involved to fill the vacation temporary vacancy. He was junior to the claimant in length of service. The Carrier relied upon the 1961 Agreement Rule 1 (a) which states the following: "The term 'train dispatcher' as herein used shall include all dispatchers except one chief train dispatcher in each dispatching office who is not regularly assigned to perform trick train dispatcher service; however, necessary relief of such chief train dispatchers because of absence from their positions, except where appointment of chief train dispatcher is made, will be performed by train dispatchers from the office involved, qualified for such work."

After reading the correspondence between the parties on the property, the record, the applicable agreement, and the prior Awards brought to our attention, we believe that the dispute is basically one of contract interpretation. If Rule 1 (a) means what the carrier contends, then Rule 10 (c) does not apply despite the Petitioners rationale to the contrary.

The heading of the applicable Agreement states: "These rules shall govern the hours and working conditions of train dispatchers employed by the Soo Line Railroad Company." The first Rule which follows that statement is headed "Scope" and it specifically states in (a) that one Chief Train Dispatcher in each dispatching office shall be excepted from the term train dispatchers. It follows, therefore, that if the Chief Train Dispatcher is not to be included among train dispatchers covered by the agreement, then Rule LO (c) does not apply.

In addition, Rule L (a) is a wholly self contained provision not only for the exception of the Chief Train Dispatcher but also it provides for the filling of a vacancy in that position. Thereby, Rule LO (c) becomes inapplicable.

It is self evident from the language of Rule 1 (a) that the Organization did not want to give the Carrier a free hand to use other than train dispachers from the office involved to fill vacancies in that office. In reading Awards prior to 1961, we have observed that the use of other than train dispatchers was an issue raised by the Organization. In the negotiation of the 1961 Agreement, the Organization obviously succeeded in limiting the choice of employe to fill the vacancy, to qualified train dispatchers in the office where the vacancy existed. Since no issue was raised by Petitioner concerning the function of the Chief Train Dispatcher in this case, we may safely assume that this position is the exception as spelled out by the language of Rule 1 (a). No further restriction or limitation on the Carrier's right to select the train dispatcher to fill the vacancy is set forth in Rule L (a). We have no authority to add to or amend the agreement and must accept it as we find it.

We do not consider Awards made prior to 1961 as relative to the interpretation of the 1961 Agreement. As explained above, we did note from those awards one of the issues which led, in part,to the 1961 agreement which, in our opinion, resolved that issue as we have indicated. Two Awards referred to us for consideration by the Organization which were decided subsequent to 1961, are concerned with compensation and benefits for the train dispatcher who was selected to fill the vacancy and are not material to the issue in this case.

Award 15506 which was submitted for our consideration by the Carrier representative is based on the same language as is set forth in the 1961 Agreement in this case. The language was interpreted in that Award as we have in this case. The additional question in that case i.e. the right of this Board to pass judgment concerning a managerial position was not raised directly in the handling of this case on the property. Since a narrow issue of interpretation of the 1961 agreement is involved, we believe we have authority to review that question.

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 6th day of September 1974.

Labor Member's Dissent to Award 20375, Docket TD-20147

Award 20375 is palpably erroneous because it lacks a basis in reason or fact. Referee Bergman appears to base his decisions on a precocious determination and indicates an unwillingness to let either the facts or the Agreement interfere with his Awards. Such action is hardly appropriate for "neutral referees" as that term is used in Section 3 First (1) of the Railway Labor Act.

The dispute involved Carrier's failure to bulletin a temporary vacancy of twelve (12) working days as required under Rule 10 (c). The work of relieving the Chief Train Dispatcher is reserved to Train Dispatchers under Rule 1 (a) and an exercise of seniority to obtain vacancies is contemplated in Rule 11 (a) reading:

> "Except as otherwise specifically provided in this agreement, train dispatchers may exercise seniority only when affected by force reduction or displacement or to apply for vacancies or new positions."

Award 20375 states:

> "After reading the correspondence between the parties on the property, the record, the applicable agreement, and the prior Awards brought to our attention, we believe that the dispute is basically one of contract interpretation. If Rule 1 (a) means what the carrier contends, then Rule 10 (c) does not apply despite the Petitioners rationale to the contrary,"

However, Award 20375 never does reach the point of clearly identifying what Carrier contended that Rule l.(a) meant.

Following this, Award 20375 states:

> "The heading of the applicable Agreement states: 'These rules shall govern the hours and working conditions of train dispatchers employed by the Soo Line Railroad Company.' The first Rule which follows that statement is headed 'Scope' and it specifically states in (a) that one Chief Train Dispatcher in each dispatching office shall be excepted from the term train dispatchers. It follows, therefore, that if the Chief Train Dispatcher is not to be included among train dispatchers covered by the agreement, then Rule 10 (c) does not apply."

This dispute did not involve the excepted incumbent of the Chief Train Dispatcher position but involved the relief of the Cnief Train Dispatcher and such necessary relief is reserved to train dispatchers under Rule 1 (a) of the Agreement.

Award 20375 continues -

> "In addition, Rule 1 (a) is a wholly self contained provision not only for the exception of the Chief Train Dispatcher but also it provides for the filling of a vacancy in that position. Thereby, Rule 10 (c) becomes inapplicable."

The parties themselves in Rule 1 (a) of the Agreement provided any and all of the modifications or exceptions to the reservation of the necessary relief of the Chief Train Dispatcher which they required or desired, i.e. the train dispatcher must be from the office involved and qualified for suc work. Once work has been reserved to a class or craft, as it was in Rule 1 (a), it is not necessary to prove each individual. rule in the Agreement applies to such reserved work. The very purpose of the Agreement is to provide the manner in which work reserved to the craft will be performed. Rules in an Agreement prevail unless there are specific provisions to the contrary. The modifications of the reservation of the relief work of relieving the Chief Train Dispatcher contained in Rule 1 (a) do not make Rule 10 inapplicable but only modifies Rule 10 to the extent clearly provided in Rule 1 (a). Rule 10 (c), covering temporary vacancies such as that involved in the instant dispute, does not state that it does not apply to vacancies concerning necessary relief of the Chief Train Dispatcher. If this had been the intent, the parties could have so stated in Rule 10 (c) or Rule 1 (a). In the absence of such intent expressed in either rule the modifications or exceptions contained in Rule 1 (a) are the sole exceptions and require only that the dispatcher working in relief of the Chief Train Dispatcher be from the office involved and qualified for such work. The Board is not empowered to enlarge upon these exceptions under the guise of interpreting the Agreement while actually changing the Agreement.

Award 20375 elects to ignore or nullify clear Agreement rules such as Rule 6 (b) reading:

> "The exercise of seniority rights in accordance with the rules of this agreement shall be based on seniority and qualifications, and where qualifications are sufficient seniority shall prevail."

as well as the clear provisions of Rule l-l (a) hereinbefore cited which grants an exercise of seniority to vacancies such as that involved in the instant dispute. Award 15506 mentioned by Referee Bergman does not show that the Agreement had either a vacancy rule similar to Rule 10 (c) in the instant dispute or an exercising seniority rule similar to Rule 11 (a) in the instant dispute. In fact, Award 15506 held the Employes' contentions were based on past practice based upon a "gentlemen's agreement" and an "informal. contract" in that dispute. In contrast, the instant claim is founded on written rules contained in the Agreement.

In the face of these clear rules and numerous Awards cited by the Petitioner in support of their contentions, Award 20375 states:

> "It is self evident from the language of Rule 1 (a) that the Organization did not want to give the Carrier a free hand to use other than train dispatchers from the office involved to fill vacancies in that office. In reading Awards prior to 1961, rue have observed that the use of other than train dispatchers was an issue raised by the Organization. In the negotiation of the 1961 Agreement, the Organization obviously succeeded in limiting the choice of employe 'to fill the vacancy, to qualified train dispatchers in the office where the vacancy existed. Since no issue was raised by Petitioner concerning the function of the Chief Train Dispatcher in this case, we may safely assume that this position is the exception as spelled out by the language of Rule 1 (a). No further restriction or limitation on the Carrier's right to select the train dispatcher to fill the vacancy is set forth in Rule 1 **(a).** We have no authority to add to or amend the agreement end must accept it as we find it.
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> "We do not consider Awards made prior to 1961 as relative to the interpretation of the 1961 Agreement. As explained above, we did note from those awards one of the issues which led, in part, to the 1961 agreement which, in our opinion, resolved that issue as we have indicated, Two Awards referred to us for consideration by the Organization which were decided subsequent to 1961, are concerned with compensation and benefits for the train dispatcher who was selected to fill the vacancy and are not material to the issue in this case."

In a reargument it was pointed out to Referee Bergman that the basis of his proposed Award was erroneous for the language of Rule 1 (a) was not a settlement of the issues in the 1961 Agreement for the same language, word for word, was included in the 1943 Agreement and, therefore, the Awards prior to 1961 could not be discounted in the instant dispute. Referee Bergman stated the entire record would be completely reviewed but there was no change in his proposed Award following this reargument.

A second reargument was held and numerous Awards were again brought to Referee Bergman's attention which supported the Employes' position such as Award 5244, adopted on March 8,1951, stating:

> "The question now arises as to whether the train dis-patcher is outside of the Scope of the Agreement when he relieves a Chief Train Dis-patcher under the circumstances of this case. The Carrier contends the affirmative on the &round that, when the train dispatcher relieves the Chief Train Dispatcher, hc is removed from the Scope of his Agreement because such position is expressly excepted tiiere from the Scope Rule. We do not find, however, that the Agreement supports this contention.
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> "The work performed in the position of Chief Train Dispatcher when he is absent is train dis-patcher's work under Rule 1 (a) of'the current Agreement. While one position in each dispatching office is excepted from the Agreement, such exception does not apply, under this rule, to train dispatchers who perform the work in the absence of the Chief Dispatcher. The language 'shall include all train dispatchers except one chief train dispatcher in each dispatching office who is not regularly assigned to perform trick train dispatcher service' clearly imports that only the one Chief Dispatcher not regularly assigned to a trick is excepted from the Scope."

In addition, it was brought to Referee Bergman's attention that the proposed Award was in error by not considering the prior Awards on the basis that the issue was settled when Rule 1 (a) was included in the 1961 Agreement when it was not a new Agreement provision and that the proposed Award would deprive the employes of Agreement rights citing from Award 11560 which states:

> "*** It is not our function to deprive covered employes of rights and privileges contracted for them by their certified representative. It is, rather, our responsibility to examine the total Agreement and apply the facts thereto."

Again Referee Bergman stated that the entire case would be studied in detail and again there was no change in the proposed Award.

The original proposed Award was adopted by the majority constituted of the Carrier Members and Referee Bergman. Referee Bergman's refusal to recognize that Award 29375 was based on en erroneous determination, i.e. that Rule 1 (a) was a new provision in the 1961 Schedule Agreement and, therefore, Awards prior to 1961 were without value as precedent, or to correct his error, make Award 20375 palpably erroneous and without precedent&J value. In addition, Award 20375 leaves room for doubt as to Referee Bergman's capability to serve as a neutral referee.

Award 20375 is clearly erroneous and I must dissent.

J. P. Erickson
Labor Member