

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20539

Docket Number TD-20171

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Fort Worth' and Denver Railway Company

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

(a) The Fort Worth and Denver Railway Company (**hereinafter** referred to as "the Carrier"), violated (1) the October 3, 1968 Memorandum of Agreement between the parties and the Joint Texas Division of the Chicago, Rock Island and Pacific Railroad Company-Fort Worth and Denver Railway Company, Section 3 thereof in particular, and (2) the Schedule Agreement between the parties, Rules 1 and 3 thereof in particular, when it required and/or permitted a **Trainmaster** Carrier official, who is not covered by the Scope of said Agreement to perform work covered thereunder on August 30, 1971.

(b) Because of said violation, Carrier shall now be required to compensate Claimant Train Dispatcher K. C. **Vanderveer** for one (1) basic 8-hour day at the pro-rata daily rate applicable to Night Chief Dispatcher for August 30, 1971.

OPINION OF BOARD: On October 3, 1968 an Agreement was reached among two carriers, the Joint Texas Division of Chicago, Rock Island and Pacific Company-Fort Worth and Denver Railway Company (**JTD**) and the Fort Worth and Denver Railway Company (**FW&D**), and the American **Train** Dispatchers Association. Pursuant to this Agreement the train dispatching facilities at Teague, Texas on the JTD and Wichita Falls, Texas on the **FW&D** were consolidated and coordinated into a **FW&D** train dispatching office located at Fort Worth, Texas. This agreement was effective January 21, 1969 and thereafter the trains of both carriers were dispatched from the consolidated **FW&D-JTD** train dispatching office at Fort Worth, Texas.

On Monday, August 30, 1971, Joint Texas Division **Trainmaster** J. W. Wood, at Teague, Texas issued three circulars Nos. 63, 64 and 65 reading in part as follows:

Circular No. 63

"Mr. R. B. Hughes is assigned to position of relief **agent-**telegrapher and telegrapher-clerk, **Tomball** and North **Zulch**, as advertised in my circular number 60 dated August 20, 1971."

Circular No. 64

"Bids will be received by the undersigned until 9:00 A.M., Tuesday, September 9, 1971, for position of telegrapher-clerk, **Tomball**, Texas, as outlined below:

* * * * *

Circular No. 65

"Bids will be received by the undersigned until 9:00 A.M., Thursday, September 9, 1971, for the position of telegrapher-clerk, Galveston, Texas, as outlined below:

* * * * *

On September 27, 1971 claim was made on behalf of K. C. **Vanderveer**, Relief Dispatcher as follows:

"Claim 8 hours at Night Chief Dispatcher rate account **Trainmaster J. W. Wood** at **Teague** performed Chief Dispatcher duties August 30, by advertising certain telegrapher positions as being vacant and others as being filled, thus depriving me of pay for that day."

This claim from its inception has been handled on the proposition that the **trainmaster** performed Chief Dispatcher duties by issuing the circulars. Close examination of the record shows that, notwithstanding certain cosmetic changes in the form of the claim, the Organization's entire case has been grounded upon that argument. Thus it is the contention of the Organization that the issuance of vacancy and **assignment** circulars concerning telegraphers' positions is by the Agreement - supported by history, custom, tradition and practice - exclusively reserved to Chief Dispatcher. Accordingly, the Organization claims that the issuance of the three circulars, supra, by the **Trainmaster** violated the Agreements between the parties.

The Organization in support of its claim primarily relies upon Rules 1 and 3 of the Schedule Agreement and Section 3 of the October 3, 1968 Memorandum Agreement, reprinted in pertinent part as follows:

"Rule 1. 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.

A Chief Dispatcher who is regularly assigned to a shift performing train dispatcher work will be regarded as within the rules of this agreement.

Rule 2 . . .

Rule 3. Definition of Other Than Trick Train Dispatcher. This class includes positions in which the duties of incumbents are to be primarily 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, the distribution of power and equipment incident thereto; and to perform related work."

"Section 3: **When** the necessary physical changes are completed and not prior to November 17, 1968, all of the train dispatcher duties now being performed at **Teague** and Wichita Falls, Texas, will be transferred to Fort Worth and the trains of both carriers will be dispatched from the 'consolidated **FW&D-JTD** train dispatching office' at Fort Worth."

In order to sustain its contention that Rules 1 and 3 of the Schedule Agreement were violated herein, the Organization must show that these rules clearly reserve to the Chief Dispatcher an exclusive right **to** the work complained of; or in the absence of such express reservation, must demonstrate by probative evidence that custom, practice and tradition have reserved such work to the Chief Dispatcher exclusively.

Rule 1 is a general scope rule and lends no support to the Organization's theory of an express reservation of the work to the Chief Dispatcher. Nor can the Organization find support in Rule 3 **supra**. That provision recognizes that the class of employees described have assigned to them some supervisory work; but of what type and to **what extent** is not described. It does not definitively and exclusively reserve to these employees the sole supervision "of train dispatchers and other similar **employees**." (See Award 18448)

Having failed to show express contractual reservation of the work in question, Petitioner has the burden of proving that the Chief Dispatcher has performed the work historically, customarily, and traditionally to the exclusion of others. This is a principle too fundamental to require further expiation. In this connection, the Organization has presented evidence which tends to show that Chief Dispatchers have from time to time in the past issued circulars and advertisements. On the other hand, Carrier argues that the issuance of bulletins, notices and/or circulars is not a function which is reserved exclusively to the Chief Train Dispatchers, since same are also issued by roadmasters, trainmasters, division engineers, superintendents, general superintendents and department heads. The Organization's argument regarding exclusivity is further eroded by the position taken by its General Chairman in correspondence on the property, wherein on appeal of a Carrier denial of this claim the Organization representative states:

* * *

"The Carrier takes the position that the issuance of bulletins, circulars and/or notices is not a function which is reserved exclusively to the Chief Dispatcher.

To clarify our position further I should like to state that we are not claiming that we have the exclusive right to issue bulletins, notices and/or circulars. We are claiming that the thought process of making a determination as to whom a position should be awarded is the work of the Chief Dispatcher as well as causing such notices as may be necessary to be issued." (Emphasis added)

Analysis of all the relevant evidence on this point fails to support the Organization's contention that the issuance of such advertisements and circulars has been performed customarily, and historically on this property by the Chief Dispatchers to the exclusion of others.

In **summary**, there is neither rule support nor convincing **evidence** of custom, practice and exclusivity on this record to support the Organization's claim to this work. It follows ineluctably from the foregoing that the Organization's reliance on Section 3 of the Memorandum Agreement similarly can be of no avail. Accordingly, the Organization has **not** carried the requisite burden of proof that the issuance of telegrapher **advertisements** and circulars by other than the Chief Dispatcher in some manner violated the Organization's Agreements.

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

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 13th day of December 1974.

Dissent to Award 20539, Docket TD-20171

Award 20539 even if considered in the most favorable light can only be found to be palpably erroneous.

The parties by a Memorandum of Agreement signed October 3, 1968 agreed to the consolidation of the present FWD and JTD train dispatching offices into one "Consolidated FWD-JTD Train Dispatching Office" to be located at Fort Worth, Texas subject to and governed by the terms and conditions of this Memorandum of Agreement. One of the terms and conditions in Section 3 was "..., all of the train dispatcher duties now being performed at Teague and Wichita Falls, Texas, -will be transferred to Fort Worth and the trails of both carriers will be dispatched from the 'Consolidated FWD-JTD Train Dispatching Office' at Fort Worth".

At the dispatching offices at Teague and Wichita Falls prior to and at the time of the consolidation into the single dispatching office at Fort Worth, the supervision of telegraphers involved in the issuance of circulars which bulletined or made assignments to telegrapher assignments was work being performed by the train dispatcher craft (the Chief Train Dispatcher at Teague and the Chief Train Dispatcher at Wichita Falls) under the terms of Rule 3 of the Schedule Agreement defining the duties of other than Trick Train Dispatchers. The Carrier partially complied with the term and condition of the Memorandum of Agreement, requiring all of the train dispatcher duties being performed be transferred to Fort Worth, by transferring the supervision of telegraphers involved in the issuance of circulars which bulletined or made assignments to telegrapher assignments from the Wichita Falls dispatching office to the consolidated Fort Worth office. However, the Carrier failed to transfer identical work from the Teague office to the Fort Worth office in violation of the term and condition that all of the train dispatcher duties being performed at Teague and Wichita Falls would be transferred to the Fort Worth office.

The instant claim followed and the Employees on the property presented detailed proof that the supervision of other similar employees, i.e. telegraphers, involved in the issuance of circulars which bulletined or made assignments to telegrapher assignments was work that was performed by the train dispatcher craft prior to, at the time of, and subsequent to the consolidation into the single dispatching office at Fort Worth. When the complex handling of the claim on the property failed to resolve the issue, the dispute was submitted to the Third Division for adjudication under Docket TD-20171. The claim submitted to the Board for consideration was in two parts: (1) violation of the October 3, 1968 Memorandum of Agreement, Section 3 thereof in particular,

Dissent to Award 20539, Docket TD-20171 (Cont'd)

which requirnd **all train dispatcher** duties then being performed at **Teague and Wichita Falls** be **transferred** to Fort Worth, and (2) violation of the **Schedule Agreement, Rules 1 and 3** thereof in particular, involving supervision of train dispatchers **and** other similar employees.

In Award 20539 the Board did not consider the two parts of the Statement of **Claim in order** but considered the **second part** first. In fact, Award 20539 concludes **by** rejecting the first ground for the claim **in an off-band manner** electing to ignore the fact **that** the Memorandum of Agreement agreeing to the office consolidation **was** based on certain terms and conditions, one of which was the understanding that **all** of the **train dispatcher** duties **being** performed at **Teague and Wichita Falls** would be transferred to the consolidated office to be established at Fort Worth, Texas.

Award 20539, by **passing** the primary claim in the dispute, considers Schedule Agreement **Rules 1 and 3** and considering Rule 3 states:

"*** That provision recognizes that the class of employees described have assigned to them some supervisory work: but of **what type and to what** extent is **not** described. It does not definitely end exclusively reserve to these employees the sole supervision 'of train dispatchers and other similar employees.' "

Award 20539 holds **that** in the absence of **an** express contractual reservation of the work in question the **Employees** were required to furnish proof based on history, custom and tradition that the train dispatcher craft performed this work to the exclusion of others. Award 20539 then states:

"*** In this connection, the Organization has presented evidence which tends to show that Chief Dispatchers have from time to time in the past issued circulars **and** advertisements. On the other hand, Carrier argues **that** the issuance of bulletins, notices **and/or circulars** is not a function which is reserved exclusively to the Chief Train Dispatchers, since **same** are also issued by **roadmasters, train-masters, division engineers, superintendents, general superintendents and department heads. *****"

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This portion quoted shows some of the serious error committed by Award 20539 for it is true that the **Employees** presented evidence proving their contentions while the Carrier simply argued. The Carrier did not present a single shred of evidence to bolster their arguments that others issued any bulletins whether they were telegrapher bulletins or not. The Carrier argued but did not furnish any proof of its contentions. Award 20539 magnifies its error by manufacturing or creating an erosion in the **Organization's argument** citing from a letter from the General **Chairman**, viz.:

"The **Carrier** takes the position that the issuance of bulletins, circulars and/or notices is not a function **which** is reserved exclusively to the Chief Dispatcher.

To clarify **our** position further I should like to state that we are not **claiming** that we have the exclusive right to issue bulletins, notices and/or circulars. We are claiming that the **thought process** of making a determination as to whom a position should be awarded is the work of the Chief Dispatcher as well as causing such notices as may be necessary to be **issued.**' (**Emphasis added**)"

However, Award 20539 fails to **read** this clarification made by the General **Chairman**, in answer to a Carrier's contention on the property, in the proper context **which** was a direct reply to a point raised in defense against the claim by the Carrier. Of even greater importance is the fact that Award 20539 fails to recognize that the next statement in the **same** letter had not "further eroded" the Organization's argument regarding exclusivity for the next paragraph of this letter reads:

"As further proof that the **work** in question has always been the function of the Chief Dispatcher on the Fort Worth and Denver **Railway** I enclose Xerox copy of a sworn statement of **Mr. M. A. Davis** who is a retired **Fort Worth** and Denver employee dated Oct. 2, 1972. You will note that Mr. Davis states that he worked from April 1926 to **January 1969** as **Telegrapher** and/or **Telegrapher Clerk**, as **Night Clerk** in the Chief Dispatchers office and extra train dispatcher, as regular dispatcher and Chief Dispatcher and again as regular dispatcher **and** that, to his **personal** knowledge, during his entire time of employment on the **Fort Worth and Denver Railway** the duties we have in question here were performed by the Chief Dispatcher. **Note** this is not a direct **quote** but is in substance **what** Mr. Davis means."

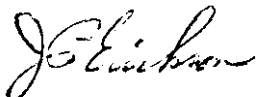
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The sworn affidavit which was submitted with this letter attests to a history, custom and tradition of some 43 years duration and could hardly be construed to be a "time to time in the past" showing as Award 20539 states. The Carrier never bothered to answer or in any way dispute or refute the sworn affidavit presented on the property.

The sworn affidavit did not stand alone as proof of the history, custom and tradition performance of the work. In addition, the Employees presented Circulars dated September 7, 1954, July 2, 1962 and January 1, 1963 as proof of prior performance of this work by the train dispatcher craft. It is not as Award 20539 states a lack of proof or evidence but it is a case of the evidence and proof being ignored. The evidence and proof were in the record and the Carrier did not offer any counter evidence or proof.

While the record of proceedings of the Adjustment Board on which Award 20539 based its action will reveal that the Carrier Member falsely submitted to the Referee that certain Exhibits were not submitted to the Carrier during the handling of the claim on the property, this is not the most serious error contained in the record of proceeding of the Adjustment Board in Award 20539. Award 20539 held that the Employees must bear a history, custom and tradition burden of proof of the work performed and then ignored the Employees' clear evidence (the only evidence of history, custom and tradition presented in Docket TD-20171), simply because the "Carrier argues" to the contrary. Arguments are not a substitute for nor do they overcome evidence or proof.

Award 20539 is at best palpably erroneous and I most vigorously dissent.


J. P. Erickson
Labor Member