NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23244
THIRD DIVISION Docket Number TD-23209

Arnold Ordman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Chicago and North Western Transportation Company

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

(a) The Chicago and North Western Transportation Company (hereinafter referred to as "the Carrier") violated the currently effective agreement between the parties, Rules 2(a), 2(b) and 2(f) thereof in particular, when it failed to use Claimants, train dispatchers L. K. Peterson, M. O. Schendel and D. B. Sutherland, on their assigned positions between the hours of 1:30 P.M. and 3:30 P.M. September 5, 1978 on Jobs 001, 003 and 004 respectively to which they were entitled.

(b) Because of said violation, the Carrier, shall now compensate Claimants L. K. Peterson, M. O. Schendel and D. B. Sutherland two hours pay at the straight time rate applicable to the above positions for September 5, 1978.

OPINION OF BOARD: Claimants in this case were assigned to the first trick dispatchers' positions at Carrier's Twin Cities Division Headquarters at St. Paul, Minnesota. Claimants' assignments were on Jobs 001, 003 and 004 from 7:30 a.m. to 3:30 pa. daily. On September 5, 1978 Claimants came to their worksite at 7:30 a.m. but on arrival were confronted by pickets of B.R.A.C. who were out on strike. Accordingly, Claimants telephoned in to Carrier that they would not start work. When it appeared after some interval that the pickets were not being removed, Claimants returned to their homes to await farther developments.

The pickets were removed at or about 1:30 p.m. that day. Carrier made no effort to contact the Claimants whose work shift ended at 3:30 p.m. Duties which Claimants would have performed under Rule 2(a), (b) and (f) of the Agreement during the remainder of the shift were performed by officers of the Carrier. At 3:30 p.m. when the second trick dispatchers reported for work, normal operations reamed.

Organization claims that Carrier violated Rule 2(a), (b) and (f) of the Agreement when Carrier failed to use Claimants between 1:30 p.m. and 3:30 p.m. on September 5, 1978. Organization asks that Claimants be reimbursed for the two-hour period.

Carrier argues that it was not obligated to reimburse the Claimants because they voluntarily absented themselves from duty, that Carrier understood from the Claimants' telephone message at 7:30 that morning that Claimants would not work for the entire day, and that nothing in the Agreement required Carrier to notify Claimants when the picket line was lifted.

We note that no claim is made for compensation for the hours between 7:30 a.m. and 1:30 p.m. on September 5, 1978 when the picket line was in being. Claimants were free not to cross the picket line, but they were not entitled to compensation for time not worked as a result of their voluntary choice.

Carrier asserts that it understood Claimants' assertion that they would not cross the picket line as a declaration that Claimants would not work for the entire shift. Organization asserts that this position was not previously raised and cannot now be urged. In any event, we hold that Carrier had no basis for this understanding.

As to Organization's claim that Carriers should have notified Claimants forthwith when the picket line was lifted at or about 1:30 p.m. and tlmt Claimants could have reported to work within 10 to 20 minutes, Carrier's initial response was that nothing in the Agreement imposed any obligation on its part to furnish Claimants with such notice. Moreover, we find it not without significance that, so far as appears, neither Claimants nor Organization assumed any obligation in that regard by stationing observers at the picketing site or communicating with the union conducting the picket line through other means.

We find other practical considerations germane here. Except for the fact that the picket line was lifted "at or about 1:30 p.m." the record lacks specificity as to when the dispute giving rise to the picket line was actually resolved. Moreover, assuming an obligation on the part of Carrier to notify Claimants of the lifting of the picket line and to recall Claimants for the short period of their shift still remaining, such obligation amld require no more than that Carrier take such action as soon as practicable. Compare Third Division Award 15883 (Kenan). Although the burden of proof rested on Organization here, no corroboration appears to have been furnished to document the assertion that Claimants, upon notification, could have reported to work within 10 to 20 minutes.

The special circumstances of this case do not call upon us to make any definitive ruling on the scope of Carrier's obligation, if any, to notify Claimants that the picket line was lifted and to recall them to work. Rather, we hold that in view of the special circumstancesand the failure of proof as to critical facts, a violation of the Agreement has not been established. We hold, further, thatonthe facts presentad, no useful purpose would have been served by the proposed recall and no basis for the compensation sought hasbeen demonstrated.

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 wtvlolated.

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 31st day of March 1981.

LABOR MEMBER'S DISSENT TO
AWARD 232.44 DOCKET TD-23209

The Majority in Award 23244 failed to fully determine what was in the record, as contained in Docket TD-23209, and based its decision, at least in part, on a contention not even contained in the record, much less having been raised on the property so as to constitute an issue properly before the Board for consideration.

Award 23244 states:

> "As to Organization's claim that Carriers should have notified Claimants forthwith when the picket line was lifted at or about 1:30 p.m. and that Claimants could have reported to work within 10 to 20 minutes, Carrier's initial' response was that nothing in the Agreement imposed any obligation on its part to furnish Claimants with such notice. Moreover, we find it not without significance that, so far as appears, neither Claimants nor Organization assumed any obligation in that regard by stationing observers at the picketing site or communicating with the union conducting the picket line through other means".

Nowhere in the record is there such a contention made by the Claimants or the Organization to the Carrier. The Carrier in responding to the claim on the property said:

> "It is not the responsibility of the carrier to keep you informed when the pickets arrive or leave the premises".

And:

> "The carrier had no obligation to inform the employes that pickets have departed, even if the carrier knew that to be a fact".

What the Employes actually said was:

> "It is not a question of whether the carrier is obligated to cal? these men. it is a question of carrier's officers performing work assigned to members of this craft during a period when there was no strike in progress".

Award 23244 also states:

> "Although the burden of proof rested on Organization here, no

corroboration-appears to have been furnished to document the assertion that Claimants, upon notification, could have reported to work within 10 to 20 minutes".

. The Employes stated on the property:

"No attempt was made to contact any of the Claimants for this work though they all live in close proximity to the office and could have been on hand within 10 to 20 minutes after being called".

The Carrier did not, on the property or in its submissions to the Board, contest this statement which Award 23244 labeled an "assertion" with no corroboration furnished to document "the assertion". The Board has many times ruled that assertions which are not contested must be accepted as fact viz:

THIRD DIVISION AWARD 14385 (Wolf)

"A" assertion which is not denied although there, is both time and opportunity to deny it must be deemed uncontroverted and, therefore, proof of its substance".

THIRD DIVISION AWARD 18605 (Rimer)

"This Board must also give weight to the well established principle that material statements made by one party and accepted or not denied by the other may be accepted as established fact (Award 9261)".

Instead of following this sound principle established by the Board, the neutral member accepted a statement made outside the record (in the Carrier Member's Memorandum of the Referee) as fact.

Award 23244 concludes by stating:

"We hold, further, that on the facts presented, no useful purpose would have been served by the proposed recall and no basis for the compensation sought has been demonstrated".

However, the Carrier alone knew that train dispatchers' work was required after the pickets were removed and before the next shift or trick of train dispatchers were scheduled to report. Also the Carrier

was aware that Rule 2 (f) of the Agreement provides:

> "(f) WORK PRESERVATION
>
> "The duties of the classes defined in sections (a) and (b) of this Rule 2 may not be performed by persons who are not subject to the rules of this agreement".

The basis for the compensation sought was the amount of time occurring from the time the pickets were removed until the next shift or trick of train dispatchers reported for duty, during which time work belonging to train dispatchers was admittedly performed by other than train dispatchers.

It is obvious that the Majority in Award 23244 failed to consider the record in its entirety and accepted something not in the record as fact, contrary to the principle established in prior Board awards.

Therefore. Award 23244 is in error and I must dissent.

J. P. Erickson
Labor Member

REPLY TO LABOR MEMBER'S DISSENT
TO
AWARD 23244 (DOCKET TD-23209)
(Referee Ordman)

Despite the Dissentor's attempt to impugn the foundation of Award 23244, that Award clearly was decided on the record before it.

While the Dissent contends that Claimants availability within 10-20 minutes was never disputed, It was also never rebutted on the property that Carrier was not made aware specifically when the pickets were allegedly withdrawn. Since it was conceded on the property that there was no contractual requirement to notify the Clalmaxts, it la simply myopic and contrary to the record to contend that Claimants were contractually entitled and should have been called. To assert that Carrier "knew that train dispatcher's work was required after the pickets vere removed" requires that the Carrier be aware when that change in the situation occurred. The record did not substantiate that charge.

Finally, Dissentor contends that Award 23244 was founded on a statement accepted as fact outside of the record. However, no such imputed factual (?) statement was made in this case. The Board's conclusion was predicated upon the finding that It:

> ". . ..could require no more than that Carrier take such action as soon as practicable. Compare Third Division Award 15883 (Kenan)."

and that:

> "....the failure of proof as to critical facts (by the Employees), a violation of the Agreement hae not been established."

The dissent does not detract from the validity of the Award based upon the record submitted.

P. V. Varga

W. F. Euker

P. E. LaCosse

J. E. Mason

J. R. O'Connell