NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25692
THIRD DIVISION Docket Number TD-24027

Herbert Fishgold, Referee

PARTIES TO DISPUTE: (America" Train Dispatchers Association
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

System Docket No. CR-42
Eastern Region-Philadelphia Division Case 1/79

"Claim of the American Train Dispatchers Association that Claimant H. E. Sharp is entitled to one additional hour of compensation pro rata rate for October 10, 11 and 12, 1979 for instructing trainee/poster B. R. Scamoffa on these dates, Rule 10, Section 7."

OPINION OF BOARD This dispute concerns the obligation of the Carrier to pay one hour's additional compensation to Claimant, a qualified Train Dispatcher, for instructing a" Assistant Movement Director ("AMD") who was in the process of qualifying ("posting") to perform train dispatching duties (the "Postee").

Postee, a qualified AMD, had exercised seniority acquired pursuant to the applicable Agreement, which, in part, consolidated seniority rosters for Train Dispatchers, Movement Directors, and AMDs. Postee exercised his seniority to a Guaranteed Assigned Train Dispatcher position, since he had not become qualified for any Train Dispatcher assignment.

Rule 4-J, Section 1 of the Agreement provides, in part, that:

> "An employee who is unable to qualify on a position obtained by award or displacement must revert to his former position...."

Indeed, the Agreement provides, in Rule 2, Section 2 (a), that a" Extra employee must qualify, within 180 days of establishing seniority as a Train Dispatcher, on all dispatching districts in which the employee is to perform his service or else forfeit his seniority. At the time of the events giving rise to the instant claim, Postee was in the process of qualifying on Carrier's Chesapeake desk pursuant to those provisions.

Rule 10, Section 7 of the Agreement provides that:

> "When prospective or extra employees are posting, the train dispatcher who instructs for the preponderance of the time shall be allowed one (1) hour additional pay at the straight time rate. This rule will not apply when other train dispatchers are posting or breaking in."

The qualified Train Dispatcher on the shift on which Postee was posting claimed the hour's pay under the quoted Section of the Agreement. The Carrier denied the claim and, following unsuccessful appeals, the matter was brought before the Board.

That Claimant was a qualified Train Dispatcher who primarily instructed Postee is not contested. Rather, the issue before the Board is whether Postee, who held a position received as a result of award for which he was not qualified and from which he would be divested absent timely qualification, was a "prospective or extra" employee or "another train dispatcher posting".

The Organization asserts that the Postee was a "prospective or extra" employee within the meaning of Rule 10, Section 7, since he had never qualified as a Train Dispatcher, had acquired his seniority date solely as a result of award, and held his position conditionally and subject to forfeit for failure to qualify.

The Carrier argues that the consolidation in the Agreement of Train Dispatchers, Movement Directors, and AMDs made AMDs a part of the Train Dispatcher craft or class, thereby bringing Postee within the exception provided by the last sentence of the quoted Rule for "other train dispatchers . . . posting or breaking in". The Carrier asserts that a "prospective or extra employee posting" covers only employees from another craft who desire to become Train Dispatchers but are not yet qualified or awarded seniority.

Excluded from the definition of "prospective or extra" employees, under the Carrier's view, are employees who hold a bulletined Train Dispatcher position and who are subject to call. Since Postee held a bulletined position as a "Guaranteed Assigned Dispatcher", he is, in the Carrier's view, "another train dispatcher posting", thereby excusing Carrier from paying the additional hour's compensation for instruction to Claimant.

The language of the Agreement does not directly cover the instant situation. Postee's acquisition of Train Dispatcher seniority occurred solely by award. He had not, at the time of the claim, worked in the craft and was in the process of qualifying as a Train Dispatcher, subject to loss of his awarded position and seniority in the craft if he failed to do so. There is nothing in the record to indicate that Postee would require less instruction than any other employee who had never previously worked in the Train Dispatcher craft.

The record indicates further that the exception upon which the Carrier relies had been intended to excuse the Carrier from paying extra compensation for instruction of previously qualified Train Dispatchers who might need to requalify for a particular assignment. That is not the case in the present claim, where Postee's previous qualification was as an AMD. While the Movement Director/AMD craft was merged into the Train Dispatcher craft for purposes of seniority, Postee's previous AMD qualification was clearly not sufficient to qualify him for a Train Dispatcher position.

Under such circumstances, the Board concludes that the purpose of Rule 10, Section 7 of the Agreement is better met by treating Postee as a "prospective or extra" employee for purposes of the single hour of instruction pay, to which the Board holds Claimant is entitled.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this *14th day of November 1985.*

CARRIER MEMBERS' DISSENT
TO
AWARD 25692, DOCKET TD-24027
(Referee Fishgold)

The Majority's decision in this case is predicated on palpable error in their analysis of the record. The Majority states:

> ". . .Postee's acquisition of Train Dispatcher seniority occurred solely by award. He had not, at the time of the claim, worked in the craft and was in the process of qualifying as a Train Dispatcher, subject to loss of his awarded position and seniority in the craft if he failed to do so. There is nothing in the record to indicate that Postee would require less instruction than any other employee who had never previously worked in the Train Dispatcher craft."

The Organization's Exhibit TD-4 is a letter from the Manager Labor Relations dated November 21, 1979, reading in part as follows:

> "Our investigation has determined that B. R. Scamoffa has been a train dispatcher since August 29. 1977 and has been working a position under the Agreement since that date. He was only being broken in on claimant's position. The second paragraph of Rule 10, Section 7 of your schedule agreement is quite clear as it states: 'This rule will not apply when other train dispatchers are posting or breaking in.' This sentence nullifys your claim." (Emphasis Supplied)

This statement was never denied by the Organization while the claim was progressed on the property. The evidence shows that Postee was qualified as a Train Dispatcher, but was not qualified on the Chesapeake Desk. The Organization's position was that an employe who was not qualified on a "specific dispatching district" is a prospective employe. The Carrier contended that Rule 10, Section 7 clearly excluded Postee in this case from its application. The rule states:

> "This rule will not apply when other train dispatchers are posting or breaking in."

In short, if the Postee is already qualified as a Rain Dispatcher but is posting only to qualify on an awarded assignment, he is not covered by Rule 10, Section 7.

The Majority committed further error when they referenced Rule 2, Section 2(a) which had nothing to do with this case. That rule deals with Extra employes and postee was not an extra employe. The only reference to Rule 2, Section 2(a) on the property is found in the Director, Labor Relation's letter dated March 11, 1980 and reads:

> "Rule 10, Section 7, allows one hour's additional pay at the straight time rate for instructing prospective or extra employees who are posting. Prospective employees are employees from another craft, Telegraphers for example, who desire to become Train Dispatchers; and, extra employees are those that come under Rule 2. Section 2(a). of the schedule agreement. Mr. Scamoffa, with a seniority date of August 29, 1977, does not qualify as either a Prospective or extra employee under those conditions. It was never the intent to pay the instructing rate to a Train Dispatcher when he is breaking in an employee who holds a bulletined position; and, the guaranteed assigned dispatcher position held by Mr. Scamoffa is a bulletined position." (Emphasis Supplied)

The Organization responded to this letter and did not contest Carrier's assertion that Claimant was not an extra employe.

In this case the Majority obviously accepted the unsubstantiated assertions made by the Organization before the Board, and apparently never bothered to review the correspondence of the claim on the property.

Finally, the Majority's assertion that:

> "The language of the Agreement does not directly cover the instant situation."

should have resulted in a denial award under the principle set forth in Award 16529 (Friedman) where we said:

> "Unless the Board is satisfied that evidence helpful in sound contract construction is non-existent or unobtainable, it should not decide a case solely by analyzing the bare bones of an Agreement's words whose applicability is unclear. The Employes as the moving party have the burden of proof and must either prove their interpretation of the Agreement's intent or establish that no extrinsic evidence at all exists.

> "Pointing to the Agreement cannot sustain that burden when its import is not plain, and Carrier denies the Employes' interpretation."

If the language of the Agreement does not cover the situation as the Majority concedes, then the Petitioner did not make out a prima facie case and the Majority erred in sustaining the claim. The Majority's conclusion "that the purpose of Rule 10, Section 7 . . . is better met by treating Postee as a 'prospective or extra' employe . . ." is nothing but unadulterated rule making. This Board is not empowered to make rules or grant the parties a better bargain than they contracted to receive. Any award that purports to do so is palpably erroneous.

We dissent,

W. F. Euler

M. W. Fingerhut

M. C. Lesnik

P. V. Varga

J. E. Yost