NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26073
THIRD DIVISION Docket Number TD-26063

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Atchison, Topeka and Santa Fe Railway Company

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

(a) The Atchison, Topeka & Santa Fe Railway Company (Carrier) violated its Train Dispatchers' schedule working conditions Agreement, including Article I, Section 1-c thereof, when, beginning at approximately 9:45 P.M. on February 17, 1983, it permitted and/or required employees not covered by said Agreement to effectively transmit and/or issue to field train order offices by electronic equipment and/or another technological method, the contents of written instructions (Track Condition Messages 'TCM') to be delivered to train and engine crews (including yard engine crews at certain locations) restricting the use or cautions to be taken in the use of main tracks, sidings, and/or local auxiliary tracks, not initially covered by train orders but which are related to Trick Train Dispatchers' responsibility for the movement of trains on various portions of the Middle Division.

(b) Because of said violation referred to in paragraph (a) above which occurred at approximately 9:50 P.M. on April 30, 1983 when an employee not covered by the Train Dispatchers' Agreement transmitted and/or issued

(1) TCM # 122 relating to the 2-5-G-B-L, MPIR, SCSM Districts of the Middle Division, the Carrier shall now compensate Claimant M. L. Stagner one (1) days pay at the rate applicable to Trick Train Dispatcher; and

(2) TCM #122 relating to the 1-3-4-D Districts of the Middle Division, the Carrier shall now compensate Claimant B. N. Pendley one (1) days pay at the rate applicable to Trick Train Dispatcher; and

(3) TCM # 122 relating to the O-E-C-M Districts of the Middle Division, the Carrier shall now compensate Claimant C. L. Cowel one (1) day's pay at the rate applicable to Trick Train Dispatcher.

(c) Because of said violations referred to in paragraph (a) which may occur on and subsequent to May 1, 1983, the Carrier shall compensate the successively senior unassigned qualified Train Dispatcher available in the Newton, Kansas office as of each respective hour and date when any TCM is initially transmitted and/or issued by an employee not covered by the Train Dispatchers Agreement, relating to

"(1) the First and Fourth Districts of the Middle Division or any portion thereof, one (1) day's pay at the rate applicable to Trick Train Dispatchers; and/or

(2) the Second, Third, 5th, Douglass, Great Bend, Larned, Little River, Minneapolis, Salina, and Strong City Districts of the Middle Division or any portion thereof, one (1) day's pay at the rate applicable to Trick Train Dispatchers; and/or

(3) The Oklahoma, Cushing, Enid, OC-A-A Districts of the Middle Division or any portion thereof, one (1) day's pay at the rate applicable to Trick Train Dispatchers.

(d) In the event no qualified unassigned Train Dispatchers are available on any of the respective hours/dates referred to in paragraph (c) above, the claim is made on behalf of qualified Train Dispatchers available in the order of preference specified in Article II, Section 10-b-1 of the schedule Agreement, as amended and at the appropriate rate.

(e) The hours and dates when the TCM's referred to in paragraph (c) above, and the identities of eligible individual claimants entitled to compensation requested in paragraph (c) and/or (d) above are readily ascertainable from the Carrier's records on a continuing basis and shall be determined by a joint check thereof in order to avoid the necessity of presenting a multiplicity of daily time claims."

OPINION OF BOARD: The Organization alleges herein by letter of May 26, 1983, that the Carrier has violated the Scope Rule of the Agreement. The Claim before this Board is that beginning on February 17, 1983, the Carrier utilized employes not covered by the Agreement to issue Track Condition Messages (hereafter referred to as TCM's) which are specifically reserved to Trick Train Dispatchers by the Scope of the Agreement which states in relevant part:

> "Positions of trick train dispatchers shall include positions, the duties of which are to be responsible for the movement of trains by train orders, centralized or other Traffic Control Systems...such as electronic equipment and/or other technological methods, where required. Trick train dispatcher positions shall supervise forces employed in handling train orders, keep necessary records incident thereto, and perform related work...."

The Organization maintains that "the work of...issuing initial written instruction" rests with the Train Dispatchers by Agreement and was herein violated when strangers to the Agreement were "effectively preparing and issuing the contents of instructions formally initially covered by train orders". As a transfer of work occurred, the Organization maintains a continuing Claim with a day's pay for each infraction.

The Carrier flatly denies such allegation and among arguments on property raises a large number of points. Among these the Carrier argues that Clerks are not issuing train orders, that there is no violation of the Scope Rule, that the Organization has failed to prove exclusivity, that the Claims are excessive, without Agreement penalty provision, and the Clerk never issues TCM's directly to any train crew.

A careful review of the instant case indicates that the Scope Rule herein disputed is a specific Rule listing the nature of work specified to a position and therefore not requiring a showing of exclusivity. The work herein assigned to Trick Train Dispatchers is the movement of trains by train orders. Probative evidence by the Organization with regard to the Eastbound freight establishes that TCM's are indeed train orders as covered by the Agreement as they relate directly to the movement of trains. As such, the Organization's contention of the "initial" issuance is of direct relevance and supported by the record. Under the Scope of the Agreement, the issuance of train orders (of which TCM's are included) are restricted to Trick Train Dispatchers. They initially issue such orders and other employes transmit them. The record herein supports the fact that Clerks are issuing the TCM's and, as such, the Carrier is in violation of the Agreement. It is neither relevant that the Clerks are not directly issuing the order to train crews, nor that the TCM's are ultimately under the control of the Dispatcher for review and release.

This Board has carefully reviewed other arguments and finds that the CRT is not an issue in this dispute (see Third Division Award 13189). Carrier arguments that nothing has changed in practice except the method of obtaining information is not supported by the record. TCM's have to do with the movement of trains and therefore are restricted to Dispatchers. By the use of CRT's, the TCM's are initially being created by nondispatchers and then provided to the Dispatchers. This is a violation and therefore Part (a) of the Claim must be sustained (see Third Division Awards 23485, 11983).

The only remaining issue to be resolved is the penalty for Carrier violation. The Organization maintains that the violation requires one (1) day's pay at the applicable rate for each day of occurrence of this continuing violation. The Carrier maintains there is lack of support for a continuing violation and more importantly, that these are excessive Claims whereby Claim is made for a day's pay "for each of three dispatchers for a total of 24 hours' payment each date when only a few minutes of work is performed."

It is clear from the record that only a few minutes is actually involved. Such is not disputed by the Organization. As such is the case, this Board invokes the doctrine of de minimis non curat lex and denies all elements of the Claim with respect to compensation. A penalty to enforce the Agreement is required by the Organization, but this Board finds in the case at bar, that such is neither contract provided, nor commensurate with circumstances. This Board is constrained to deny all other elements of the Claim on de minimus grounds.

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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of July 1986.

CARRIER MEMBERS' DISSENT
TO
AWARD 26073, DOCKET TD-26063
(REFEREE ZUSMAN)

The Majority denied the Organization's continuing claim for eight hours pay, three shifts per day, five days per week, for a few minutes work performed once a day on an irregular basis. Setting forth the claim is sufficient to demonstrate the soundness of the Majority's holding in rejecting such inappropriate relief.

Unfortunately, such sound reasoning did not extend to the Majority holding on the merits. The position of the Carrier was set forth in detail on the property in its letters of June 13, 1983, and September 26, 1983. In the letter of June 13, the Carrier, in pertinent part, stated:

> "Prior to the commencement of TCM's on February 18, 1983, the same information was contained in written form as 'Trainmaster Instructions.' However, due to the cumbersome method and the delay of having to continually issue additions and deletions thereto, it was decided to have most of these instructions contained in the computer, which would be easily updated, and then such instructions could be issued by a dispatcher as part of the clearance card. The train crew then would up-to-date instructions. The only time such information was covered by train orders was to cover the period of time needed in which to get the new instructions issued under Trainmaster Instructions, which is still the same practice today.
>
> "Your contention that a clerical employe (87 Clerk-Newton) is preparing and/or issuing certain track condition information to train and engine crews (including yard engine crews) is not correct. Information received from out on the line is funneled into this clerical employe who inputs such information into the computer via CRT. The clerical employe then prints out the complete TCM and 'highlights' the changes made by him in yellow which is then passed to the Assistant Chief Dispatcher who either approves the changes or makes corrections thereto. Once approved by the Assistant Chief Dispatcher nothing further is done with the TCM's until a dispatcher issues them to a particular train crew. The trick dispatcher is responsible to see that the TCM's are cleared to each train and shown on each clearance card. As can be seen, TCM's are under the complete jurisdiction and control of dispatchers."

In its letter of September 26, the Carrier, in pertinent part, stated:

"FIRST: The instant disputes are null and void for the reason that clerical employes are not performing work reserved exclusively to Dispatchers, clerks are not issuing train orders or TCM's to train crews but only performing work that has been performed by Clerks, Trainmasters and Assistant Trainmasters, Supervisor of Operations, Agents and other exempt employes for years across the Carrier's System by using the advanced technology and scientific improvement of equipment (CRT Machines) to provide up-to-date dependable and quality information previously contained in the 'Trainmaster Instruction' booklet and/or updated therein in order to operate the railroad in a more efficent and economical manner. Also, in this connection, I refer you to Letter of Agreement dated March 31, 1981, wherein '...it was agreed that operating practices in existence prior to the effective date of the revised Scope Rule (April 1, 1981) are considered to be in conformity with the revised Scope Rule.' Thus, since this type of handling was in effect prior to April 1, 1981, such practice is not in violation of the Scope Rule.

"SECOND: The CRT Machine is simply a tool by which an employe may perform his own duties in a more productive and efficient manner. The clerical employe's usage of the CRT device eliminated the need for a duplication of work, i.e., a single operation simultaneously accomplished a result that formerly was the product of several work activities. The basic fact remains that the use of the CRT equipment was only a tool or instrument to facilitate the basic responsibility of the clerical employe who initially generated the work which was his/her responsibility....

...[T]he clerical employe is performing the same work functions both prior to and after utilizing the advanced technology of the CRT program...."

The facts set forth in the Carrier's letters were never refuted by the Organization. The Majority paid no mind to the past practice evidence presented by the Carrier on the ground that the Scope Rule is specific, thus rendering moot any issue of exclusivity. The Referee chose to ignore the Letter of Agreement of March 31, 1981, wherein the parties specifically agreed that practices in existence prior to the effective date of the Scope Rule would be permitted to continue without regard to the Scope Rule. Thus, even if the

Scope Rule were specific, which it is not, the undenied past practice demonstrated by the Carrier would have rendered the Scope Rule irrelevant.

It is noteworthy that in the two Third Division Awards relied upon by the Referee, Nos. 23485 and 11983, exclusivity was relied upon in Award 23485, not specific Scope Rule provision; and Award 11983 involved a claim which is not even remotely similar to the facts or issues of this dispute.

For all the above reasons, the Carrier Concurs and Dissents to the Majority Award.

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

P. V. VARGA

J. E. YOST

LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
to Award 26073 - Docket TD-26063
(Referee Zusman)

The Majority found correctly that the creation of Track Condition Messages by other than train dispatchers was a violation of the Scope Rule, and sustained the claim in part. The Carrier Members' Dissent does not detract from the Award's significance for the integrity of the Scope Rule.

The Majority also held correctly, "A penalty to enforce the Agreement is required by the Organization." The Award then proceeds to deny the monetary aspect of the claim, citing the doctrine of de minimis non curat lex.

Nine Awards were presented in panel discussion on behalf of the Employees, typified by these examples:

Third Division Award 7576:

> ". . . We do not deem it material that the work removed from the Agreement appears to be limited in amount. Whether it be limited or substantial is not controlling--the fact that work was removed is what is material."

Fourth Division Award 3692:

> "The fact that the Agreement does not 'contain a provision providing a penalty . . .' does not dispose of the claim, any more than the other Carrier contentions. . . ."

Third Division Award 21663:

> "Yet integrity of contract requires more than reversal to the status quo, elsewise unilateral violation could take place with impunity. Some kind of convincer is required, . . ."

Scores more in like vein could have been supplied.

Awards denying compensation, in spite of proven, flagrant, planned, deliberate Agreement violations are, fortunately, rare. The thoughtful reader should consider the circumstances surrounding holdings such as this.

Section 152, First, of the Railway Labor Act enjoins those governed by its terms:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, . . ."

Award 26073 finds, in effect, that this Carrier did not fulfill its duty to exert a reasonable effort to maintain its Agreement with its train dispatcher employees. But, the Carrier is assessed nothing as a deterrent to discourage it from disdain of its agreements.

Awards such as this, instead, encourage violations. The Carrier has nothing to lose. It can test the agreements and the forebearance of its employees, at no risk.

By contrast, we have yet to witness any carrier waiving its authority to discipline an errant employee, simply because that employee was not personally enriched by his rule infraction. The employee pays a disciplinary penalty, as a deterrent to rule infractions and to serve as an example to others.

While we concur in the finding that the Agreement was violated, we dissent to the Award's failure to assess any monetary penalty. We see, in the Award, the Employees risk the integrity of their Agreement; the Carrier risks nothing.

"Some kind of convincer was required." None was supplied. That is the basis for this dissent.

R. J. Irvin
Labor Member