NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26137

THIRD DIVISION Docket Number TD-25803

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim #1 - System Docket CR-201

(a) The Consolidated Rail Corporation (hereinafter referred to as the 'Carrier' or 'ConRail') violated Rules 1(a) and 1(b)1 of its Train Dispatchers schedule working conditions Agreement when it permitted and/or required supervisory and non-Agreement employees in the Diesel Power Control Bureau (hereinafter referred to as the 'Blue Room') Philadelphia, Pa. to perform duties of Assistant Chief Train Dispatcher-Power on July 24, 1982 and certain dates subsequent thereto.

(b) Because of said violation, the Carrier shall now compensate the senior extra Train Dispatcher in the Harrisburg Movement Office, Harrisburg Seniority District who is qualified as an Assistant Chief Train Dispatcher-Power and available at the starting time of each shift on which employees in the Blue Room Philadelphia, Pa., perform duties of Assistant Chief Train DispatcherPower on and after July 24, 1982.

(c) In the event no qualified extra Train Dispatchers are available at the starting time of any of the Assistant Chief Train Dispatcher-Power positions which were abolished in the Harrisburg Movement Office, on any of the dates referred to in paragraph (b) above, the claim is made on behalf of the senior regularly assigned Train Dispatcher in the Harrisburg Movement Office, Harrisburg Seniority District who is qualified as an Assistant Chief Train Dispatcher-Power, at the time and one-half rate. Rule 5 - Section 2(e).

(d) Eligible individual Claimants entitled to the compensation requested in paragraphs (b) and/or (c) above are readily ascertainable on a continuing basis from the Carrier's records and their respective identities shall be determined by a joint check thereof.

Claim #2 - System Docket CR-231

(a) The Consolidated Rail Corporation (hereinfter referred to as the

'Carrier' or 'ConRail') violated Rule 1(b) 1 and 1-(b)3 Note of its Train Dispatchers schedule working conditions Agreement when it permitted and/or required supervisory and non-agreement employees in the Diesel Power Control Bureau (hereinafter referred to as the 'Blue Room') Philadelphia, PA to perform duties of Assistant Chief Train Dispatcher on or about April 27, 1983 and dates subsequent thereto.

(b) Because of said violation, the Carrier shall now compensate the senior extra Assistant Chief Train Dispatcher in the Harrisburg Movement Office, Harrisburg Seniority District who is qualified as Assistant Chief Train Dispatcher and available at the starting time of each tour of duty 7:00 A.M. to 3:00 P.M. - 3:00 P.M. to 11:00 P.M. and 11:00 P.M. to 7:00 A.M., eight hours pay Assistant Chief Train Dispatcher rate, when non-agreement employees in the Blue Room, Philadelphia, PA perform duties of Assistant Chief Train Dispatcher by assigning power in Potomac Yard, Benning, Baltimore and the Popes Creek Branch in Morgantown and Chalk Point beginning April 27, 1983 and subsequent dates thereto.

(c) In the event there are no qualified extra, Assistant Chief Train Dispatchers available at the starting time of any tour of duty on any of the dates referred to in paragraph (b) above, the claim is made on behalf of the senior regularly assigned Assistant Chief Train Dispatcher in the Harrisburg Movement Office, Harrisburg Seniority District for eight (8) hours pay overtime rate for each tour of duty in accordance with Rule 5, Section 2(e).

(d) Eligible individual claimants entitled to the compensation requested in paragraphs (b) and/or (c) above are readily ascertainable on a continuing basis from the Carrier's records and their respective identities shall be determined by a joint check thereof."

OPINION OF BOARD: Both Claims before this Board involve alleged transfer of work from Agreement covered to Non-Agreement covered employes (at Harrisburg, PA and Baltimore, MD). The Organization maintains that the Carrier violated Rules 1(a) and 1(b)1 (Rule numbers vary in Claim #2) which state in pertinent part:

> "RULE 1-SCOPE
>
> (a) The term 'train dispatcher' as hereinafter used (and as defined in paragraph (b) of this Rule) shall be understood to include chief, assistant chief..
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> (b) 1. Chief Dispatchers, Assistant Chief Dispatchers Chief Train Dispatcher: Assistant Chief Dispatcher: these classes shall include positions in which it is the duty of incumbents...to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work.

"Note...the duties of these classes may not be performed by officers or other employees..."

With respect to the Claims at bar, the Organization to prevail must provide probative evidence that the work was within the Scope of the Agreement, was transferred to Non-Agreement employes and that, as such, the Agreement was violated. A review of the record as developed on property documents that the disputed work involving the distribution of power is reserved to the Assistant Chief Train Dispatcher (Power) by the Scope Rule of the Agreement, which is specific in nature (Third Division Award 16556). The Organization provided probative evidence indicating that positions were abolished, that the work of those positions prior to abolishment included instructions on the distribution of power and that after abolishment, much of this work was performed by employes of the Diesel Power Control Bureau.

Carrier's position in the whole of this case is that the abolishment of positions did not violate the Agreement in that the positions involved merely relayed information from locations to the Blue Room. The Blue Room was ultimately responsible for any decisions made and could reverse such decisions. As stated in the letter of January 5, 1984, "In effect, the middle man, or relay man, was eliminated, giving the Diesel Bureau (Blue Room) better control of the power for which it is solely responsible."

A complete review of the record established that the Organization has provided sufficient evidence of a probative nature to establish a prima facie case of a Rule violation. Whatever may be the Carrier's intent, the elimination of the "Middle Man" in this instant case is a violation of the Agreement. The Agreement provides that such work belongs to the employes under the Scope Rule and further notes that "the duties of these classes may not be performed by officers or other employees..."

This Board has reviewed carefully the Carrier's arguments which were raised on property as well as those issues such as Carrier's Exhibit E which were not discussed on the property and are thereby inadmissible. As the burden shifted to the Carrier, it was incumbent upon Carrier to provide evidence to rebut the Organization's Claims. This it did not do. The Carrier denied the violation, but provided no evidence on the property to substantiate its position. Cited Awards and Public Law Boards have been thoroughly reviewed, but are substantially different from the circumstances and Agreement language at bar (specifically, Award Number 63, Public Law Board 2037 in which no evidence of past practice was submitted, unlike the instant case). The Board finds that the Carrier has violated the Agreement.

Both Claims which are identical in nature request compensation. This Board has determined that a violation of the Scope Rule occurred in that after abolishing positions, work reserved to the Assistant Chief Dispatcher (Power) by the Agreement was taken over by Non-Agreement personnel. However, the central unresolved issue is whether the Claim at bar for damages is justified. That question revolves around the issue of who was affected by Carrier's action.

To establish a Claim for damages the Organization must prove that Claimants were directly affected by the Carrier's violation. The Organization has shown a clear force reduction. Those directly affected were the former occupants of the positions. The on-property correspondence establishes that they were able to immediately exercise seniority to other positions. Claim is made instead on behalf of the senior Extra Train Dispatchers or if none available the senior regularly assigned Train Dispatchers as per Carrier's records who were causally affected.

Carrier vehemently argues before this Board that damages in the instant case are without Rule support and specifically where unnamed Claimant's were not shown to be economically affected (Third Division Awards 26063, 25696, 25445). This Board has no doubt that Carrier's records would indicate if any of the unnamed Claimants were immediately affected with economic loss. Clearly there was a force reduction which this Board has held to be in violation of the Agreement. It is clear from the record on property (and particularly the exchange of correspondence of June 24, 1983 and the reply of August 4, 1983) that damages for Claimants directly and explicitly affected by Carrier's action in either economic loss or lack of full employment is requested and is proper. As such, we will sustain all elements of the Claim for those Claimants in Carrier's records who were directly affected. This is consistent with past Awards of this Board (Third Division Awards 23928, 23571, and 21663).

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 19th day of September 1986.

Carrier Members' Dissent
to
Award Number 26137, Docket TD-25803
Referee Marty E. Zusman

From a review of this award it is clearly apparent that the majority merely imposed their particular brand of industrial justice, in effect holding a violation occurred and someone must pay. In their zeal to extract "a pound of flesh," the majority chose to ignore the facts in the record that all work of the abolished positions was transferred to other Asst. Chief Dispatchers with the exception of several informational telephone calls per trick that were made by Blue Room personnel. The work performed took only a minute or two to perform and if there was a violation it would constitute a de minimus violation. By awarding compensation the Board majority ignored the applicable agreement which makes no provision for penalty payments. They also chose to ignore a plethora of Second and Third Division Awards wherein the Majority refused to assess damages when no rule so provided or at least limited the assessment to that of the claimant's actual damages.

In Second Division Award 1638, the Majority held:

> "...This conforms to the rule that the employe should be made whole and, at the same time, eliminates punitive damages which are not favored in law. It conforms to the legal holding that the purposes of the Board are remedial and not punitive; that its purpose is to enforce agreements as made and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterents against future violations. The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former."

In Second Division Award 10666 - adopted 32 years after Award 1638 - The Majority again held:

"We find there is a rule violation. However, the burden is on the claimant to cite to this Board contractual provisions that provide the basis for redressing the violation. This he has not done."

In Third Division Award 10963, the Majority held:

"In the instant case Petitioner has proven the violation. It has not met its burden of proving monetary damages. There is no evidence in the record that any Employe in the MW collective bargaining unit suffered any loss of pay because of Carrier's violation of the contract. The inference from the record, if any can be drawn, is that the MW Employes were steadily employed by Carrier during the period of the project. Therefore, for this Board to make an Award as prayed for in Parts (2) and (3) of the Claim would be imposing a penalty on the Carrier and giving the MW Employes a windfall--neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of this Board."

In Third Division Award 26063, adopted 24 years later than Award 10963, the Majority held:

"Further, this Board has no authority to assess punitive damages indiscriminately where no fraud, discrimination, or malice is shown in the record and where no employe is shown to have suffered any damages by reason of the alleged violation."

Not only did the Majority ignore the cited Board authority to either deny a penalty wherein no rule so provides or at least limit redress to those who were proven to have suffered economically, they also chose to ignore the 1981 United States Court of Appeals, Fourth Circuit, Norfolk and Western Railway Co. vs. Brotherhood of Railway and Airline Clerks case and the recent United States District Court for the District of Maryland, B&O Railroad vs. Brotherhood of Railway and Airline Clerks case wherein the courts have either set aside the damages awarded or in the B&O vs. BRAC case, actually vacated the Award (3rd Division 24861). The Maryland court followed the Fourth Circuit which had held penalty pay is proper only if the employer is guilty of willful or wanton misconduct or if the collective bargaining agreement provides for penalty pay.

In lieu of the aforementioned authority, the Majority cited Awards 23928, 23571 and 21663 as support in the assessment of a penalty despite the showing that the neutral in this case refused, in 25247, to follow the Majority in 23928; that the Award in 21663 was identical to the type of damages overturned in the United States Court of Appeals, Fourth Circuit ruling in BRAC vs. N&W, and that the neutral assessing punitive damages in Award 23571 was the same neutral who assessed damages in Award 24861 that was vacated by the District Court of Maryland.

We must dissent to Award 26137. The Carrier's conduct never was and cannot be characterized as, "willful or wanton" and there is no rule that provides for the penalty awarded. It is readily apparent that the Majority exceeded its authority in Award 26137 and such aberration cannot be considered a valid precedent in any other claim.

Robert L Hicks
R. L. Hicks

M W Fingerhut
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Michael C. Lesnik
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P V Varga
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James E. Yost
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LABOR MEMBER'S REPLY
to Carrier Members' Dissent to
Award No. 26137 - Docket TD-26803
Referee Marty E. Zusman

The Carrier Members have minimized the seriousness or degree of the violations presented to the Board in Docket TD-26803. The majority correctly found that jobs had been abolished and a substantial part of the duties thereof transferred to non-agreement personnel. To say that the distribution of motive power on a large segment of a division requires "only a minute or two" to perform indicates a lack of perception or, more likely, refusal to admit the facts.

We leave to the reader's judgment whether the Carrier's conduct was "willful or wanton." To obstinately, persistently ignore a clear reservation of work by agreement, in the face of forceful protest, certainly suggests not only willfulness and wantonness, but also a petulant attitude of assertiveness.

Redress was claimed and sustained for those affected by the force reduction which resulted in the work being transferred to management personnel. The carriers always feel they should enjoy impunity when caught with a hand on the cookie jar. This Referee merits approbation, rather than censure, for having the backbone to uphold the integrity of the Agreement in spite of Carrier's exhaustive plea that its misbehavior be condoned, if not approved.

R. J. Irvin
Labor Member