NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26381

THIRD DIVISION Docket Number TD-26144

Marty E. Zusman, Referee

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

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

(a) The Consolidated Rail Corporation ('Carrier' or 'Conrail') violated Rule l(d) of its Train Dispatchers' schedule working conditions Agreement, when, effective 3:00 p.m. January 28, 1983, it removed the work of monitoring office readout machines connected to hot box and/or dragging equipment detectors located at Mile Post 24.8 near Denton, Mile Post 51.2 east of Chelsea and Mile Post 102.1 west of Hartung on the Main Line, and Mile Post 25.7 south of CP 27 on the Kalamazoo Branch, from Train Dispatchers in the Jackson, Mich office and transferred such work to Block Operators at that location.

(b) Because of said violation, the Carrier shall now compensate the senior extra train dispatcher respectively available on each shift in the Jackson, Mich. office, one (1) day's pay at the rate applicable to Trick Train Dispatchers beginning at 3:00p.m. January 28, 1983 and continuing on each subsequent shift and date thereafter until the violation ceases.

(c) In the event no qualified extra Train Dispatchers are available for any of the respective shifts specified in paragraph (b) above, the claim is made on behalf of the senior qualified regularly assigned Train Dispatcher available for such shift or shifts, at the appropriate rate.

(d) In the event no qualified regularly assigned Train Dispatcher is available under the conditions set forth in paragraph (c) above, the claim is made on behalf of the senior qualified Train Dispatcher who is off duty during such shift or shifts.

(e) Eligible individual Claimants entitled to the compensation claimed herein include C. W. Ernst, P. M. Leahy, D. B. Campbell, C. 0. Davis, N. C. Lantz, R. M. Latva, G. E. Ferguson, T. D. Staelens, C. E. Austin, C. Humphreys and J. W. Wooster, are readily ascertainable on a continuing basis from the Carrier's records, and shall be determined by a joint check thereof in order to avoid the necessity of presenting a multiplicity of daily claims."

OPINION OF BOARD: On January 28, 1983, the Carrier moved hot box detector office readout machines in its Jackson, Michigan office to a new location nearby. At issue is the Organization's Claim that the work of monitoring the machines has been transferred to Block Operators when said work belongs to Train Dispatchers.

The Organization argues that at the Jackson, Michigan office such work prior to September 1, 1979, had been done by Train Dispatchers and as such, was protected by the Agreement as per Rule I (d). That Rule reads in part that:

> "Work not included within the Scope which is being performed on the property of any former component railroad by employees covered by this Agreement will not be removed from such employees at the locations at which such work was performed by history and past practice or agreement on the effective date of this Agreement."

It is the Organization's position that when the Carrier moved such equipment into the Block Operators office at Jackson, Michigan, it transferred such work as belonged to Train Dispatchers in violation of the Agreement.

The Carrier denies any Rule violation and specifically denies that the work has ever been exclusively that of Train Dispatchers on the Michigan Division. It maintains that said work always has been a shared responsibility on the property. While it agrees that the office readout machines were moved, it denies that any change in or transference of work occured, and as such, no Rule violation. It specifically states in correspondence on property (May 17. 1983), that as of September 1, 1979, at the location in this dispute, Operator-Clerks were monitoring the equipment.

In this Board's review of the instant case, we note that the Carrier submitted evidence including numerous statements to which the Organization objected. Our review finds that the evidence was clearly presented after the October 2, 1984, Notice of Intent to file a" ex parte Submission to this Board was filed. The new evidence was not handled on property and as such, cannot be considered as properly before this Board (Third Division Awards 19011, 20773).

The Organization carries the burden of proof to establish that such work prior to the effective Agreement belonged to Train Dispatchers and as such Rule 1 (d) was violated. The only probative evidence of record supporting the Organization's Claim is the two Train Dispatcher's letters of July 9, 1983. The Carrier asserts that it has "ever been exclusive work at the Jackson location and argues its assertions rebut the statements. Assertions are not evidence and as such, their denial is not a" effective rebuttal. Based on the evidence in the record as handled on property the Organizations Claim must be sustained.

As for the requested remedy, the Organization not only carries the burden of proof, but of perfecting all elements of its Claim. There is no evidence in the record that Carrier's actions affected the senior extra Train Dispatcher in any material way. Nor is there evidence of record on the property that one (1) day's pay was lost, that the remedy is contractually provided, or that it is anything other than "de minimus" which it clearly appears to be. As such, although the evidence shows the work belongs to Train Dispatchers (and we do not lightly ignore Carrier violations), finding no evidence of willful fraud, malice, monetary loss to Claimants, contractually supported penalty, potential employment loss or the like, we must deny parts (b), (c), (d) and (e) of the Claim.

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 25th day of June 1987.

LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
to
Award 26381 — Docket TD-26144
Referee Zusman

The author of this Award is commended for cleanly cutting through the barricade of specious, convoluted defenses erected by the Carrier and sustaining the claim on its merits.

For one example, the Carrier asserted the work was a shared responsibility on the property. That was a correct statement, but the rule on which the claim was founded did not demand exclusivity, but addressed work not included within the Scope being performed by history and past practice at the particular location. The Majority were not misled by exclusivity discussions set forth in detail by the Carrier.

While the Board's Opinion states "the evidence shows the work belongs to Train Dispatchers", it falls short by failing to award the compensation sought in the claim.

We are compelled to ask a question which cannot be answered. What incentive is there to bring the Carrier into compliance with its agreements?

When the shoe is on the other foot, this Board has supported discipline which is intended to bring employees into compliance with a carrier's rules. Third Division Award 6637 said that deterrence is a recognized element in any system of discipline. Third Division Award 12842 said that discipline is administered for education, caution, and benefit rather than as punishment. Third Division Award 16065 said the purpose of discipline is not primarily punitive, but corrective. Third Division Award 20874 said discipline is administered for education, caution, and benefit of the offended and other employees. Third Division Award 21760 said the purpose of discipline is to rehabilitate, correct, and guide employees.

In none of the above cases did the employee reap some monetary benefit from his misconduct, but they were nonetheless assessed a monetary penalty "for education, caution, and benefit".

Unless this Board's Awards assess a monetary cost for "education, caution, benefit", to "rehabilitate, correct, and guide" them, carriers will continue to test or ignore agreeemnts, to flout the rules they signed.

In the decision rendered by Award No. 1 of Public Law Board 3477, a discipline case involving these same parties, an employee held to be guilty and reinstated without pay, lost wages of more than $84,000 for his education, correction, and guidance, in a case in which he derived no monetary benefits from his misconduct. Here, the same Carrier is held guilty of misconduct, and is let off without penalty because it derived no monetary benefits.

This kind of disparate treatment cries out for correction.

We dissent to that part of the Award which denies any compensation for Carrier's violation of the Agreement. Carriers understand only one language-that of the economic market place, i.e., what will it cost?

Only by the imposition of monetary reparations can a carrier be taught the risk of non-compliance with contractual obligations. Unpunished misconduct is commonly thought to result in disrespect of authority and anarchy. There is no reason large corporations should be insulated from the penalty for misconduct while single individuals are punished for theirs.

R. J. Irvin
Labor Member