Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27187
THIRD DIVISION Docket No. TD-26636
88-3-85-3-382

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Southern Pacific Transportation Company (Western Lines)

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

(a) The Southern Pacific Transportation Company (Western Lines) ('Carrier') violated its Train Dispatchers' schedule working conditions Agreement, when, effective at or about 12:01AM, on January 17, 1983, it allowed the respective duties and responsibilities referred to in

(1) Article 1, Section (b) and
(2) Article 1, Section (c)

of said Agreement, as pertains to that portion of the Tillamook Branch of the Oregon Division between Batterson and Tillamook and which duties were previously performed by Train Dispatchers in the Eugene, Oregon office, to be assumed by persons not covered by said Agreement.

(b) Because of said violation, the Carrier shall now compensate

(1) the senior extra Train Dispatcher respectively available on each shift in the Eugene, Oregon office, one (1) day's pay at the rate applicable to Assistant Chief Train Dispatchers beginning 12:01A.M., January 17, 1983, and continuing on each subsequent shift and date thereafter until the violation referred to in paragraph (a)(1) above ceases, and

(2) the next senior extra Train Dispatcher respectively available on each shift in the Eugene, OR office, one (1) day's pay at the rate applicable to Trick Train Dispatchers beginning 12:01AM, January 17, 1983, and continuing on each subsequent shift and date, until the violation referred to in paragraph (a) (1) above ceases.

(c) In the event no qualified extra Train Dispatchers are available for any of the respective shifts specified in paragraphs (b) (1) above, the claim is then 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 in paragraphs (b), (c) and/or (d) above include:

NAME	POSITION	REST DAYS
AG LARSON	711	MON/TUE
JM DOWNEY	701	FRI/SAT
RB JONES	741	FRI/SAT
DB PINKSTON	721	SUN/MON
RC HALE	751	WED/THR
HH MESSAL	704	MON/TUE
BG RAINWATER	703	SAT/SUN
WO FONGER	706	MON/TUE
BP HAYDEN	712	SUN/MON
RB BELL	754	FRI/SAT
LR GRAN	702	SAT/SUN
FA PARROTT	731	FRI/SAT
HT DEMPSEY	705	THR/FRI
GD LEATH	752	WED/THR
WG LAVERS	755	WED/THR
WR FEELER	732	MON/TUE
WM WILSON	742	WED/THR
WH VANEEKHOVEN	761	VARIOUS
JL CRAHAN	753	TUE/WED
RS KANG	743	SUN/MON
SJ GUST	756	THR/FRI
SA BOZAAN	733	TUE/WED
DJ PARROTT	713	FRI/SAT
TT SIMON	762	VARIOUS
KA HELVIE	763	VARIOUS
AA SEDILLO	764	VARIOUS
JG GREENHAW	765	VARIOUS"

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The basic facts leading to this dispute are summarized as follows:

Prior to January 15, 1983, Carrier operated two runs on the portion of the branch line between Hillsboro and Tillamook, Oregon. One run with Carrier's engine and train crews was assigned to work from Tillamook to Batterson and back to Tillamook. The other run with Carrier engine and train crews was assigned to work from Hillsboro to Batterson and back to Hillsboro. Batterson was the interchange point for cars handled by the two runs. Both train and engine crews operated under train orders issued by the train dispatcher's office at Eugene, Oregon. Based on business considerations, Carrier consummated an Agreement with the Port of Tillamook Bay Railroad (PTBR) on January 12, 1983, which in effect discontinued operations west of Batterson, Oregon and the handling of all rail traffic in that area was contracted out to the Tillamook Bay Railroad. As an additional supportive step, Carrier also negotiated an Agreement with its operating crafts that the Tillamook Bay Railroad could now perform the runs. According to Carrier, PTBR uses only one locomotive (leased from Southern Pacific Railroad) to make two and sometimes three round trips per week from Tillamook to Batterson and said trips are made without the necessity of train orders.

In response to this action, the Organization charged that Carrier blatantly violated Article 1 (Scope Rule), Sections (b) and (c) respectively, since prior to the effective implementation of the January 12, 1983 contracting Agreement, the asserted lost work was exclusively performed by employees of the train dispatcher classes. Sections (b) and (c) are referenced as follows:

> "Section (b). Definition of Chief, Night Chief and Assistant Chief Dispatcher's Positions. These classes shall include positions in which the duties of incumbents are to be responsible for the movement of trains on a division or other assigned territory, involving the supervision of train dispatchers and other similar employees; to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work.
>
> Section (c). Definition of Trick Train Dispatchers' Positions. The above class includes positions in which the duties of incumbents are to be primarily responsible for the movement of trains by train orders, or otherwise; to supervise forces employed in handling train orders; to keep necessary records incident thereto; and to perform related work."

The Organization maintained that since the Scope Rule herein was specific and not general in nature, it was unnecessary to proof exclusivity by virtue of custom, history and tradition. The Organization maintained that Carrier was barred from contracting out explicitly protected work and cited numerous Third Division Awards and Public Law Decisions to support its position. It noted that the trackage on the Tillamook Branch still remained the property of Carrier and Carrier continued its responsibility to underwrite the maintenance of the trackage. It further observed that Carrier acknowledged the Agreement with the operating crafts, as an antecedent step before the Port of Tillamook Bay Railroad operated the subject trackage and pointed out that Carrier admitted that train movements were under the direction of train dispatchers before the implementation of the January 12, 1983, contracting Agreement.

In rebuttal, Carrier argued that the claim was procedurally defective, since it failed to articulate, in accordance with Rule 7 (c) specific demonstrable occurrences. It cited several Third Division Awards to affirm its procedural objections.

On substantive grounds, it asserted that it was not estopped from discontinuing its operation between Batterson and Tillamook and contracting out the handling and movement of rail traffic on that section. On this point, it noted that the Organization has not produced evidence indicating that said action was prohibited or restricted nor evidence showing that train orders were, in fact, being issued. It noted that the Port of Tillamook Bay Railroad using one leased Southern Pacific locomotive, generally made two and sometimes three, daylight round trips per week from Tillamook to Batterson, without the need for train orders and without the need to contend with conflicting moves. Accordingly, since the involved train crew did not perform the work set forth in the Organization's Scope Rule, but instead operated on its own initiative, Carrier argued that a rule violation, by definition, could not have occurred. It also noted that no dispatcher's position was abolished as a result of the January 12, 1983 contracting Agreement and no dispatcher showed a loss of earnings from the aforesaid transaction.

In considering this case, we concur with Carrier's position. We do so for several reasons. Firstly, Carrier was not estopped from discontinuing operations west of Batterson, Oregon. It properly entered into an Agreement with its operating employees to permit train crews of the Port of Tillamook Bay Railroad to run trains on this portion of the branch line between Hillsboro and Tillamook. Secondly, there is no evidence that work covered by Article 1, Sections (b) and (c) was performed by specifically identifiable employees of the Port of Tillamook Bay Railroad or that train orders were specifically issued by the crew(s) operating the two or three round trip runs per week between Tillamook and Batterson. Thirdly, notwithstanding Carrier's consistent statement that the train crew(s) operated without train orders and in an operational environment not requiring such issuance, the Organization never refuted these statements or demonstrably established that train orders were issued. The on situs appeals correspondence, which is germane to a resolution of this dispute does not contain specific identifiable evidence

that train orders were issued or that other protected work was performed by employees of the Port of Tillamook Bay Railroad. Consequently, and in view of this appeals record we are constrained to find for Carrier and the instant claim must accordingly be denied. We hasten to point out that unlike the several adjudicated cases upholding scope rule violation between the same parties herein under Public Law Board No. 629, the fact specifics of those cases are palpably distinguishable from the facts herein. In the case at bar, the record is bereft of clear evidence that specific protected work was specifically performed by specific unauthorized employees of the Port of Tillamook Bay Railroad.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1988.

LABOR MEMBER'S DISSENT
to
Award 27187 - Docket TD-26636
Referee Roukis

Responsibility for the movement of trains is exclusively the work of the train dispatcher classes, and may not be contracted out, which is essentially what the Carrier did in this case.

Several Awards have held that this work is reserved to train dispatchers on this property:

Third Division Award	Referee
6885	Jay S. Parker
7575	Dwyer W. Shugrue
7576	Dwyer W. Shugrue
7628	Livingston Smith
9846	Frank Elkouri
16038	George S. Ives
P.L.B. 629	
1	Paul D. Hanlon
2	Paul D. Hanlon
3	Paul D. Hanlon
4	Paul D. Hanlon

Likewise, the same or similar Scope Rule has been held to reserve this work to train dispatchers on other properties:

Third Division Award	Carrier	Referee
1015	LV	Wiley W. Mills
2070	DL&W	Ernest M. Tipton
5628	PRR	Hubert Wyckoff
5664	SLSF	Hubert Wyckoff
8840	SIRT	Donald F. McMahon
11432	PRR	Martin I. Rose
14219	SLSF	Arthur Stark
14911	SLSF	Edward A. Lynch
15460	S&A	George S. Ives
15468	Reading	Edward A. Lynch
15477	AGS	Don Hamilton
16556	N&W	John J. McGovern
17709	Soo Line	Charles W. Ellis
17764	CB&Q	Don Gladden
17827	CB&Q	David Dolnick
18459	SLSF	David Dolnick
18568	SLSF	David Dolnick
18589	SLSF	David Dolnick
19466	SLSF	William M. Edgett
20838	Soo Line	Robert A. Franden

Third Division Award	Carrier	Referee
24183	C&NW	Martin F. Scheinman
25214	C&NW	Martin F. Scheinman
26073	AT&SF	Marty E. Zusman
26137	ConRail	Marty E. Zusman
26496	MP	Herbert L. Marx, Jr.
26593	StLSW	Elliott H. Goldstein

It is significant, we think, that this trackage on the Tillamook Branch remained the property of the Carrier:

> "Commencing on January 17, 1983, Carrier continued its responsibility in regards to maintenance at its expense of the entire length of branch track to Tillamook that Carrier continued to own." (Underscoring supplied)

The above quotation is taken from the Carrier's own Submission. Further, the Carrier admitted it negotiated an agreement with employees of the operating crafts to permit the Port of Tillamook Bay Railroad to operate on the subject trackage.

The Carrier defended on the basis the Employees failed "to define the 'occurrence' on which the claim is based" and "At no time during handling on the property did Petitioner assert or submit any evidence or proof". That these defenses were found to have any substance by the Majority calls for this Dissent, for the record itself furnishes the rebuttal to these defenses:

(1) The Carrier admitted that train movements were, prior to January 15, 1983, under direction of train dispatchers.

(2) The Carrier admitted it contracted with PTBR to perform its work.

The cause of action, therefore, is the removal of the work from exclusive performance in accordance with the Scope Rule. These admissions by Carrier are regarded by this Dissenter as adequate to supply the Petitioner's burden of proof.

A more flagrant violation of the Scope Rule cannot be comprehended. Indeed, an admitted violation occurred. This Dissent is required for this

reason. The outcome of this dispute is indicative of the anti-labor, pro-business disposition of our society. This Dissent is triggered not so much by surprise, but more by resignation.

R. J. Irvin
Labor Member