Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27603
THIRD DIVISION Docket No. TD-26655
88-3-85-3-398

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Seaboard System Railroad (former SCL)

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

(a) The Seaboard Coast Line Railroad Company ('Carrier') violated its Train Dispatchers' schedule working conditions Agreement, including Article 1(b) 1 thereof, when on Monday, August 16, 1982, and each Monday, Tuesday, Wednesday, Thursday and Friday thereafter, it permitted and/or required an employee titled Staff Assistant located at Mulberry, Florida, to perform duties which are exclusively reserved to Chief, Night and Assistant Chief Train Dispatchers under said Agreement, including but not limited to the following:

1. Direct ordering of equipment from the yardmaster at Winston Yard.

2. Calling signal maintainers direct, either by telephone or radio, reporting signal trouble to them so that trouble can be corrected.

3. Notifying train crews direct informing them of broken rails, tracks out of service and other defects that are usually are covered by train orders. This in effect is issuing verbal train orders.

4. Instructions given directly to train crews how many and where to set off at specific points on the 'BV' territory and giving instructions on cars to be moved, giving car initials and numbers frequently.

5. Notifying mechanical personnel as to expected time of departure of Unit Trains and arranging for them to have inspections made to avoid delay to train. Notifying mechanical personnel of defective equipment so that repairs may be made. Instructing mechanical personnel to inspect specified equipment to determine if it is suitable to move on SCL.

(b) Because of said violations, the Carrier shall now compensate the senior extra Train Dispatcher who is available at the straight time rate in the Tampa, Florida (Time Table station name Yeoman) as of 7:45 a.m. on

Monday, Tuesdays, Wednesdays, Thursdays and Fridays respectively, one (1) day's pay at the rate applicable to Assistant Chief Train Dispatchers beginning Monday, August 16, 1982, and continuing on each Monday, Tuesday, Wednesday, Thursday and Friday thereafter until said violations cease.

(c) In the event no extra Train Dispatcher is available at the straight time rate as of 7:45 a.m. on any of the claim dates specified in paragraph (b) above, the claim is then made in behalf of the senior Train Dispatcher available in the Tampa (Yeoman), Florida, office on such claim date or dates, in the order of preference set forth in the Memorandum of Agreement dated June 21, 1973.

(d) The respective identities of individual Claimants who may be entitled to the compensation claimed in paragraphs (b) and/or (c) above, including, but not limited to W. E. Jones, W. H. Powell, C. E. Young, C. E. Mattox, W. B. Watson, R. R. Cribb, L. E. Perry, W. T. Connatser, H. B. Horne, H. A. Pierce, A. R. Carter, R. D. Simmons, G. W. Skipper, J. E. Dudley, J. S. Weaver, R. H. Emerson, Dewey Oelslager, D. J. Kime, C. H. Childs, H. P. Burbage, G. L. Mungon, R. L. Hughes, W. C. Loney, and T. L. Evans 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 submitting a multiplicity of daily claims."

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 employes 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 were given due notice of hearing thereon.

The dispute in this case focuses upon the Organization's assertion that a non-covered Staff Assistant performed certain work claimed by the Organization at the Carrier's Mulberry, Florida Terminal after covered employees were transferred from Mulberry to Tampa, Florida. It is well-established that new arguments or evidence not raised on the property cannot be considered by this Board. (Third Division Award 26257 and cases cited therein). Because much effort of the parties in this matter was devoted to issues and facts not raised on the property by the Carrier, we find that we must detail the on-property handling of this dispute in order to properly focus upon the relevant facts and issues that we can consider.

The initial Claim dated September 28, 1982 protested the performance of the five areas of work set forth in the Claim by a Staff Assistant commencing August 16, 1982 which duties the Organization contends "fall within

those [duties] contained in Article I(b) 1 of the Agreement...[and] that such duties are exclusively reserved to Chief, Night and Assistant Chief Dispatchers...." The Organization further gave specific examples of instances where the Staff Assistant performed work claimed by the Organization. In concluding, the Organization asked for a joint check of the Carrier's records.

By letter dated November 5, 1982, the Carrier denied the Claim noting that the position of Staff Assistant at Mulberry, Florida was created and filled on November 1, 1977, and therefore the Claim was untimely since it was not filed within the prescribed time limits in the Agreement. The Carrier further addressed the five areas of work asserting that other employees not covered by the Agreement have, in the past, performed those specific functions claimed by the Organization. The Carrier further took the position that the Scope Rule at issue is "general in nature and does not specifically cover the work performances cited in the five (5) items on page one of your communication." The Carrier then declined to submit to a joint check of its records.

By letter dated February 3, 1983, the Organization appealed and took the position that the Scope Rule was specific and not general in nature. With respect to the timeliness question, the Organization argued that the time of the creation of the Staff Assistant at Mulberry was not significant. According to the Organization, "[w]hat is pertinent is that the incumbent of that position has performed train dispatcher work from time to time since the train dispatchers were moved from Mulberry to Tampa." The Organization further took the positions that the Scope Rule covers ordering of equipment; calling signal maintainers for repairs has "historically been principally performed by Train Dispatchers;" notifications of broken rails, etc. is not based on emergency type notifications but are routinely covered by train orders; and instruction of train crews regarding cars to be picked up and set off at specific points on the "BV" territory and of mechanical department personnel concerning inspections to be made of unit trains is covered by the Scope Rule, although conceding that "others may be involved in the process." The Organization concluded that prior to the abolishment of the Assistant Chief Dispatcher position at Mulberry, "most of the duties here in reference were performed by the incumbent of that position" under the Scope Rule. Further correspondence between the parties routinely denied or further appealed the matter.

Thus, as set forth in detail above, the only issues raised on the property that we will address are the timeliness of the Claim and the applicability of the Scope Rule to the work at issue. The remaining arguments are newly raised and not properly before us.

In its Submission, the Carrier argues that the Claim is untimely, pointing to the 45 day time limit for filing claims found in Article IX(e) of the Agreement. Yet, even in this argument, we are faced with newly raised material which we shall address. In further support of its timeliness argument, the Carrier asserts that the Assistant Chief Dispatcher positions at Mulberry were abolished and re-established at Tampa on March 29, 1982 and hence the September 28, 1982 Claim is outside the 45 day period.

The Carrier further argues:

"Filing a claim on September 28, 1982, based on an alleged 'transfer of work' that occurred on March 29, 1982, is far beyond the 45 - day time limit."

and such is not a continuing claim. However, careful review of the on-property handling shows that the critical date to the Carrier's argument of March 29, 1982 and the specific facts surrounding that transfer were not raised. The Carrier's timeliness arguments on the property concerned the 1977 establishment of the Staff Assistant position and no mention was made of March 29, 1982. On the other hand, the Organization made specific references on the property to incidents occurring after August 16, 1982 upon which date the Claim is based. Again, since the facts and arguments concerning March 29, 1982 were not raised on the property, we are unable to consider that date as part of the Carrier's timeliness argument. (Third Division Award 16631). Since that date cannot be considered, the Carrier's argument concerning the lack of a continuing violation is similarly not properly before us. Properly before us is the date of August 16, 1982 which was raised on the property by the Organization as the date that the Organization asserts the work commenced to be performed by the Staff Assistant. That is the critical date and therefore, the September 28, 1982 Claim was filed within the time limits in the Agreement. We agree with the Organization that the fact that the Staff Assistant position was established in 1977 is immaterial. The crucial date is the date disclosed by the record developed on the property as the date that individual began to perform the disputed work. By the evidence properly before us, the Claim is therefore timely.

Article I of the parties' Agreement states:

"(a) Scope

The term 'train dispatcher' as hereinafter used (and as defined in paragraph (b) of this rule) shall be understood to include chief, night chief, assistant chief, trick, relief and extra dispatchers, excepting only such chief dispatchers as are actually in charge of dispatchers and telegraphers and in actual control over the movement of trains and related matters, and have substantially the authority of a Superintendent with respect to those and other activities. This exception shall apply to not more than one chief dispatcher on any Division.

NOTE: It is agreed that one chief dispatcher in each dispatching office is excepted from the rules of this agreement.

(b) Definitions

1. Chief Train Dispatchers
Night Chief Dispatchers
Assistant Chief Train Dispatchers

These classes shall include positions in which it is the duty of incumbents 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."

For the purposes of our discussion, and noting that the Carrier contests this conclusion (with citation to supporting awards), we shall assume for the sake of argument and in accord with the Organization's position that the Scope Rule is specific and not general. That assumption is also not without prior support. See Public Law Board No. 588, Award No. 1:

"Unlike the Scope Rule in agreements of many other classes and crafts, the one in this Agreement, above quoted, is clear and meaningful. It defines and describes the work of the affected employes. There is no ambiguity. The exclusivity to that work need not be established by evidence of history, tradition, custom and practice. In Award No. 7770 we said: 'We have no hesitation in holding as to so-called 'train movements,' responsibility therefor belongs to the dispatcher; and that to the extent that the instructions issued by the Carrier purport to give any such responsibility to the yardmaster, the agreement is violated.'"

See also Third Division Award 16556:

"The Scope Rule is clear, precise and unambiguous. The language is not susceptible to mis-construction. They [the Organization] additionally have presented several affidavits from various Dispatchers attesting to the fact that for over 20 years, the work has been performed by them as provided in the afore cited Scope Rule."

But even assuming that the Scope Rule is specific and not general, we nevertheless are unable to sustain the Claim. A basic axiom that binds us is that the Organization bears the burden of proof to substantiate the Claim. In this case, and again confining ourselves to the record evidence properly developed on the property, we cannot say that the Organization has met its burden.

Specifically, the Organization must make the threshold showing that the disputed work actually falls within the Scope Rule it asserts as specific. That proposition finds support in the very Award relied upon by the Organization, Public Law Board No. 588, Award No. 1:

> "But this contractual exclusivity is tempered with a few well reasoned exceptions. Circumstances arising from operational problems modifies this exclusivity. Moving trains by other employees in an emergency is such an exception because there is no threat to the integrity of the Scope Rule. (Awards No. 9824-9829.) Although the issuance of orders to move trains are duties reserved to Dispatchers, 'Preliminary decisions concerning how many cars should be moved to what location, however, are made by others.' (Award No. 14219.) This exclusivity applies to movement of trains by train orders or by an order which is tantamount to a train order. (Award No. 14175.)"

The claim in Award No. 1 was ultimately denied notwithstanding the existence of a specific Scope Rule because there was no showing by the Organization that the instructions at issue were considered and used as a train order and it was further concluded that the message at issue was incidental to the duties of the Trainmaster. Thus, there was no showing that the work in question actually fell within the Scope Rule.

In its February 3, 1983 letter, the Organization generally recognized that not all of the work at issue belonged to the employees covered by the Agreement. The Organization noted therein that "most of the duties here in reference were performed by the incumbent ...." Specifically, the record before us shows that the Organization concedes that three of the five areas of work at issue are not always covered by the Scope Rule. The Organization argues that calling signal maintainers directly to report signal trouble is the covered employees' work, yet in its Submission, the Organization states that "[t]his duty has historically been principally performed by Train Dispatchers...." Similarly, the Organization argues that notifying train crews direct informing them of broken rails is its work, yet it states that "notification of trains concerning broken rails and other defects are usually covered by train orders, which is reserved to Train Dispatchers." Moreover, the Organization seeks work concerning instructions given directly to train crews concerning how many and where to set off at specific points on the "BV" territory etc., yet it tells us that "others may be involved in this process...." [Emphasis added]. Considering that these kinds of concessions have been made, and further considering that the Carrier strenuously asserts that other non-covered individuals performed this very work, it is incumbent upon the Organization, as in Award No. 1, supra, to demonstrate more than a mere allegation that the particular work falls under the Scope Rule. It has not done so.

The remaining two areas of work (direct ordering of equipment from the yardmaster at Winston Yard and certain notifications to mechanical personnel) although not having the same kind of concessions noted above suffer the same fate in light of the analysis required by Award No. 1, supra. In both instances, the Carrier strenuously asserts that other employees perform the contested work. Yet, there is no satisfactory specific showing by the Organization that the work falls within the Scope Rule.

In sum, with respect to the merits, we have assumed for the sake of argument that the Scope Rule is specific as the Organization argues. However, the Organization bears the burden of showing that the disputed work, in fact, falls within the Scope Rule. The Organization has made general claims to the work at issue, conceding that not all of the work it seeks falls under the Scope Rule, but has not specifically shown to our satisfaction that such work actually falls under that Rule. We do not take the Carrier's contradiction of the Organization's assertions as evidence of past practice since to do so would be improper under Awards concerning Scope Rules that are specific as opposed to general in nature. However, in light of the concessions made by the Organization that some of the work may not fall under the Scope Rule, we do consider the Carrier's assertions as sufficient to shift the burden back to the Organization to show that the particular work, with some degree of certainty, in fact, falls within the Scope Rule. On the basis of this record, and beyond allegations, and especially in light of the concessions that some of the claimed work may not fall within the Scope Rule, we cannot conclude that the Organization has met that burden. To do otherwise would force us to speculate which work actually falls under the Rule. We are unwilling to engage in such speculation. We must therefore deny the Claim.

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 27th day of October 1988.