

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29191
Docket No. TD-28774
92-3-89-3-171

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM:

CLAIM #1

"(a) The St. Louis Southwestern Railway Company (hereinafter referred to as the Carrier) violated its train dispatcher schedule working conditions agreement, including Article 1 Section 3 (b) [amended to also include Article 4(d)] thereof when on Nov 29th and Nov 30th and Dec 7th and Dec 14th and Dec 21st and Dec 28th 1986 it permitted and/or required a junior employee to work excepted Chief Train Dispatcher position when a Senior employee was available and qualified to work this position.

(b) Because of said violation the Carrier shall now compensate Claimant G. W. Miller 6 days pay at the pro-rata rate applicable to Chief train dispatchers on Nov 29th 1986, Nov 30th 1986, Dec 7th 1986 Dec 14 1986 Dec 21st 1986 and Dec 28th 1986.

CLAIM #2

I would like to present the following claim on my behalf:

One days pay at Time and one half rate of pay on Excepted Chief Dispatcher position for Sunday June 21, 1987.

Junior employee ER York with seniority date of 11-23-74 was used by Carrier this date. My seniority date is 5-21-67.

Having worked this position for several years in relief capacity I informed the chief Dispatcher that I was available, willing and wanted to work this position but was denied.

This position is a Union position, advertised by Bulletin to the Train Dispatchers by Carrier to be filled by Article 1 section 3(b) and Article 4(d) of the Train Dispatchers scheduled working conditions agreement...."

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 waived right of appearance at hearing thereon.

This dispute involves the filling of a relief position on certain Saturdays and Sundays. On the Claim dates, the incumbent of the relief position, Mr. G. E. Atkinson, should have relieved the excepted chief dispatcher for his weekly rest days.

According to the Organization, on the Claim dates, Mr. Atkinson was absent; and instead of calling Claimant who was the senior qualified employee available, the Carrier used a junior train dispatcher.

The Organization points to Article 1, Section 3(b) of the Agreement, which states that a chief dispatcher's position should be filled by a train dispatcher qualified to assume and perform the responsibilities and duties of the chief dispatcher; and if the ability is sufficient of more than one available individual, seniority shall govern who gets the work. The Organization contends that the Claimant, as the senior dispatcher, should have been selected to fill the vacancy when the regular chief dispatcher was absent.


After a thorough review of the record here, we find that the Organization has successfully shown that Article 1, Section 3(b) has been applied in concert with Article 4(d) on numerous occasions in the past, and the Carrier always would select the senior train dispatcher as long as the ability of that individual was sufficient. In this case, the Carrier did not do that. Consequently, we find that the Organization's interpretation and application of the Agreement is correct and, to that extent, the Claim must be sustained.

However, the record reveals that this Claim lay dormant for sixteen months before it was submitted to this Board. This Board does not look favorably on delays of that length of time. While we reject the Carrier's position that the delay constitutes laches, we feel constrained, in the interest of the sound and orderly procedures prescribed by the Railway Labor Act, to apply the principles set forth in prior Awards and deny the Claim for compensation.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April 1992.

MARK S.
3rd time Awards
5-7-92 Adopted.

LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
AWARD NO. 29191, DOCKET TD-28774
REFEREE MYERS

It is necessary to concur with the findings of Award No. 29191 wherein the majority found the "...Organization's interpretation and application of the Agreement is correct". Beyond that, however, the majority drifted off into the abyss.

The majority seeks to justify their refusal to allow the compensation claimed, based on the fact that the "...Claim lay dormant for sixteen months before it was submitted to this Board".

The reality of the matter is, quite simply, that Agreement "...does not specifically provide that a claim is barred from further handling if such claim is not presented before the appropriate Division of the NRAB with a determined period of time..." [Carrier submission page 15].

The delay of sixteen months in progressing this dispute to the NRAB is not excessive and did not harm the Carrier nor increase its liability in this case. Absent such a showing, denial of the compensation claimed is groundless.

Previous awards have held that delay in itself, does not bar a claim.

Public Law Board No. 629, Award No. 3

"The Carrier also raises a procedural defense based upon failure of the Organization to progress this claim to this Board within a reasonable time. There is no time limit set forth in the Agreement, so the Carrier's position is essentially an assertion of the equitable defense of laches. This defense may not be asserted merely on the basis of an inordinate time lag, but must be supported in addition by a showing of some prejudice by reason of the delay such as loss of evidence or other inability to properly defend against the claim."

Third Division Award No. 27897

"Although the Claim went unpaid for over two years before being pursued by the Organization, the time lag is not in and of itself sufficient to bar the Claim. There must be in evidence a showing by the Carrier that the delay resulted in damage or disadvantage in perfecting its case."

Third Division Award No. 25484

"It is true that the claims have suffered a long period of processing to reach the Board and at the Board, but there is no indication that the delays were inconsistent with Board procedures."

It seems that the above awards echo the opinion so clearly enunciated long ago.

Third Division Award No. 6308

"Preliminary to discussion of this claim on its merits Carrier has raised a procedural question that requires our attention. It points to a considerable period of delay by the Organization in handling this claim both on the property and in appealing it to this Board after it had been denied by the highest officer on the property

authorized to handle it. It asks that we not consider but deny the claim because thereof. The Carrier cites no provision of the parties' Agreement relating thereto and there is none in the Railway Labor Act. In the absence of any showing that Carrier has been in anyway injured, damaged or prejudiced by such delay there is no reason why it is material. If a limitation or cut-off rule is desired with reference to the handling of a claim on the property it must be done by agreement of the parties and if desired with reference to an appeal from the property to this Board it must be done by an amendment to the Railway Labor Act. In the absence thereof we do not have authority to write such a provision into either by means of an Award. Since no injury, damage or prejudice has been shown by reasons of the delay we find this contention to be without merit." [Emphasis added]

While the majority very clearly rejects the "...Carrier's position that the delay constitutes laches...", it proceeds to deny the compensation claimed as though laches was applicable.

This Board should function to issue awards that will serve to settle the disputes placed before it. Not to issue awards that will serve as fodder for future disputes. Having failed to enforce this agreement violation with the compensation claimed, the majority has created breeding grounds where new disputes will grow and manifest themselves.

I concur only to the findings of the agreement
violation. I strongly dissent to the denial of compensation.

A handwritten signature in dark ink, appearing to read 'L. A. Parmelee', written over a horizontal line.

L. A. Parmelee
Labor Member