

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37902
Docket No. TD-38140
06-3-04-3-35

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

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Peoria & Pekin Union Railway Company)

STATEMENT OF CLAIM:

"The P&PU Railway Co. (the Carrier) violated the current agreement between the Carrier and the Organization, including Article I in particular, when it permitted and/or required an employee not covered by the scope of said agreement to exercise primary responsibility for the movement of trains on the 'East Lead' (formerly the East Peoria Lead) and the 'West Lead' (consisting of the combination of what was formerly known as the Third Main and North Track No. 2, the northern rail on the levee).

Because of said violation, the Carrier shall now compensate the senior Train Dispatcher on rest day (1) day's pay at the overtime rate applicable to the Trick Train Dispatcher beginning on the first shift April 28, 2003 and continuing on each first and second shift on each subsequent date thereafter until the work is returned to the Train Dispatchers. (The work reverts to the Train Dispatcher on each third shift when there is no Yardmaster on duty.)

The identities of individual claimants entitled to the compensation requested in above paragraph are ascertainable from the carrier's records and shall be determined by a joint check thereof."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

As Third Party in Interest, the United Transportation Union – Yardmasters Department was advised of the pendency of this dispute, but chose not to file a submission with the Board.

The instant claim was precipitated on April 28, 2003, when the Carrier issued the following notice:

“The rail east of the Illinois River Bridge (IRB) Interlocking through and including Wesley Junction has been reconfigured as follows:

The northern rail on the levee, from the East Home Signal of the IRB Interlocking to the yard, has been designated as yard track and will be referred to as the ‘West Lead.’ This piece of track is now non-signaled yard track, and provides access to Caterpillar SS, and yard tracks 32 through 41.

The portion of yard track formerly known as the ‘East Peoria Lead’ will now be referred to as the ‘East Lead,’ and is also non-signaled yard track.

When issuing yarding or departing instructions to trains, the Yardmasters will specify either East or West Lead.

The southern rail on the levee east of the IRB interlocking will be known as ‘Main Track #1.’ This remains signaled Main Track, and provides access to and from the East Lead, Nickel Plate Main, and the Single Main.”

At issue is whether the Carrier violated Article I - Scope of the controlling Agreement when it issued the foregoing notice. It reads, in relevant part, as follows:

"ARTICLE I - SCOPE

(b) Definitions

2. Trick Train Dispatcher

This class shall include positions in which the duties of incumbents are to be primarily responsible for the movement of train by train orders, or otherwise; to supervise forces employed in handling train orders; to keep necessary records incident thereto; and to perform related work.

(c) Classification

... It shall be the duty of Dispatcher to handle and control all movement of trains over Main Track in Centralized Traffic Control territory; will handle Illinois River Bridge Interlocking Plant."

The Organization contends that, pursuant to the foregoing language, Train Dispatchers have primary responsibility for the movement of trains on the East Lead (formerly the East Peoria Lead) and on the West Lead (consisting of a combination of what was formerly known as the Third Main and North Track No. 2). In support of its position, the Organization offered statements from Train Dispatchers who attested that they have been solely and exclusively responsible for the movement of trains on the specific tracks identified in the instant claim. The Organization submits that the removal and transference of said work to Yardmasters was a violation of the Scope Rule under these circumstances.

Further, the Organization argues that this issue has been adjudicated many times before and resolved in its favor under similar facts. It has long been recognized that Train Dispatchers have a specific Scope Rule. The primary responsibility for the movement of trains is a duty that is expressly reserved to these employees. See Third Division Awards 26073, 26593, 27109, 27344, and 30089. The

Carrier cannot simply rename a track or change its method of operation so as to negate the Dispatchers' right by Agreement to dispatch the trackage involved.

The Carrier's denial of the claim is based on two central arguments. First, it asserts that the Yardmaster did not assume any new responsibilities as a result of the April 28, 2003 notice. The Carrier contends that the Yardmaster has always had control of train movements within the yard and on yard tracks. The East Peoria Lead and Third Main have always been yard track, the Carrier avers.

Second, the Carrier contends that changes in track configuration have resulted in a change in operating practices. The West and East Leads are now non-signaled switching tracks, not mains. While the Dispatcher's control of the CTC and authorization for trains occupying the main track are the same, it is no longer necessary to obtain the Dispatcher's permission to use the tracks in question. Under this system, no direction of control is required by Dispatchers. Because Dispatchers have no contractual right to control the movement of trains on non-CTC yard tracks, the Carrier asserts that this claim must be denied.

After careful review of the record in its entirety, the Board finds the Organization's position more persuasive than that of the Carrier, although its claim cannot be sustained in its entirety.

Article I places primary responsibility upon Train Dispatchers for the "movement of trains by train orders, or otherwise." The contention by the Organization that it has always controlled the tracks in question was supported by statements from Dispatchers controlling those tracks. Although the Carrier denied that such a practice existed, it provided no probative evidence that would serve to refute the statements provided by the Organization.

Once that fundamental point was established and the Organization made out a prima facie case that the work was scope covered and performed by ATDA-represented employees as a matter of custom and practice, the burden shifted to the Carrier. While we recognize the distinction between main line and yard movements, it is not clear how the track reconfiguration and the elimination of the signals affected the movement of trains. Confining our review, as we must, to the record presented on the property, we see that the Carrier argued that control was and is exercised by the Yardmaster solely for the purpose of switching or yarding trains, but the Organization countered that argument by asserting that the West

Lead and East Lead are still used for the advancement of trains, and that in fact the 3rd shift Train Dispatcher continues to be responsible for train and engine movements on these tracks when there is no Yardmaster on duty. Based on these assertions and counter assertions, we find that the Carrier has not sufficiently refuted the Organization's showing that the authority has always resided with the Train Dispatchers and that the changes in the configuration of the tracks did not alter the nature of the work performed.

Concluding as we do that there has been a violation of Article I of the Agreement, the remaining question concerns the appropriateness of the remedy sought by the Organization. The cases cited by the Organization show a divergence of views on this point. Compare, Third Division Award 26593 (Claimants entitled to one day's pay for each claim date in light of lost opportunity to perform the work); Third Division Award 30089 (one hour's pay awarded for each shift on which trains were required to obtain permission from the Yardmaster); Third Division Awards 16556, 26073, 27109, and 27344 (no damages awarded in the absence of quantifiable lost work opportunities). Here, we are not convinced that any wage loss or lost work opportunities have been established. The Organization failed to show that there were no employees available at the straight time rate of pay that could have performed this dispatching work in accordance with their regular duties. Accordingly, we decline to award the compensation requested.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of August 2006.

Labor Member's Concurring Opinion and Dissent
To Third Division Award No. 37902
Docket No. TD-38140
(Referee Ann S. Kenis)

I concur with the Majority's finding that the Train Dispatchers' Scope Rule expressly reserves the responsibility for the "movement of trains by train orders or otherwise" to the Train Dispatchers and that "the carrier cannot simply rename a track or change its method of operation so as to negate the Dispatchers' right by Agreement to dispatch the trackage involved. However, to "decline to award the compensation requested" in view of this violation of the Agreement is an injustice to the employees and is the reason for my dissent.

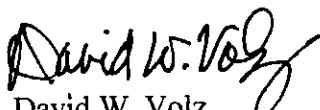
The carrier never raised an argument concerning the amount of work that was or was not involved in this claim, except to say that the Yardmasters had always done the work. Nor does the on-property record reveal that the carrier argued that the remedy requested by the Organization in this claim was excessive or that there were employees available at the straight time rate of pay that could have performed this work in accordance with their regular duties. Faced with the Carrier's silence on these points, the compensation requested should have been awarded. To borrow words from a previous Labor Member in a Concurring Opinion and Dissent from nearly two decades ago:

"Awards such as this, instead, encourage violations. The Carrier has nothing to lose. It can test the agreements and forbearance of its employees, at no risk. By contrast, we have yet to witness any carrier waiving its authority to discipline an errant employee, simply because that employee was not personally enriched by its rule infraction. The employee pays a disciplinary penalty, as a deterrent to rule infractions and to serve as an example to others. While we concur in the finding that the Agreement was violated, we dissent to the Award's failure to assess any monetary penalty. We see, in this Award, the Employees risk the integrity of their Agreement; the Carrier risks nothing. 'Some kind of convincer was required.' None was supplied."

Nearly twenty years later and the same type of violation is still occurring proves those words ever so true.

Even if there were no wage loss or loss work opportunities, the logic of Third Division Award 26593, adopted after the Award involving the above referenced dissent, should have been followed here.

"...we have concluded that there is no prohibition from awarding damages where there is no actual loss of pay. That finding is based on our belief that in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses."


David W. Volz
Labor Member