Award No. 2623
Docket No. TD-2577

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION
GULF COAST LINES
INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that the Carriers violated the rules of the Dispatchers' Agreements:

(1) When on February 1, 1927, without conference or agreement (Article VIII), the two carriers unilaterally changed the title of Night Chief Dispatchers, Palestine, Texas, San Antonio, Texas, DeQuincy, La., and Kingsville, Texas, to trainmaster, and thereby removed the work, duties and authority of the train dispatcher class from the scope and operations of the agreement rules by assigning said duties to the newly titled position of trainmaster, a position wholly excepted from the rules of said agreements.

(2) That the position shall now be bulletined for dispatchers' bids, properly titled Night Chief Dispatchers, and the work, duties and authority of Night Chief Dispatchers, as covered by Article 1 of the Agreements, shall be restored to the dispatchers' class.

(3) That the train dispatchers entitled to the positions in the offices involved, by reason of their seniority, shall be compensated the difference between their earnings each month and the night chief's rate of pay $370.00 per month, from July 15, 1943, the date claim was filed with the carrier, until violation is corrected.

(4) That the train dispatchers entitled to the relief work in the offices involved shall be compensated for the difference between their earnings each month and what they would have earned from July 15, 1943, the date claim was filed with the carrier, until violation is corrected, account being deprived of relief work on night chief positions, which, in some cases, deprives relief men of a regular assignment of six days per week, giving them only three days per week, when under the Articles of the Agreements they are entitled to six days.

EMPLOYES' STATEMENT OF FACTS: Effective latter part of 1925 on the Gulf Coast Lines, and February 1, 1927, International-Great Northern Railroad, the carriers, without conference or agreement, changed the title of night chief dispatchers to trainmaster. Nothing was changed on the dates mentioned except the titles. The occupants of the positions continued to perform the duties of night chief dispatchers and are still performing exclusively all the duties and have all the authority of night chief dispatchers which is outlined in the Occupational Classification Order issued by the Interstate Commerce Commission July 1, 1921. This action on the part of the carriers

It continued without protest from the Organization until December 11, 1940. In the meantime there had been a wage increase. The protest was filed by F. A. Conley, who during the entire period was Division Chairman of the Organization and also Chief Yard Clerk at Osawatomie—having direct supervision of the employes in whose behalf the claim is now made. Having stood by for nine years, with full knowledge of the facts, without protesting the arrangement the Organization should not now be allowed to assert a claim for violation of the Agreement."

and the "Findings" of the Board in this award read in part as follows:

"That the laches of claimant precludes the Board from considering the merits of the claim."

From Award No. 1806, (Clerks vs. G. C. L., I.-G. N.) which denied the Employes' claim, the following appears in the Opinion of the Board:

"The letter of the General Chairman of January 21, 1938 was not a claim. It was in the nature of an inquiry and an offer to discuss the matter. The fact that no protest to the Carrier's reply of February 1, 1938 was made for a year and a half would naturally lead the Carrier to conclude that its view had been accepted. * * * They should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay."

and the "Findings" of the Board in this award read in part as follows:

"That these employes are barred from maintaining their claims."

From Award No. 1811, (Clerks vs. G. C. L., I.-G. N.) which denied the Employes' claim, the following appears in the Opinion of the Board:

"After their initial protest, for a period of almost thirteen years they acquiesced in the procedure adopted by the Carrier, and thereafter up to the time of filing this complaint made but feeble protest. Under well recognized principles they are now estopped to claim that the agreement has been violated."

and the "Findings" of the Board in this award read in part as follows:

"That the action of the Carrier in this case does not constitute a violation of the agreement."

From Award No. 2281 (Clerks vs. W. P.), which denied the Employes' claim, the following appears in the Opinion of the Board:

"It is the Employe's acceptance of his position, and the salary paid him for a long period of thirteen years without complaint, that on the ground of laches, estops him from now asserting his claim; and what he cannot do directly, cannot be done, indirectly, through the Brotherhood. On this basis alone, if none other existed, the claim will be denied."

and the "Findings" of the Board in this award read in part as follows:

"That the Employe and the Brotherhood, as his representative, are barred by the laches of the Employes from maintaining the claim filed."

When consideration is given to the facts and evidence submitted herein by the Carrier, together with the Findings of the Board in previous cases involving circumstances similar to those involved in the case under consideration, it is clearly evident that the contentions of the Employes as set forth in their Ex Parte Statement of Claim should be dismissed, and the accompanying claim for monetary allowance, accordingly, denied.

OPINION OF BOARD: The controversy here is a claim of the American Train Dispatchers Association that the Gulf Coast Lines, on March 1, 1926, at DeQuincy, Louisiana and Kingsville, Texas, and the International-Great Northern Railroad, on February 1, 1927, at Palestine and San Antonio, Texas, in violation of the controlling Dispatchers' Agreements, changed the title of

Night Chief Dispatchers at those points to that of Trainmaster, a position not covered by their terms, and thereby removed the work, duties and authority of the Train Dispatcher class from the scope and operation of the rules of such agreement and transferred them to the new titled position of Trainmaster.

The claimant seeks to have the positions of Night Chief Dispatcher restored and to have such employes as have sustained loss by the action of the carriers compensated from July 15, 1943, the date the alleged claim was filed with the carriers.

The parties are not in accord as to the extent of the effort made by the petitioner to have the title of Night Chief Dispatcher restored at the points in controversy but for reasons presently to be disclosed, we shall not unduly labor that question. Briefly, there was evidence which we accept for our purposes that so far as the DeQuincy and Kingsville offices were concerned, the first attempt was made in September 1939. As to Palestine and San Antonio, protest was made in February 1927 and an effort made by the claimant to form a temporary adjustment board to arbitrate the difficulty which was blocked by the carriers' refusal to participate. Later in 1931 an unsuccessful effort was made to restore the position at Palestine. Still later in 1939 there was an effort made by the General Chairman to have day and night Division Trainmasters on the property classified as day and night Chief Dispatchers. This attempt resulted in failure. Each party seeks to justify its position on the basis of this effort, but we give it little, if any, prominence in reaching our conclusion. With the exception of the efforts referred to above we should here state in fairness to all parties that the record discloses no further attempts on the part of the organization as to any of the properties until 1943 when this claim was filed.

Other pertinent facts can we believe be fairly summarized thusly: the position of Chief Night Dispatcher was and for a considerable period of time prior to the changes complained of had been recognized in the offices involved; the carriers without notice or conference changed the titles to those positions or abolished them, the distinction in our judgment being unimportant here, and substituted therefor the position of Trainmaster who, among other things, assumed the same duties and performed the same work and authority exercised and performed by the Chief Night Dispatcher; the positions have not been reclassified and the carriers have refused the claim of the Dispatchers' organization that agreements then and now current require them to do so; pursuant to requirements of the Interstate Commerce Commission Classification Order of July 1, 1921, the carriers as late as June and July 1943 reported to that body and classified the positions in question as "Chief Train Dispatchers."

There are, as we understand it, two agreements now in force and effect governing the contractual rights of the parties, no change having been made in either since the action giving rise to the present dispute. We now refer to pertinent rules there to be found.

The Scope Rule of the Dispatchers' Agreement on the Gulf Coast Lines, effective October 24, 1925, reads:

> "The term train dispatcher as used herein will be understood to mean Night Chief, Asst. Chief, Trick Relief and Extra Dispatcher."

The Scope Rule of the Dispatchers' Agreement on the International Great Northern, effective August 1, 1925, reads:

> "The term 'train dispatcher' as herein used shall be understood to include assistant chief, night chief, trick, relief and extra dispatchers."

Section VIII (b) of each agreement is identical and provides:

> "Should either of the parties to this agreement desire to revise or modify these rules, thirty (30) days written notice, containing the proposed changes, shall be given and conferences shall be held at the expiration of said notice, unless another date is mutually agreed upon."

Referred to by the claimant is Section 3 of the National Mediation Agreement. We shall not quote those provisions or discuss their import as we do not deem that section determinative of our problem. For the same reason, we are not disposed to enter into a discussion of the effect of the Interstate Commerce Commission Classification Order likewise referred to although, if our conclusion was to rest upon the question of whether the position of Night Chief Dispatcher had been abolished or there had been a mere change in the title of that position under the facts disclosed by the record, we might be disposed to hold the fact the positions were reported as "Dispatcher positions" was entitled to considerable weight in our determination of such question.

Having stated as briefly as the state of the record will permit what we believe to be the salient facts entitled to consideration, we direct our attention to the question of whether the claimant's claim is meritorious. That question is more than difficult and of such doubt we approach it with a full realization that whatever our conclusion may be there will be others who after weighing in the balance the same facts and principles we have considered might reach a contrary result.

The first proposition to challenge our attention is the force and effect to be given the current agreements, hereafter referred to in the singular, since we believe them to be practically analogous so far as their provisions are pertinent to the instant dispute. It goes without saying that if such agreements, either by express terms or by interpretative construction, do not prohibit the changes made by the carriers the claimant must fail while if they do, other principles must be considered and applied in the order of their importance.

It must, we believe, be conceded that the work which was performed by Night Chief Dispatchers at the points in question prior to their replacement came within the provisions of the current Scope Rule. Likewise, apparent if not conceded, is the fact that the carriers did away with, either by substitution of title or by abolishment, such positions and substituted therefor the positions of Trainmaster to carry on the work of the Night Chief Dispatcher, a fact conclusively established by the evidence and unrefuted by the carriers, if in fact the record is not fairly open to the construction it is undenied. Nor, is there evidence, aside from the fact the change was made which is not sufficient, there was no further need for the performance of the proper functions of the Night Chief Dispatcher at the points in question. Under such circumstances, this Board is cases involving similar, if not almost identical situations, has repeatedly held the carrier may not take work from the Scope of an agreement. See Awards 2070, 2316, 1831, 1828, 1852, 2526 and 2227. Under the facts here, and based on the precedents cited we feel impelled to hold the carriers have violated the current agreement by their action in doing away with the Chief Night Dispatchers' positions.

We doubt, in view of the facts and circumstances of this case if there is occasion for serious consideration of the principles applicable to either the doctrine of laches or that of estoppel. As construed in many of our interpretative decisions it would seem to us a more controlling principle, recognized by this Board so often as to need no citation, is that where there is a continuing violation of the agreement and the relief sought is for compliance with its provisions, there being no demand for reparation in the form of compensation under conditions which might bring into the picture some elements of the principles of estoppel, the claim will not be held to be barred. That principle in our opinion is applicable here to the rights of the parties, if, as we have concluded, the petitioner's contention that the carriers violated the Scope Rule of the current agreement is correct. The violation first took place when the Night Chief Train Dispatchers' positions were retitled or abolished and has continued until the present moment. There was, therefore, a continuing violation properly subject to the jurisdiction of this Board. The fact, as suggested, that such claim was not brought before the Board promptly after its organization under provisions of the Railway Labor Act is not fatal to its consideration. The agreement possessed no limitation provisions and we find none in the Act or in our Rules of Procedure.

In reaching the conclusion just announced, we have not been unmindful of Respondents' contention, strenuously urged and ably presented, that because of the long continued delay in presentation of the claim our decisions require a denial of relief on grounds of laches and estoppel. We are fully cognizant of the fact that the period of time ensuing between the date of the original violation and that of final submission of the grievance is an unusual circumstance and we frankly concede the better practice is to avoid such inaction and delay. Because of that situation precedents cited by Respondents are entitled to and have received special and respectful consideration. Our examination discloses most of them are based on claims for reparation where the employe had accepted and received benefits over an extended period of time. See Awards 116, 1435, 1806, 2146 and 2605. Others involved present an entirely dissimilar factual situation. Awards 1640 and 1606. We have no quarrel with the well considered decision in Award 2137, where it is said:

> "It is true that repeated violations of a rule do not change it. But repeated violations acquiesced in by employes may bring into operation the doctrine of estoppel. This is particularly true where the controversy concerns simply rates of pay. Wages are not accepted over a long period of time without protest if an employe believes that he is not receiving what is due him. Employes should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay."

Nor with the result reached in Award 1289 and 1811 under the facts as they there existed. The distinction between those cases and the one here in our opinion is that involved in it is a situation which not only precludes the application of the doctrine of either estoppel or laches under the facts and principles there found and announced, but also prohibits their application because of the continuity of the violation.

From what has been said it must be apparent our decision is that the carriers are obligated to reclassify the positions and bulletin for Night Chief Dispatcher at all points in dispute. Reparation, however, because of delay for which all parties are in part responsible, will be denied if positions are bulletined and filled within twenty-five (25) days from effective date of this award, otherwise, reparation to commence on the date of its rendition.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 carrier is violating the agreements.

AWARD

Claim for reclassification sustained.

Reparation limited as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of July, 1944.