

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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

- (a) The Missouri-Kansas-Texas Lines failed to comply with the rules of the train dispatchers' current agreement when on March 20, 1946, without conference or agreement, the carrier abolished the position of night chief train dispatcher at Muskogee, Oklahoma (which position was subject to the train dispatchers' agreement) with hours 10:00 P. M. to 6:00 A. M., and transferred worked theretofore performed by night chief train dispatcher to a newly established position of car distributor (the position not subject to the train dispatchers' agreement) with assigned hours from 9:00 P. M. to 6:00 A. M.
- (b) The position of night chief train dispatcher at Muskogee, Oklahoma shall now be restored and the work which falls within the scope of the duty of the night chief dispatcher be restored to that position, and that
- (c) Such train dispatchers, who by reason of this unilateral action of the management sustained and continue to sustain monetary losses, be compensated therefor by the carrier until the position is properly filled.

EMPLOYEES' STATEMENT OF FACTS: There exists an agreement on rules governing hours of service, compensation and working conditions of train dispatchers, including night chief train dispatchers, effective June 19, 1937. Article 1—Scope thereof reads as follows:

"The term 'train dispatcher' as herein used shall include all train dispatchers, excepting only one chief train dispatcher in each dispatching office who will not be required to perform trick train dispatcher duties."

The hours of service, compensation, and working conditions of the "one chief train dispatcher in each dispatching office, etc.," in the above-quoted rule, are covered by a memo-agreement dated September 17, 1945, but that position is not here involved.

Article 1—Scope, above-quoted, is followed by a "Note", reading:

Traffic	October 1942	December 1942	Percent Incr. or Deer.	March 1946	Percent Incr. or Deer.	November 1947	Percent Incr. or Deer.
Freight Loco. Mi.	211,776	240,155	11.8	140,018	51.2*	114,911	84.2*
Freight Train Mi.	209,023	236,735	11.7	134,991	54.8*	110,244	89.6*
Frt. Gross Ton Mi.	425,071	498,826	14.7	257,216	65.2*	296,357	43.4*
Pass. Loco Mi.	119,477	119,316	.1*	80,394	48.6*	67,599	76.7*
Pass. Train Mi.	110,153	110,894	.7	76,017	44.9*	66,231	66.3*
Pass. Car Mi.	1,010,916	1,053,501	4.0	893,148	13.1*	778,151	29.9*

(*) Denotes red figure, or decrease.

General Chairman Pagel in his letter of July 30, 1946, to Superintendent F. H. Schaller calls attention to Awards Nos. 1828 and 1831 of the Third Division. The Carrier has carefully reviewed these and various other awards of the Third Division, covering the principles involved in this dispute, but all of them involve different facts, circumstances, agreement rules, understandings and interpretations on other railroads, and none of them are influencing or controlling and applicable to the situation on this Carrier as specifically pointed out in this submission. The Carrier, therefore, submits that, under the provisions of the amended Railway Labor Act, this case must be, and insists that it shall be, considered and decided upon the basis of the facts, circumstances, agreement rules, understandings and interpretations applied and recognized by the parties on this property, and not on any other basis as Petitioner is apparently attempting to accomplish.

General Chairman Pagel in his letter of July 30, 1946, to Superintendent Schaller, also calls attention to statement of the Carrier in Dockets TD-2355 to TD-2362, inclusive, regarding the general supervision of train movements, but as the Petitioner, by his Statement of Claim of January 28, 1948, has withdrawn that part of the claim regarding work performed by Night Chief Dispatcher transferred to trick train dispatchers, the Petitioner has answered his own challenge and no further discussion or consideration of this point is necessary.

For all of the foregoing reasons the conclusion is inescapable and the Carrier requests that Claims (a) and (b) be denied.

The conclusion is also inescapable that Claim (c) should be denied for the same reasons that Claims (a) and (b) are denied, and, in addition, Claim (c) should be denied for the reason that it is vague, indefinite and uncertain as to the names of the individuals, amount each claims, the manner in which such alleged losses, if any, were sustained, and no such claims have been handled on the property in accordance with the provisions of the amended Railway Labor Act, and this claim is, therefore, not properly before the Division for consideration and decision. Claim (c) should also be denied for the reason that no train dispatchers were displaced, when the position of Night Chief Dispatcher was abolished March 20, 1946, and the incumbent of that position elected to return to his former position as Manager-Wire Chief in relay telegraph office at Muskogee, instead of exercising his seniority as train dispatcher, and forfeited his seniority as train dispatcher, with the result he sustained no monetary loss as result of the action of the Carrier in abolishing position of Night Chief Dispatcher, but any loss he may have sustained was the result of his own preference and election. The Carrier, therefore, requests that Claim (c) also be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The controversy here is over a claim of the American Train Dispatchers Association that the Missouri-Kansas-Texas Lines, in violation of the Dispatchers' current Agreement, abolished the position of night chief train dispatcher at Muskogee, Oklahoma, and transferred work theretofore performed by the occupant of such position to a newly established position of car distributor. The relief sought is restoration of the position and of the work falling within the scope of the duty of a night chief dispatcher, also compensation until the position is reestablished and filled for employees suffering loss by abolishment thereof.

The parties are not in accord as to the facts and have made no effort to reconcile their differences with respect thereto. For that reason it has been necessary to peruse and carefully analyze an extended record for the purpose of trying to arrive at a true picture of the factual situation on which the disposition of this claim depends. By the exercise of considerable effort that has been done and we are now able to and shall relate in chronological order, so far as practical, without reference to the respective versions of the parties respecting them, such pertinent facts as we deem to have been definitely and conclusively established from an unprejudiced examination of the record.

1. There is a current Agreement between the parties executed and effective on July 16, 1937, likewise a Memorandum Agreement subsequently executed recognizing the American Train Dispatchers Association as the authorized representative of Chief Train Dispatchers for all purposes here involved.

2. The first and second paragraphs of Article 1, the Scope Rule, of the current Agreement read:

"The term 'train dispatcher' as herein used shall include all train dispatchers, excepting only one chief train dispatcher in each dispatching office, who will not be required to perform trick dispatcher's duties.

NOTE: Definition of chief, night chief, and assistant chief dispatcher 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."

3. Night chief dispatchers were not regularly employed or assigned in train dispatching offices on this railroad for many years prior to November 1942.

4. At the Carrier's train dispatcher office in Muskogee, Oklahoma, night chief dispatchers had not been regularly employed or assigned from April 1924 to November 16, 1942, a period of over eighteen years.

5. There were no night chief dispatchers regularly employed or assigned in any train dispatching office in this railroad when the current dispatchers' Agreement was negotiated and became effective.

6. What has been heretofore stated respecting night chief dispatchers applies with equal force and is true as to assistant chief dispatchers.

7. On November 16, 1942, because of heavy and unprecedented war traffic the Carrier voluntarily established the position of night chief dispatcher with assigned hours from 7 P. M. to 7 A. M. at its Muskogee office and filled the position in due course.

8. A car distributor was regularly employed and assigned in the dispatchers' office at Muskogee when the current Dispatchers' Agreement was negotiated (hours 9 P. M. to 6 A. M.), when the position of night chief dispatcher was established (hours 9 P. M. to 6 A. M.), after its establishment (hours 6 A. M. to 3 P. M. and later following Third Division Awards 2316, et seq., hours 2 P. M. to 10 P. M.), and when such position was abolished as hereinafter related (hours 9 P. M. to 6 A. M., and later 10 P. M. to 6 A. M.).

9. March 20, 1946, the position of night chief dispatcher at Muskogee was discontinued or abolished account of substantial decrease in traffic without conference, negotiation or agreement and the assigned hours of the car distributor were changed from 2 P. M. to 10 P. M. to the hours last mentioned in the preceding paragraph.

So much for facts regarded as conclusively established and no longer, for our purposes, subjects for dispute or controversy.

It will be noted the claim as filed is in part based upon the premise the Carrier "transferred work theretofore performed by night chief dispatcher to a newly established position of car distributor." Passing for the present the question whether work was transferred to the car distributor it will simplify the issues and had just as well be now stated that under the facts and circumstances of this case this Division does not believe any new position of car distributor was established by the Carrier's action. But what of it? Too much emphasis has been placed by the parties upon the present status of the involved car distributor's position. Whatever the result of the Carrier's action in that respect it is of moment not to claimant but to the Telegraphers' Organization which is the recognized representative of the car distributors. What is of concern to claimant is whether as a result of the abolishment of the night chief dispatcher's position work was—and we are less technical than Carrier would have us be in its submission—transferred to, given to, or required to be performed by the car distributor which properly belonged to the night chief dispatcher under and by virtue of the Dispatchers' current Agreement. Thus we come to the vital and all decisive issue in this controversy, an issue which requires further analysis of the record and consideration of facts having an entirely different status than those heretofore related.

On the issue just stated the parties assume unreconcilable positions. Time after time the petitioner in its ex parte submission and in its oral presentation makes general statements in substance to the effect the duties of the night chief dispatcher still exist as Muskogee and are being performed by the car distributor. The Carrier makes assertions directly to the contrary. Charges and counter charges are made by each with respect to that subject. The trouble is that neither statements nor charges unsupported by proof are sufficient to justify this Division in making an affirmative Award.

The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance. We have read and reread the record for the purpose of determining whether there is sufficient concrete evidence to be found there to enable us to say the petitioner has established to our satisfaction its claim that as a result of the abolishment of the night chief dispatcher's position at Muskogee work properly belonging to such position has been given or transferred to or required of the car distributor's position. No necessity exists for a detailed statement of what the record reveals or fails to reveal. It will suffice to say that careful as our search has been we have failed to find sufficient evidence to permit us to arrive at any such conclusion and are required to conclude the claim must be denied for failure of proof.

The numerous Awards cited by the parties in support of their respective positions have been read with interest but are not discussed for the reasons they all deal with facts and circumstances entirely different than those presented by the record in the instant case. For instance, Awards 2526 and 2527 of this Division, on which claimant places great weight, while sound authority for the proposition a Carrier cannot abolish a position and transfer its work to one in some other class, are not in point here because the question of sufficiency of proof was not involved.

In reaching our conclusion we have not been unmindful of the possibility, assuming certain matters left by the record in its present state to pure speculation and conjecture can be established by competent proof, that a more complete preparation and presentation of petitioner's cause might have produced evidence sustaining its contentions with respect to this claim. In that connection consideration was given to remanding this case for further proceeding on the property but rejected as inadvisable. As we understand it, the abolishment of one position and the transferring of its work to another in violation of a rule of a current Agreement is a continuing violation for which redress may be had at any time sufficient facts are available to warrant relief. Therefore, this Award, except as it affects compensation claimed under sub-division (c) of the claim up to the date of its rendition, is not *res judicata* and will not preclude further action by the petitioner if deemed advisable under facts presently existing.

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 Employees involved in this dispute are respectively carrier and employees 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 petitioner failed to establish its claim.

AWARD

Claim denied for the reasons and on grounds indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of July, 1948.