

Award No. 10735

Docket No. TD-11289

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Robert J. Ables, Referee

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**PARTIES TO DISPUTE:**

**AMERICAN TRAIN DISPATCHERS ASSOCIATION**

**MISSOURI PACIFIC RAILROAD COMPANY — GULF DISTRICT**

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

(a) The International Great Northern Railroad Company, (Missouri Pacific Lines) hereinafter referred to as "the Carrier" violated the currently effective agreement between the parties to this dispute, particularly Article IX-(d), when it failed and refused to fill the position of Chief Dispatcher (Division Trainmaster) on December 1, 1958, at Palestine, Texas with a qualified employe from the current seniority roster.

(b) The Carrier shall now be required to fill the Position of the Chief Dispatcher (Division Trainmaster) at Palestine, Texas, with a qualified employe from the current seniority roster.

**EMPLOYEES' STATEMENT OF FACTS:** There is in effect an Agreement between the parties to this dispute bearing an effective date of May 1, 1948, on file with your Honorable Board and by this reference is made a part of this submission as though it were fully set out herein.

The following Articles, which are particularly pertinent to this dispute, are quoted here for the convenience and ready reference of your Board.

**"ARTICLE 1.**

**"(a) Scope.**

This Agreement shall govern the hours of service and working conditions of train dispatchers. The term 'train dispatcher', as hereinafter used, shall include Night Chief, Assistant Chief, trick, relief and extra train dispatchers. It is agreed that one Chief Dispatcher (now titled Division Trainmaster on this property) in each dispatching office shall be excepted from the scope and provisions of this Agreement.

"The rule leaves the final determination in the selection of the employe to the judgment of the Carrier. We cannot read into the Agreement a requirement that discussion must first be had with dispatchers or consent be first obtained from them before Carrier is justified in making the appointment. That does not mean that the Carrier may act arbitrarily, and under the pretense of giving consideration, select an employe from another district without consideration of seniority, fitness and ability."

It is to be observed that in the case covered by Award 3131 your Board specifically held that under the rule there involved, which stated that:

"\* \* \* consideration will first be given to train dispatchers on the seniority territory involved."

the Carrier is not required to select a Chief Dispatcher from the same seniority district. It was also found that the employe selected for promotion to Chief Dispatcher appeared to have ample qualifications for the position, and based thereon your Board concluded that—

"In the fact of this record we do not believe that Claimants have proved that consideration was not first given to the dispatchers here involved within the meaning of the rule."

In the instant case, as has been shown, there is no rule requiring the Management to first consider train dispatchers on the territory involved; that is, the territory formerly known as the International-Great Northern Railroad prior to the merger of the International-Great Northern and the group of properties known as the Gulf Coast Lines into the Missouri Pacific Railroad Company, effective March 1, 1956. Consideration was, however, given to the train dispatchers on the territory formerly the International-Great Northern before Mr. Cunningham was selected for appointment as Chief Dispatcher. As has been stated, Mr. Cunningham holds seniority as a train dispatcher and is properly qualified for the position of Chief Dispatcher.

In view of the foregoing the Carrier fully discharged its obligation under Article IX (d) of the effective agreement and there was no violation of the agreement in the action taken by the Carrier.

All matters contained herein have been the subject of discussion in conference or through correspondence between the parties.

(Exhibits not reproduced).

**OPINION OF BOARD:** On December 1, 1958 the vacant position of Chief Dispatcher (titled Division Trainmaster on this property) was filled by one, M. H. Cunningham, who was not a dispatcher with seniority on the seniority district involved.

The Employes contend that the Dispatchers' Agreement was violated when the Carrier failed to give consideration to any one of the fifteen eligible senior dispatchers, according to their seniority, in filling the Chief Dispatcher position.

The Carrier contends that it gave due consideration to eligible dispatchers; that selection of personnel for this official position is a matter

of managerial judgment; that this judgment was exercised fairly; and that, accordingly, Carrier did not violate the agreement.

The controlling rule is Article IX (d) which provides:

"Promotions.

In the filling of vacancy of position of excepted Chief Dispatcher (Division Trainmaster), senior train dispatchers will be considered in line with their seniority. Nothing in this rule, however, is to be construed to make such assignment compulsory when in the judgment of the Management the employee is not properly qualified to fill position."

There is more to this case than meets the eye, but we do not know what it is. Limited to the record, we hold in favor of the Carrier.

The first sentence of the rule requires the Carrier to "consider" senior train dispatchers in line with their seniority. This word has broad parameters. Those "who" shall be considered is clear. "When" such consideration shall take place can be inferred—before the selection. But "how" the required consideration shall be accomplished is wide open. It could be that eligible dispatchers would be called before Carrier officials for interrogation and review of qualifications. Or, it could be as the Carrier states was the case here, which was that officials conferred amongst themselves and concluded that none of the fifteen dispatchers in the seniority district, considered in line with their seniority, was properly qualified to fill the position of Chief Dispatcher.

Since the second sentence of the rule makes the Carrier the final judge whether the employee is properly qualified, there can be no contest of the Carrier's judgment that none was qualified (barring a showing by the Employees of arbitrary or capricious action.) Award 3131 (Youngdahl) and First Division Award 13470 (Munro).

Freed from any further contractual obligation to select "local" dispatchers, the Carrier could make its own appointment to this excepted, official position.

Such construction of Article IX (d) may make the promotion rule meaningless, as contended by the Employees, but this is the inevitable view of the disadvantaged party when by agreement the other party holds all the cards.

Award 6816 (Robertson) cited by the Employees clearly supports their view that the Carrier must give the required consideration to named dispatchers or a violation of the agreement will be found. In that case it was held that the Carrier had not given "full and unprejudiced consideration" as required in the promotion rule. Intent was determined by circumstantial evidence.

While it is little more than quibbling with that decision, it is noted that a temporary assignment as Chief Dispatcher was involved rather than a permanent assignment, as is the case here. There is enough difference in these assignments to make the precedent concerning the one not binding on the other. In any event, we are persuaded that the dissent to Award 6816 and other authority constitute the better view.

In Award 3131, the Carrier was required to give consideration on the basis of seniority, fitness, and ability to all train dispatchers employed by the Carrier, giving first consideration to train dispatchers on the seniority district involved. In upholding the Carrier's selection of a dispatcher from another seniority district, who had not even worked for the railroad for ten years, it was held that:

"The rule leaves the final determination in the selection of the employee to the judgment of the Carrier. We cannot read into the Agreement a requirement that discussion must first be had with dispatchers or consent be first obtained from them before Carrier is justified in making the appointment."

Thus, under a more strict rule than is present in the claim here, and involving the selection of a Chief Dispatcher further removed from the Carrier's operations, it was held in Award 3131 that the duty of the Carrier to consider certain employees did not place any special requirement on the Carrier to select its Chief Dispatcher from such employees.

The basis of this holding and of the finding here is that the choice of personnel to discharge responsible duties in industry and commerce everywhere is recognized as a prerogative of management. First Division Award 12336.

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

That the parties waived oral hearing;

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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of August 1962.