Award No. 11059
Docket No. TD-12805

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Pennsylvania Railroad Company, (hereinafter referred to as "the Carrier") violated, and continues to violate, the Scope and Definitions of Part II of the Schedule Agreement between the parties, and Item #1 of Memorandum of Agreement effective October 18, 1957, when after 7:00 A. M., October 23, 1957, it abolished the Movement Director positions in the Fort Wayne, Indiana, office and thereafter permitted and required duties of Movement Directors to be performed by employes and/or supervisory officers not within the Scope of the Agreement.

(b) Carrier shall now compensate the senior available extra Movement Director for each day and each trick, one day's compensation at pro rata rate of Movement Director, beginning October 23, 1957 and continuing until the said violation has been terminated.

(c) In the absence of an extra Movement Director the Carrier shall compensate the senior available assigned Movement Director on their respective assigned weekly rest days at time and one-half rate.

(d) Carrier shall be required to restore all Movement Director duties to employes within the Scope of the Agreement.

(e) That a joint check of the Carrier's records be made by representatives of the Carrier and the claimant organization to determine the individual claimant employes herein.

EMPLOYES' STATEMENT OF FACTS: At the time the instant dispute arose there was in effect an Agreement between the parties, bearing the date July 1, 1950. A copy thereof is on file with this Board and by this reference is incorporated into this submission the same as though fully set out herein.

examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all of the same.

All data contained herein have been presented to the employes involved or to their duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim of the American Train Dispatcher's Association that the Carrier has violated and continues to violate the Scope of Part 2 of the Schedule Agreement between the Carrier and this Organization and Item #1 of the Agreement consummated on October 18, 1957 between the Superintendent-Personnel, Northwestern Region, and this Organization by removing work and duties previously performed by Movement Directors at Fort Wayne, Indiana, and allowing it to be performed by Power Clerk, Yardmaster, Chief Clerk, Train Dispatcher and Officials at Fort Wayne and by Clerk in the Movement Office at Chicago, Illinois. The violation consisting of a transfer of certain duties and work to the aforementioned employes who are not employes of the Movement Director craft or class; subject duties and work previously performed by Movement Directors prior to the abolishment of the Movement Directors positions at Fort Wayne, Indiana, effective 7:00 A. M. October 23, 1957.

"SCOPE

* * * * *

"(Effective July 1, 1950) The term "Movement Director," as used in Part II of this Agreement, shall include only positions and duties of Movement Directors and Assistant Movement Directors, and employes occupying positions as relief or extra Movement Directors and Assistant Movement Directors, performing service on positions classified in the Rate Schedule applicable to Part II of this Agreement."

Item #1 of Agreement dated October 18, 1957.

"IT IS AGREED:

"1. Effective 7:00 A. M., Wednesday, October 23, 1957, Movement Director positions in the Movement Directors' Offices at Fort Wayne, Indiana, will be abolished and duties incident thereto will be transferred to and absorbed by the Movement Director and/or Assistant Movement Director positions presently in existence in the Movement Office, Chicago Union Station, Chicago, Illinois."

Under the Agreement of October 18, 1957, all duties that belonged to Movement Directors exclusively were to be transferred to Chicago. Three of the Power Clerks at Fort Wayne were former Movement Directors and knew the duties of that position as well as the duties of Power Clerks. They were instructed in writing by the Carrier not to perform any of the duties belonging to Movement Directors.

Claimants contend that they were verbally instructed to do such work. No proof nor evidence was offered to support this contention. This allegation was denied by Carrier. In absence of such evidence it is not possible to sustain the claim.

For the foregoing reasons, we believe the Agreement was not violated.

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 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 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 24th day of January 1963.

LABOR MEMBER'S DISSENT TO AWARD 11059, DOCKET TD-12805

Even a casual examination of the record upon which the Board's decision must be based in this case discloses an incredible, almost preposterous and unconscionable disregard of the evidence adduced in support of the Employes' claim. The holding of the majority also evidences either an ignorance of or myopic disregard for principles to which this Board has consistently adhered.

Here is an outstanding example of the too many instances wherein this Division presumes to fairly, objectively, and intelligently dispose of issues raised and evidence adduced in an extensive record within the compass of one brief paragraph, and even that factually incorrect.

That paragraph, the next to the concluding one in the opinion, states:

> "Claimants contend that they were verbally instructed to do such work. No proof or evidence was offered to support this contention. This allegation was denied by the Carrier. In absence of such evidence it is not possible to sustain the claim."

In the first place, the holding of the majority is obviously predicated on the thesis that only Power Clerks were performing Movement Director work. But the record is replete with specific instances, none of them denied in the record, which disclose carrier officers and supervisory personnel also performing such work. Indeed, Carrier itself submits evidence verifying this fact.

Further, the basis of the majority's holding is based on the premise that there is "no proof or evidence offered" to support the contention that the Power Clerks were verbally instructed to perform the work here involved. This despite the voluminous exhibits in the record that they were performing the work in question. But there IS evidence in the record in the form of an express statement of one of the Employes involved that verbal instructions were given to perform the work. **And the entire record may be searched without finding any denial of this evidence by the Carrier.** During the panel argument the Referee called upon the Carrier Member to point to any such denial. And the only thing he could point to was what Carrier's highest designated officer had to say in denying the claim — that is, that the Carrier "understood" that the Power Clerks had discontinued performing the Movement Director work in question. Therefore the statement that "this allegation was denied by Carrier" is FACTUALLY INCORRECT! And certainly the majority should be familiar with the well established principle that undenied statements of record must be accepted as correct. It has been so held on numerous occasions, as in Awards 9512, 10364, 10536 and First Division Award 19882.

Indeed, the issue was raised only, and somewhat obliquely at that, in the Carrier Member's brief submitted during the panel argument. But, again, at no time during negotiations on the property, and the author challenges any of the majority to controvert it, did the Carrier deny that verbal instructions had been given the Employes to perform the work in question. And it is incredible, after all the years this Board has been in operation, that anyone short of an ignoramus would contend that these disputes are to be disposed of upon any other basis than the record before it reciting the negotiations on the property. Obviously, it would be no less than the height of brazen effrontery to fob off any theory that a Johnny-come-lately attempt by the Carrier Member to come forth with a denial which is not supported by the record would be entitled to any credence.

The Award is also factually incorrect in stating as a fact that:

> ". . . all duties that belonged to the Movement Directors **exclusively** were to be transferred to Chicago." (Emphasis ours.)

Reference to the provisions of the agreement cited and quoted in the Award just prior to that statement says very clearly and simply that the "duties incident" to the Movement Director positions will be transferred to and absorbed by the Movement Director office in Chicago, which obviously was not the case.

It is most unfortunate, this writer submits, that such an extensive record, involving very basic issues, and replete with evidence, should be dealt with so summarily and incorrectly. For such shoddy workmanship, if indeed it merits any such appellation, is completely without merit or precedent value.

R. H. Hack
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 11059, DOCKET TD-12805

This is another instance where the Dissenter substitutes invective for contractual support. It is most unfortunate, but nevertheless a fact, that

the Board's functions are demeaned by such personal attacks. We do not intend to dignify them with an answer.

However, we would be remiss in our duties if we failed to correct a statement by the Dissenter which has a sandy bottom. It is alleged that Power Clerks were told to disregard Carrier's instructions not to perform Movement Director's work and that such verbal instructions were never denied by the Carrier. We found that Carrier did deny the issuance of such verbal instructions. The Dissenter now says this finding is "FACTUALLY INCORRECT".

Suppose we examine the reply made by the Carrier and judge for ourselves whether it is "factually incorrect". The Manager, Labor Relations reply reads, insofar as pertinent, as follows:

> "* * * On November 8, 1957, claims for payment as outlined in the subject were presented. Following receipt of these claims, on November 11, 1957, instructions were renewed, specifically to the Power Clerks at Fort Wayne, to refrain from performing **any** of the work of the abolished Movement Director positions. It is our understanding that the Power Clerks did, in fact, discontinue performing all of the work of the abolished Movement Director positions which, through force of habit, they had occasionally performed. (Emphasis theirs.)
>
> **"If, as you allege, the Power Clerks are continuing to perform Movement Directors' work, IT IS IN VIOLATION OF INSTRUCTIONS AND WITHOUT ASSIGNMENT BY OR KNOWLEDGE OF THE COMPANY.** * * *" (Emphasis ours.)

The Carrier could not have been more emphatic in its denial of the allegation advanced by Petitioner. The Carrier stated "it is without assignment by or knowledge of the Company." At this point, the burden of persuasion shifted to Petitioner. He failed to carry that burden. Therefore, the Majority properly found the Carrier had denied the allegation and that in the absence of proof or evidence to support it, the claim could not be sustained.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts