

Award No. 12505

Docket No. TD-14337

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Joseph S. Kane, Referee

PARTIES TO DISPUTE:

**AMERICAN TRAIN DISPATCHERS ASSOCIATION
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

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

(a) The Chicago, Burlington & Quincy Railroad Company (hereinafter referred to as "the Carrier") violated the effective Schedule Agreement between the parties, specifically Article 1, Rules 1 and 2 thereof, when on August 11, 1962 to September 3, 1962, inclusive, between the hours of 8:00 A. M. and 12:00 Midnight, it required and/or permitted employees not within the scope of said agreement to perform work covered thereby, within the hours of the 8:00 A. M. to 4:00 P. M. and 4:00 P. M. to 12:00 Midnight shifts.

(b) The Carrier shall now compensate the senior available extra train dispatchers for the Alliance, Nebraska, train dispatching office one day's compensation at pro rata rate of trick train dispatcher for each of the dates and shifts specified in paragraph (a) of this Statement of Claim by reason of said violations, or

(c) In event no extra train dispatchers were available on said dates then compensate assigned train dispatchers, observing assigned weekly rest days and available for service, at the overtime rate of trick train dispatcher.

(d) Named claimants as referred to in paragraphs (b) and (c) above on specific dates as referred to in paragraph (a) above are identified as follows:

Name	Status	Date	Hours Pro Rata	Claimed Overtime
E. B. Savage	Extra	August 11	8	
C. E. Phillips	Assigned Rest Day	August 11		8
E. B. Savage	Extra	August 12	8	
W. H. Nortrup	Assigned Rest Day	August 12		8

Name	Status	Date	Hours Pro Rata	Claimed Overtime
E. R. McGuire	Assigned Rest Day	August 13		8
J. E. Roten	Assigned Rest Day	August 13		8
E. R. McGuire	Assigned Rest Day	August 14		8
J. C. Hardy	Extra	August 14	8	
G. H. Fawcett	Assigned Rest Day	August 15		8
J. A. Ross	Assigned Rest Day	August 15		8
E. B. Savage	Extra	August 16	8	
G. H. Fawcett	Assigned Rest Day	August 16		8
L. R. Bentley	Assigned Rest Day	August 17		8
F. H. Hall	Assigned Rest Day	August 17		8
E. B. Savage	Extra	August 18	8	
C. E. Phillips	Assigned Rest Day	August 18		8
E. B. Savage	Extra	August 19	8	
W. H. Nortrup	Assigned Rest Day	August 19		8
H. W. Lindeen	Assigned Rest Day	August 20		8
J. E. Roten	Assigned Rest Day	August 20		8
E. R. McGuire	Assigned Rest Day	August 21		8
J. C. Hardy	Extra	August 21	8	
J. A. Ross	Assigned Rest Day	August 22		8
J. C. Hardy	Extra	August 22	8	
E. B. Savage	Extra	August 23	8	
J. C. Hardy	Extra	August 23	8	
E. B. Savage	Extra	August 24	8	
F. H. Hall	Assigned Rest Day	August 24		8
E. B. Savage	Extra	August 25	8	
L. R. Bentley	Assigned Rest Day	August 25		8
E. B. Savage	Extra	August 26	8	
W. H. Nortrup	Assigned Rest Day	August 26		8
H. W. Lindeen	Assigned Rest Day	August 27		8
J. E. Roten	Assigned Rest Day	August 27		8
G. H. Fawcett	Assigned Rest Day	August 28		8
E. R. McGuire	Assigned Rest Day	August 28		8

Name	Status	Date	Hours Pro Rata	Claimed Overtime
J. C. Hardy	Extra	August 29	8	
J. A. Ross	Assigned Rest Day	August 29		8
J. C. Hardy	Extra	August 30	8	
E. B. Savage	Extra	August 30	8	
E. B. Savage	Extra	August 31	8	
L. R. Bentley	Assigned Rest Day	August 31		8
C. E. Phillips	Assigned Rest Day	September 1		8
L. R. Bentley	Assigned Rest Day	September 1		8
W. H. Nortrup	Assigned Rest Day	September 2		8
H. W. Lindeen	Assigned Rest Day	September 2		8
H. W. Lindeen	Assigned Rest Day	September 3		8
E. D. Lamb	Assigned Rest Day	September 3		8

EMPLOYEES' STATEMENT OF FACTS: There is an agreement between the parties, effective May 1, 1958, 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.

Article I, Rules 1 and 2 which are particularly pertinent to this dispute are quoted here for ready reference:

"ARTICLE I SCOPE AND DEFINITIONS

RULE 1—SCOPE

The rules of this Agreement shall govern the hours of service, compensation and working conditions of train dispatchers. The term 'train dispatcher' as used in this Agreement shall include chief, night chief, assistant chief, trick, relief or extra train dispatchers, provided however, that one chief dispatcher in each dispatching office shall be excepted from all of the provisions of this Agreement. However, he shall retain and accumulate seniority in accordance with Rule 14. It is understood that said excepted chief train dispatchers will be granted one assigned rest day each week and an annual vacation, and that appointments to such positions will be made from the ranks of dispatchers.

RULE 2

DEFINITION OF TRICK TRAIN DISPATCHER

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

2. The practice on the property at Keystone Spur for the past five years supports the Carrier's position that dispatchers have no authority over, nor are held responsible for, train movements confined exclusively to this trackage designated as being within yard limits.
3. The use of Clearance Form A by operators for the purpose of advising crews the condition of block when the second amusement train began operation, did not create any change in the responsibility of train dispatchers, and therefore constituted no violation of the schedule agreement.
4. The Petitioner's contention that Schedule Rules 1 and 2 support the claim is unfounded and they have failed to submit proof of these assertions.
5. Yard movements are made in numerous yards on the property on authority of yardmasters, switchtenders, or Operating Rules, and therefore supports the Carrier's position that this is not exclusively assigned to dispatchers.
6. None of the claimants suffered any damage whatever by reason of the operator's conduct made the subject of this claim; and on ten of the claim dates, the named claimants were not even available.

In view of the foregoing, this claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute involves the operation of trains on Carrier's Alliance Division, Keystone Spur, between Hill City, South Dakota and Keystone, South Dakota, a distance of 9.45 miles of single track. The Black Hills Central Railroad Company leased trackage rights over this spur, in order to operate an amusement train during the tourist season of approximately thirteen weeks. In addition to this operation, the Burlington Road operated a regular train over the same spur tri-weekly.

On August 18, 1957, the Black Hills service was inaugurated and operated according to Rule 908 of the Carrier's Operating Rules, without train orders or Form A. On August 11, 1962, an additional Black Hills Central train was added to the service between Keystone and Oblivion. On August 11, 1962, the operating instructions were changed by Bulletin No. 10, providing for operators at Oblivion and Hill City, and requiring the operators to give instructions to the train crew by the use of Form A, rather than verbally as had been done in the past.

On August 18, 1962, the Claimant's Organization objected to the use of Form A, without having this form approved by the dispatcher at Alliance, Nebraska. This delegation of the dispatchers' work coming within the Scope of its Agreement, specifically Rule 1 and 2, of Article 2. The responsibility for the direction of train movements by train orders Form A, or otherwise came within the scope of the craft or class of train dispatchers. It was contended further that a Form A was necessary before making a trip on the spur track and necessary for the operator to call the dispatcher at Alliance, Nebraska, on the telephone and receive an O.K. for such a train movement. The Carrier's Operating Rule 221(a) and the Standard Code of Operating Rules, Rule 211, also required such approval by the dispatcher. The violations of the Agreement commenced on April 11, 1962, pursuant to Carrier's Bulletin No. 10 and ended on September 4, 1962, when Bulletin No. 18 cancelled No. 10.

The Scope Rule is as follows:

"ARTICLE I
SCOPE AND DEFINITIONS

RULE 1—SCOPE

The rules of this Agreement shall govern the hours of service, compensation and working conditions of train dispatchers. The term 'train dispatcher' as used in this Agreement shall include chief, night chief, assistant chief, trick, relief or extra train dispatchers, provided however, that one chief dispatcher in each dispatching office shall be excepted from all of the provisions of this Agreement. However, he shall retain and accumulate seniority in accordance with Rule 14. It is understood that said excepted chief train dispatchers will be granted one assigned rest day each week and an annual vacation, and that appointments to such positions will be made from the ranks of dispatchers.

RULE 2

DEFINITION OF TRICK TRAIN DISPATCHER

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

Operating Rules cited:

"OPERATING TIME TABLE NO. 8

RULE 221

(a) Where trains are operated on single track, Clearance Form A must be filled out by the operator before clearing a train, showing thereon, without erasure or alteration, the total number of train orders and the number of each train order, if any, addressed to a train. He will then repeat from the clearance to train dispatcher the information shown thereon. The dispatcher will make the required record in the train order book, and if operator has correctly repeated the number of all train orders addressed to a train will respond by giving 'OK', the time, and the Superintendent's initials, which the operator will endorse on the Clearance."

Standard Code of Operating Rules:

"RULE 211

Clearance Form A must be filled out by the operator before clearing a train, showing thereon, without erasure or alteration, the total number of train orders and the number of each train order, if any, addressed to a train. He will then repeat from Clearance Form A to the train dispatcher the information shown thereon. The dispatcher will make the required record in the train order book, and if operator has correctly repeated the numbers of all train orders addressed to a train will respond by giving 'OK', the time and his initials, which the operator will endorse on the Clearance Form A."

The Carrier's contentions denied there were any violations of Rules 1 and 2 of the Agreement, or that this work was the exclusive work of the dispatchers. The track in question was a spur track, entirely within yard limits. This work traditionally has not been within the Scope Rule of the dispatchers, but under the control of yard supervisors and others. Thus Rule 908 properly allocated the work in question in this dispute. From August 18, 1957, bulletined instructions were issued by the Superintendent to the effect that this train would operate on the Keystone Spur as provided by Operating Rule 908 without clearance Form A or train orders. The agent at Hill City gave such instructions verbally to the train crew about the block conditions on the spur track. This procedure was adopted because the train movement was in yard limits; similar to a switching movement, wherein the dispatcher does not direct the movement or keep a record of the same. These instructions concerned a block condition not train orders. Furthermore, these instructions remained in effect from August 18, 1957 to August 10, 1962, or nearly five years, without objection by the Claimants.

When the second Black Hills Central train began operation on August 11, 1962, the instructions were amended only to the extent that operators located at both Hill City and Oblivion were to issue Clearance Form A as a precautionary measure. No additional information was added that had not been given verbally, just recording the condition of the block. No decisions were to be made by either operator with respect to which train would run first, arranging meets or to "OS" the trains to the dispatcher. All that was required of the operator was to know the condition of the block and transmit this information to the train crew on a Form A. The dispatcher at Alliance, Nebraska could not determine the condition of the block from his records, nor did he record the movement on the train sheet. The calling of the dispatcher would add nothing to the efficient operation of the train, or the responsibilities of the dispatcher.

Thus, the responsibilities of the dispatcher were the same prior to and subsequent to the use of Clearance Form A. If the Agreement was not violated when the instructions were verbal, the use of a Form A could not result in a violation of the Rules unless the contents of such form required more information. Operating Rule 908 is as follows:

"RULE 908

Engines and cars must be moved on yard tracks only as such tracks are seen or known to be clear.

Before moving engines and cars on station, or industry tracks, train and yardmen must know that the cars can be moved with safety.

Switches must be properly lined for the movement to be made.

Unless otherwise authorized cars must not be shoved on yard tracks, team tracks, industry or freight house tracks, until a member of the crew is stationed at the opposite end of tracks for the purpose of ascertaining the amount of room or clearance and prevent shoving cars out to foul.

Where conditions make it necessary, hand brakes must be set before placing cars at industries, at team tracks, or on other tracks.

Where gates are provided across tracks, or where tracks extend into buildings through openings equipped with doors, a member of the crew must first see that door or gate is open and properly secured, and then place himself in a position to pass signals, to insure cars being spotted without causing damage.

Care must be taken in switching tracks on which occupied company service cars are stored and when practicable they must not be moved in switching operations.

When occupied company service cars are set out of a train at a station, or on a track between stations, or when moved from one track to another at a station, the conductor must notify the Chief Train Dispatcher.

Trains will be notified of occupied company service cars when such cars occupy sidings or station tracks used as sidings."

An examination of the Scope Rules reveals that they are general in nature and not detailing any particular work to any class or craft. They fail to show that this work is exclusively that work of the Claimant Organization. Rule 1 of Article 1 does not describe the work but lists job titles. Rule 2 of Article 1 is a classification of Trick Train Dispatcher, without granting any exclusive right to any specific work. There is no mention in said rule that it was one of the functions of the Claimant to approve a Form A when it contains such block instructions as revealed in this record. The expression in Rule 2:

"... are to be primarily responsible for the movement of trains by train orders, or otherwise. . . ."

does not make the dispatcher exclusively responsible for the movement of trains by train orders or otherwise. In the facts before us, the operators were the employees responsible for the instructions given, not the dispatcher; no train orders were used nor record kept of the movement.

Does custom, tradition or past practice reserve these duties to the Claimant? Our answer is no. For approximately five years this operation was conducted on the basis that the block instructions given to the train crew verbally, were permissive and not in violation of the Agreement. Throughout this period, no objections were raised by the Claimants that the work cited here belonged to them. There is no allegation in the record that the use of the Form A changed the method of operation or that it contained any information other than what information had been given verbally for the past five years. There is no allegation that train orders were given as with the Carrier's own train operating over the same spur. It has been alleged by the Claimants that this operation required checking with the dispatcher when it operates over the spur line. However, it must be observed that this regular Burlington train moves over other tracks by train order necessitating that the dispatcher have knowledge of this movement, which he records and directs other trains based on the information so received.

The Agreement does not give to the dispatcher the exclusive right to approve all situations where Form A is used. It has been alleged and not denied that the only purpose in using Form A was to advise as to the condition of the block as a substitute for a block signal. Any other type form could have been used, but this form was available. The information contained on

the form had no effect on the operation of the train after the block condition was known. No records were kept of the movement by the dispatcher nor was he acquainted with the situation. He would only be giving approval to the train movement after the operator gave him the information about the block. The approval by the dispatcher would serve no purpose.

The Complainant has relied on Operating Rule 221, of the Carrier's Operating Rules and Rule 211 of the Standard Code of Operating Rules, in support of their position. Rule 221 specifically provides for the use of Form A where train orders are used in directing the movement of a train. In this dispute, train orders were not used and have not been so alleged to have been used or contained in Form A. Rule 211 also refers to train orders which is not denied. However, the question of whether Form A contained train orders was never raised or placed in issue. In Award 7770 of this Division it was held: "The claim must stand or fall on the rules above cited, for since the operating rules are established unilaterally by the carrier, they may be changed unilaterally and a departure from the practice prescribed in these rules is not comparable to a violation of agreement rules". Thus, we are bound by our interpretation of the Scope Rule rather than the Operating Rules.

From the evidence presented and the Awards of this Division, we are of the opinion that the Agreement was not violated. It appears in the record that the Carrier has attempted to continue to have this work performed in as nearly the same manner by the same employees, after the use of Form A as it was prior to the use of Form A. No allegation has been made in the record that the Rule was violated prior to August 11, 1962, when Form A was introduced. Form A contained no further information than was transmitted verbally. In Award 12289 of this Division, we held: "We should be guided by the contents of the form rather than the form itself." These are the tests of whether the Agreement was violated.

Thus, the record before us does not show that this work on this location exclusively belongs to the train dispatchers, nor have they had this work exclusively reserved to them by tradition, practice or custom.

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 21st day of May 1964.

**LABOR MEMBER'S DISSENT TO AWARD 12505,
DOCKET TD-14337**

The Award of the majority in Docket TD-14337 is a classic example of one which so clearly evidences an incredible disregard for the precisely stated issue and the record properly before the Division for its consideration.

Even a cursory reading of the record discloses that the Carrier, resorting to what may fairly be regarded as contemptuous unconcern for this Board's rule and established principles, devoted much of its Ex Parte Submission to issues which had neither been raised nor discussed by the parties during negotiations on the property. All this was expressly pointed out at some length, with ample citation of authority, in the Employees' response to the Carrier's Submission. The author of this dissent is regretfully impelled to express grave doubt as to whether the Referee even read the document in reference. Certainly there is no room for doubt concerning the fact that new issues cannot be raised for the first time when a dispute reaches this Board. That principle is little short of a truism. Yet it is very obvious from even a casual reading of Award 12505 that the Referee did consider issues not properly of record. It is equally obvious that those improperly injected issues, clearly barred from consideration, materially colored and influenced the Referee's erroneous conclusions. The issues properly before him, including very relevant exhibits submitted—and properly submitted—by the Employees have been completely disregarded. In view of all this the Award is not dispositive of the issues properly before the Board and is wholly devoid of any precedential value.

Moreover, Award 12505 is replete with factual misstatements. However, it would serve no useful purpose to extend this dissent to the length which would be necessary to point out and comment upon such errors. This for the reason that the Carrier subsequently restored to the claimant employees their claimed right to authorize Clearance Form A as to the train operations involved. That was the issue of the whole dispute.

In view of this, it would likewise be inappropriate to comment upon the material significance and weight accorded to the contention that the Employees had "acquiesced" in a practice for some five years "without objection". No extended comment is warranted, for even a juvenile would understand from reading the record properly before the Board that there were very important differences between the train operation made effective in 1962, and which resulted in this dispute, and the operation on the limited and strictly narrow gauge basis during the alleged period of "acquiescence".

Not only was Award 12505 rendered in disregard of this Board's rules and principles relating to the injection of entirely new issues—which issues were considered and obviously accorded material weight—the complete disregard for the record and issues properly before it have resulted in a clearly erroneous and palpably stupid holding. As Montaigne so aptly put it, "No one is exempt from talking nonsense; the misfortune is to do it solemnly."

R. H. Hack
Labor Member