

Award No. 13242

Docket No. TD-14759

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

**THE NEW YORK CENTRAL RAILROAD,
EASTERN AND NEW YORK DISTRICTS**

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

(a) The New York Central Railroad Company (hereinafter referred to as "the Carrier") violated, and continues to violate, the existing agreement between the parties, Article 4(g) and 4(i) thereof in particular, by its failure and refusal to remove the name of S. J. Orlando from the Electric Division train dispatchers' seniority roster.

(b) The Carrier shall now be required to remove the name of S. J. Orlando from the Electric Division train dispatcher seniority roster.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, a copy of which is on file with your Honorable Board, and the same is incorporated into and as a part of this submission, as though fully set out herein.

Article 4(g) and 4(i) of the Agreement, referred to in the Statement of Claim herein are here quoted in full for ready reference:

"Article 4(g):

Failure to perform service as train dispatcher during a period of ninety consecutive days shall cause a forfeiture of seniority except when such non-performance is due to lack of work, sickness, or as otherwise provided in these rules or as otherwise agreed upon in specific cases between the parties hereto. A train dispatcher who voluntarily relinquishes his position and enters other service (except as provided in Article 4(i)) shall forfeit his seniority as train dispatcher.

Article 4(i):

Train dispatchers now filling or who may hereafter accept official positions with the railroads parties hereto shall retain and accumulate seniority. If they return to positions covered by this agreement they may, unless otherwise agreed upon by the superintendent and office chairman.

(a) return to the position held at time they accepted the official position,

not be considered, however, the rule as written has no such requirement and we necessarily find the claim as filed to be without merit and it should be denied."

CONCLUSION: Carrier submits that all employees promoted from the ranks of train dispatchers to positions of official capacity with the Carrier must be given similar treatment under the seniority rules.

Previous cases and the correspondence in the Exhibits reproduced by Carrier, give evidence that Carrier's action is in accordance with past practice and it has not violated the agreement. The claim of the Organization should therefore be denied.

(Exhibits not reproduced).

OPINION OF BOARD: The seniority provisions of the Agreement are found in Rule 4, the following excerpts therefrom being pertinent:

"(g) FORFEITURE OF SENIORITY (6-1-1951)

Failure to perform service as train dispatcher during a period of ninety consecutive days shall cause a forfeiture of seniority except when such non-performance is due to lack of work, sickness, or as otherwise provided in these rules or as otherwise agreed upon in specific cases between the parties hereto. . . .

* * * * *

(i) OFFICIAL POSITIONS (4-1-1944)

Train dispatchers now filling or who may hereafter accept official positions with the railroad party hereto shall retain and accumulate seniority. . . ."

It is uncontroverted that: (1) the name of S. J. Orlando has been shown on Carrier's seniority roster for train dispatchers since January 1959; (2) on July 21, 1960, Orlando, when asked by the Chief Dispatcher whether he would be available for extra work, replied he would not because of his services being required on a position he was then holding in the Office of the District Transportation Superintendent; and (3), Orlando failed to perform service as a train dispatcher during a period of 90 consecutive days following July 21, 1960.

Petitioner timely requested Carrier to strike Orlando's name from the seniority roster. Citing Rule 4 (g), the reason given was that Orlando forfeited his seniority by failure to perform service as a train dispatcher during a period of 90 consecutive days beginning July 21, 1960. Petitioner claims that Carrier's denial of the request violates the Agreement.

Carrier avers that, during the 90 days period, Orlando was in an official position; and, therefore, citing Rule 4 (i), Orlando was contractually vested with the retention of his seniority as a train dispatcher; and, Carrier was contractually obligated to place his name on the seniority roster.

The crux is whether the record, made on the property, supports a finding that Orlando was, or was not, in an official position during the material time.

As to Orlando's position, during the time material herein, Carrier's Transportation Superintendent said: "Mr. Orlando's present assignment, while labeled a clerk, is in fact a district car distributor." Without adducing evidence as to what Orlando's *de facto* duties were, Petitioner makes a statement of conclusion that, since the position was labeled "clerk," it was not an official position. And, Carrier's description of the duties of the position:

"He is charged with many responsibilities which are similar to those of the chief train dispatcher and continually works with the Division Transportation Superintendents handling items of importance to the movement of freight, both loaded and empty, make-up of freight trains and protection of perishable traffic in addition to his regular duties of assigning a proper flow of empty equipment for utilization."

is lacking in probative value.

The Agreement fails to enlighten us as to the intent of the parties as to what positions or duties are embodied within "official positions." There is no evidence in the record which proves the intent. While the labelling of a position as "clerk" creates a suspicion that it is not an official position, it is not conclusive proof. Nor are the duties of the position, expressed by the Carrier in generalities, proof that it is an official position within the contemplation of Rule 4 (i). In essence we are faced with conflicting statements of opinion—Petitioner says the position is not an official position; Carrier says it is.

Since we may not supply a definition of "official positions"—to do so would be beyond the powers of this Board—we find ourselves unable to make a finding, on the record before us, whether Orlando was in an official position, within the contemplation of Rule 4 (i), during the time material. We, consequently, cannot resolve the dispute and, therefore, must dismiss the Claim.

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 on the record before us, for lack of proof of a material fact, we are compelled to dismiss the Claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1965.