

Award No. 14911

Docket No. TD-15990

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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

(a) The St. Louis-San Francisco Railway Company (hereinafter referred to as "the Carrier"), violated, and continues to violate the Agreement between the parties, Article 1 (a), (b), (c) thereof in particular, when, beginning February 15, 1965 and continuing thereafter, it required or permitted employees not within the scope of the Agreement to perform work covered thereby.

(b) The Carrier be required to compensate Extra Train Dispatchers I. E. Talley and C. L. Harrison one day's compensation at rate applicable to Assistant Chief Dispatcher, six days per week, beginning February 15, 1965 and continuing until the said violation of the Agreement ceases.

EMPLOYEES' STATEMENT OF FACTS: At the time the claim here before the Board was asserted, the Agreement in effect between the parties was that which became effective September 1, 1949, revised as of January 1, 1953. A copy thereof is on file with this Board and is incorporated herein by reference as though fully set out.

The Agreement between the parties was further revised, effective October 1, 1965. A copy thereof should be on file with this Board and it is likewise incorporated herein by reference.

Insofar as the rules material to this dispute are concerned, with special reference to Article 1, the Scope Rule, the rules in both Agreements referred to are identical.

For ready reference, Article 1, Scope, of the Agreement is here quoted in full text:

"ARTICLE 1. SCOPE

(a) 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 dis-

Prior to 1964, however, this Carrier maintained five widely separated train dispatching offices located at Tulsa, Oklahoma; Springfield and Chaffee, Missouri; Fort Scott, Kansas; and Amory, Mississippi.

The Train Dispatching Office at Tulsa was relocated in Springfield effective February 16, 1965.

In addition to the train dispatching force at Tulsa, the Carrier maintained a car distributor position which was and is a position subject to the rules of the Agreement between the Carrier and the Transportation-Communication Employees Union. The position of car distributor was left undisturbed in Tulsa when the train dispatching office at that point was relocated in Springfield. The duties of the car distributor position are the same today as they were prior to the relocation of the train dispatching office.

(Exhibits not reproduced.)

OPINION OF BOARD: Initially, we must hold that we are concerned solely with Carrier's actions commencing with February 15, 1965.

Effective that date, the Carrier advised all concerned that:

"Chief Dispatchers and Dispatchers will be located at Springfield, Missouri, instead of Tulsa, Oklahoma. . . .

Effective February 16, 1965 all messages and correspondence pertaining to and in connection with the handling of train consists and pick-ups, etc., will be sent to Chief Dispatcher at Springfield, Missouri.

Effective February 16, 1965, all car orders and other messages and correspondence pertaining to handling and disposition of freight equipment, including copies of all train consists and pick-ups, yard checks, etc., also any and all handling for relief, etc., pertaining to or in connection with agents and telegraphers, including deadhead claims and private automobile mileage for regular and extra telegraphers, CT 95 reports for SW Division, will be sent to C. A. BEARD, Car Distributor, Tulsa, Oklahoma. Continue to send 22 and CT 49 loading reports to Tulsa, Oklahoma."

Carrier's notice effective February 16, 1965 (but issued February 10) advised that "for the time being Car Distributor C. A. Beard will remain in Tulsa, or until further advised."

In its position before the Board, the Carrier acknowledges that the position of Car Distributor "was left undisturbed in Tulsa when the train dispatching office at that point was relocated in Springfield. The duties of the Car Distributor position are the same today as they were prior to the relocation of the train dispatching office."

In its ex parte submission here, the Carrier states that it believes "the principal Organization contention in this case is that the car distributor at Tulsa is allegedly performing certain functions which should be performed by employees subject to the Train Dispatchers' Agreement."

We agree this is the claim: The Carrier is permitting or assigning to the Car Distributor at Tulsa the performance of what is generally acknowledged (Exhibit TD-5, among others) as Train Dispatchers' work. It should be noted here that Carrier's Car Distributor at Tulsa is not a train dispatcher; he is a car distributor, and is covered by the agreement between the Transportation and Communication Employees' Union and this Carrier.

On the basis of the record before us we must and do find that Carrier's action was a violation of the Agreement as charged, and we will sustain Part (a) of the claim.

With respect to Part (b) of the claim, the record discloses that during the period in question, Claimants were extra train dispatchers, and were compensated for such work as they may have performed.

We will hold here, as we did in Award 14262 (Third Division-Supplemental) that "absent a specific agreement to the contrary, an aggrieved employe is entitled to compensation only for the money loss he suffered as a result of such action."

We will sustain Part (b) of this claim for a day's pay pro rata, on a five day week basis, less compensation earned in this Carrier's employ.

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 the Agreement was violated.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14911 **DOCKET TD-15990 (Referee Lynch)**

This award is correct in ruling that the claim is "concerned solely with Carrier's actions commencing with February 15, 1965."

The specific claim handled on the property and submitted to the Board is that beginning February 15, 1965:

"... The car distributor, Mr. Beard, who has been working in the Chief Dispatcher's office since that position was established sometime in 1940, and who has been performing his duties under the direct instructions and supervision of the Chief Dispatchers was left at Tulsa to perform these duties as well as some that have been performed by the chief dispatchers for many years."

The award is categorically wrong, however, in ruling that:

"On the basis of the record before us, we must and do find that Carrier's action was a violation of the Agreement as charged, and we will sustain Part (a) of the claim."

Neither in this short ruling nor elsewhere in the award do we find an indication as to just which work performed by the car distributor after February 16, 1965, is generally acknowledged as train dispatchers' work.

NOTE: Emphasis herein ours, unless otherwise indicated.

Carrier's advice to the Employees, effective February 15, which is quoted in the award, merely states that certain correspondence, etc., was to be sent to the car distributor at Tulsa. There is no showing whatever that anything done by the car distributor in connection with the correspondence, etc., changed in any way after the relocation of the dispatchers' office effective February 16, 1965. In the complete absence of any proof as to the work done by the car distributor in connection with these matters both before and after the relocation of the dispatchers' office, it is manifestly wrong to suggest that the mere notice that this correspondence, etc., would continue to go to Tulsa indicates in any way that new or different work in connection therewith was to be performed by the car distributor.

Throughout all handling of this claim, Carrier has consistently taken the position the duties of the car distributor at Tulsa remained the same after the relocation of the dispatchers' office as before. The Employees obviously had the burden of proving otherwise, and they submitted no proof on the point. In fact, they appear to have completely abandoned the point in an attempt to substitute for the claim properly before us a claim that allegedly commenced in 1964 and that is barred by the time limit provisions. See Awards 11717-Hall, 12045-Engelstein, 12984-Coburn, 14368-Lynch, and others on time limits.

The entire argument concerning the alleged transfer of dispatchers' work to the car distributor presented in the Labor Members' memorandum to the Referee in this case reads as follows:

"As pointed out by the Employees before the claim was asserted, the factual background must be known. The office chairman collected data and they are Exhibits in the Employees' Ex Parte submission. The Exhibits show instructions issued to trains and a carbon copy to the train dispatcher. Let us examine Message No. 1, on page 26 of the record:

"Tulsa
July 1, 1964

C&E No. 441
Claremore CM Q 220 p

Move all mty box from Claremore for loading at Dewey Port, Tiger.

Move all mty hoppers from Claremore.

Spot ten Std. balance Chandler Six west Dewey. 16-1 Chandler, 5-1 Std plants.

cc: RS Dispr East

RS 220 p.'

Anyone familiar with railroad messages, either by Morse, teletype, etc., can recite what each part of this means.

First: 'Tulsa July 1, 1964.'

This means this message is from Tulsa, dated July 1, 1964.

Second: 'C&E No. 441 Claremore CM Q 220 p'

C&E means Conductor and Enginemen. No. 441 means train number 441. Claremore is the town number 441 will receive the message or the instructions. CM is Claremore's Morse call numbers. Q is Tulsa's Morse call letter, or the person sending messagecall letter. (The call letters are also used even over message circuit phones.) 220 p would be the time the instructions were sent.

Third: The body of the message is self-explanatory.

Fourth: cc, as we all well know, means carbon copy.

Fifth: RS, as the record discloses, was Ray Strapp, the Chief Train Dispatcher.

Sixth: Dispr East, **can only mean** the train dispatcher working the East end, or Subdivision. (Emphasis theirs.)

Seventh: RS 220 p — Chief Train Dispatcher's signature and time.

Now, if these instructions were ordered by the Chief Dispatcher and supervised by the Chief Dispatcher, **WHY WERE:**

1. Instructions issued from Tulsa?

Answer: That is where the car distributor was.

2. Instructions addressed to C&E No. 441?

Answer: Train 441 was going to perform the work.

3. Why did the Chief train dispatcher **AND THE TRAIN DISPATCHER** need a copy?

Answer: The Chief for his records, and the Train Dispatcher so he would know what work his trains were going to do. **Proof that the car distributor was working on his own, instructing train crews.**

How can anyone dispute the fact that it is train dispatchers' work to issue instructions to trains regarding their work on the road? How else can a train dispatcher be primarily responsible for the movement of trains, supervise persons handling train orders and keep records incident thereto, and issue train orders and, as the Carriers' rules, no doubt, state—a train dispatcher controls the movement of trains.

Let us now look—starting on page 36 of the record, Exhibit TD-5—at the complete lack of information as disclosed in previous messages of instructions. This is the very reason why the Organization states the factual background must be considered. The Carrier doesn't explain the change in the message form. If the moving of the Tulsa train dispatcher's office from Tulsa to Springfield changed operations, just compare the messages in the Employees' Ex Parte Exhibits. IT IS AFTER THE CLAIM WAS ASSERTED that the messages changed, and the record so discloses. This was an obvious attempt by the Carrier to make their word good to honor the Agreement between the Parties, but still operate in violation of the Agreement as prior to the claim."

We must confess some difficulty in following the Labor Members' reasoning. The question concerning anyone disputing the fact that it is train dispatchers' work to issue instructions to trains is wholly irrelevant to any issue before the Board in this case. This car distributor is a telegrapher, and obviously may be called upon to transmit any kind of instructions or orders to trains, as long as he is following the directions of and is under the supervision of the chief dispatcher. The Employees have not attempted to convince us otherwise in the record before us. The sole question they have properly presented is whether the car distributor was in fact directed and supervised by the dispatcher in his work. Thus, the copying or quoting of a communication that was transmitted by the car distributor over the signature of the chief dispatcher, standing alone, is wholly irrelevant to the issue presented. The communication could have had exactly the same form and exactly the same appearance in a case where the chief dispatcher had specifically directed and dictated the communication as in a case where he was totally ignorant of the communication. Nothing on the face of the communication tends to establish that the chief dispatcher did not direct and supervise its preparation. See Award 3848.

It should be at once obvious that if the Employees had any basis for contending the car distributor was working without the direction and supervision of the chief dispatcher in sending messages such as that quoted by the Labor Member, they should at least have submitted a statement of the chief dispatcher or someone having first-hand knowledge of the facts. Such a statement would have constituted evidence. The mere reproduction of the message is irrelevant and proves nothing.

We do find two contentions clearly stated in the Labor Member's arguments which we have quoted above. The first contention is that the notation "cc-RS Dispr East", appearing on all messages shown in the Employees' Exhibit TD-1, constitutes "proof that the car distributor was working on his own, instructing train crews." The second contention clearly stated is that Carrier allegedly "doesn't explain the change in the message form" and, therefore, the Board can assume that Carrier continued to "... still operate in violation of the Agreement as prior to the claim."

Contrary to this contention that Carrier does not explain the change in the form of the messages as reflected by the Employees' Exhibits TD-1 and TD-5, Carrier placed in the record a comprehensive explanation which clearly establishes that no inference of lack of supervision over the car distributor can sensibly be drawn from the change in form, namely, the fact that copies of some of these messages are made for the East dispatcher in certain instances and not in other instances. Carrier's explanation reads:

"The Board is requested to bear in mind that the '20 illustrative instances' furnished by the Organization in Exhibit TD-1 allegedly occurred some six to eight months prior to the date the office was relocated, and that '18 illustrative instances' furnished in Exhibit TD-5 allegedly occurred after the office was relocated in Springfield. The Organization states at the top of page 14— 'There is, however, one significant difference between the illustrative cases set out in the two exhibits—a difference which might easily be overlooked.' The Organization goes on to infer that the 'significant difference' is that prior to the date the office was moved, the chief dispatcher was furnished copies of messages, but after the relocation of the office, he was furnished copies of messages in only three instances. The Organization states:

'This fact, the employees submit, evidences that the car distributor at Tulsa has been, and continues to, perform duties within the scope of Article I (b) 1 of the Agreement, independently of direction and supervision of the chief dispatcher.'

The statement is denied. It merely points up that the car distributor is performing the same work as he did when the employees occupied the same physical office.

There is more than 'one significant difference between the illustrative cases', but not because the chief dispatcher was or was not furnished copies of the alleged messages. That has nothing whatsoever to do with the dispute. The difference is this:

First, when the train dispatching office was located in Tulsa, it was necessary for the chief dispatcher to give the train dispatcher involved a copy of work instructions to trains. The Board will note that in each instance reported in Exhibit TD-1 there appears in the lower left corner 'cc RS Dispr East.' After the office was relocated in Springfield, it was no longer necessary for the chief dispatcher to furnish train dispatchers a copy of the work instructions, except on occasions. At or about 7:00 A. M., the telegrapher in the telegraph office at Tulsa copies the '22 Report', which is a telegraph report of cars on hand at a particular station and cars required at that point for loading in the next 24 hours. A copy of such report is furnished to the car distributor at Tulsa and the chief dispatcher at Springfield. The chief dispatcher can furnish the train dispatcher the necessary information from the '22 Report.' Additional equipment needed, which was not ordered on the '22 Report', must be ordered in accordance with instructions. It is on these occasions when additional equipment is needed that the chief dispatcher so notifies the car distributor and then, in turn,

receives, for use of the train dispatchers, copies of messages as referred to in the Organization's Exhibit TD-5. The Board will note that on the three occasions mentioned by the Organization, additional equipment was needed for Mill Creek. (See messages (3), (10) and 12).)

It is necessary for the train dispatcher to have such information for the reason that standing instructions provide that Number 33 will set out at Ada empty equipment for Mill Creek. These instructions, of 'significant difference', line up all empty box cars available for Mill Creek in Train No. 33 to go through and set out at Mill Creek and not set out at Ada.

The chief dispatcher is performing the duties of chief dispatcher at Springfield the same as he did when his office was located at Tulsa, and the car distributor at Tulsa is performing, under the supervision and direction of the chief dispatcher, the duties of his position the same as when both the chief dispatcher and the car distributor were located at Tulsa. Any contention to the contrary is denied."

Whether the chief dispatcher kept the East dispatcher advised as to the car movements and locations by means of the "22 Report" and standing orders, or by means of extra copies of the orders made up by the car distributor under the direction and supervision of the chief dispatcher has no tendency whatever to establish the existence or nonexistence of supervision and control over the car distributor by the chief dispatcher, and it is sheer nonsense to argue otherwise.

Thus, we have the Labor Member arguing affirmatively that there was no change in the type and amount of supervision exercised by the chief dispatcher over the car distributor on the effective date of this claim, in addition to having a record that is completely barren of any evidence tending to show that effective with the date of this claim Carrier transferred to the car distributor any work at all that is recognized as coming under the Dispatchers' Agreement.

At various points in the record, the Employees contend that the chief dispatcher could not supervise the car distributor at a distance of 200 miles. In the General Chairman's letters on the property, this distance factor appeared to be his sole basis for the claim that the car distributor was no longer supervised and directed by the chief dispatcher.

The record shows that Carrier has a communications system by the use of which the chief dispatcher can instantly communicate with the car distributor at Tulsa. There are railroad-owned long-line telephone circuits maintained by this Carrier which permit the chief dispatcher in Springfield to dial the telephone number of the car distributor in Tulsa, and vice versa.

In addition to the Carrier's long-line telephone circuits between Tulsa and Springfield, the Carrier maintains Morse telegraph circuits and teleprinter service between those points. The chief dispatcher uses any one or all of such circuits to communicate with the car distributor at Tulsa.

This Board has ruled in recent Award 14385 (Wolf), involving the same parties and substantially the same facts and claim, that the Employees had

failed to prove their case, and the claim was denied, even though it was established that the dispatchers' office had been relocated 200 miles distant from its prior location where the car distributor remained. Furthermore, this Board has consistently ruled that mere distance alone is not a controlling factor in establishing the existence or non-existence of supervision and control. See Awards 14835 (Zack), 12310 (Wolf), 12415 (Coburn), among many others. Also, determining the amount of supervision is a managerial prerogative. See Awards 13838 (Coburn), 13400 (Bailer), 13031 (Hall), 7059 (Carter), among many others.

Fundamental rights which are extremely important to the Carrier, its owners and the public are involved in cases of this kind, where the Board is asked to sustain a costly claim on a record that contains no competent proof of an agreement violation. We believe that the Board's jurisdiction is exceeded by an award that sustains such a claim. This Board should dismiss claims where the controlling facts are in dispute and the claimants have failed to support their contentions with relevant evidence. Awards 14089 (Coburn), 13748 (Mesigh), 13329 (Dorsey), among many others. In the absence of evidence to support findings of fact on the controlling issues, a sustaining award is arbitrary, and beyond the Board's powers. Section 3 First (i) of the Railway Labor Act, as amended.

That portion of the award which recognizes and partially sustains part (b) of the claim is wrong and exceeds the Board's jurisdiction for the additional reason that this portion of the claim was not handled in the usual manner on the property, as required by Section 3 First (i) of the Railway Labor Act.

Concerning the handling, the General Chairman's letter submitting the claim on the property described the demand for relief as follows (P. 57):

"I present this letter as a claim for one day's pay in favor of extra train dispatcher I. E. Talley and C. L. Harrison in line with their seniority for one day's pay six days per week, beginning on February 15, 1965 and continuing until such time as the violations cease to exist. . . ."

In response, Carrier's Superintendent advised the General Chairman:

"First, the monetary portion of this claim is vague and indefinite, and it is impossible to determine whether you are claiming one day's pay to be divided equally between the two claimants, or claiming one day's pay in behalf of each of the two claimants for six days per week. . . ."

The General Chairman's response to this request for clarification of the monetary demand, with particular reference to whether the claim was being made for one day's pay on behalf of each of two claimants, was as follows:

"I am sure that you are aware in all claims for contract violations where more than one party is involved that the senior man in seniority has first preference or choice.

* * * * *

I do not think in a deliberate violation of this kind that the question of monetary loss is involved. Had one of these men been assigned to the duties involved, they would have received the Assistant Chief Dispatchers' rate for the days they worked the position and to which they are entitled. . . ."

In arguing the matter to the Board in their Ex Parte submission, the Employes gave Carrier no further clarification of their claim.

The claim is certainly vague, in our thinking, and we would say that if the response of the General Chairman, which we have quoted above, actually clarifies the claim at all, it simply indicates that only one day's pay for the senior available man is being claimed for each day involved, not a day's pay for both men each day. However, the ambiguity of the claim became even more obvious to us when we received the memorandum submitted to the Referee by the Labor Member, for in that memorandum we find this statement:

"Since the violation covered more than a span of one trick, this can and is the reason for submitting claims for two train dispatchers. . . ."

This is a very simple and easy statement. If the position taken by the Employes on the property had been as here stated, the General Chairman obviously could have stated that fact as clearly and simply as had the Labor Member; but, the statements we have quoted from the record indicate that this is not the position taken by the General Chairman on the property.

Since the claim was never clarified, and these contentions were not made by the Employes on the property, we believe that by advancing such contentions here the Labor Member is demonstrating his own confusion and proving Carrier's point that part (b) of the claim is vague, and does not constitute a proper claim.

The Labor Member attempts to justify part (b) of the claim, as interpreted by him, by arguing that Carrier failed to come forward with essential proof:

". . . Carrier could, BUT DIDN'T, have stated the assigned hours of the chief train dispatcher and the car distributor, but since Carrier didn't, the time on the messages prove instructions were issued after the chief dispatcher was off duty. So the car distributor was acting on his own. You might say conector. [sic] Hardly, the Carrier could have proved its point in this with a short simple statement. The assigned hours are '. . .'" (Emphasis theirs.)

If this question had been raised by the Employes in handling on the property, Carrier would have had an opportunity to prove that the hours of the assignments of the chief dispatcher and the car distributor were the same, and that this fact was irrelevant in any event. Carrier's failure to discuss either of these points was clearly induced by the Employes' failure to clarify their claim on the property. This, of course, is a further indication of the fact that part (b) of the claim was not properly handled on the property. The failure of the General Chairman to completely clarify the

monetary claim in part (b) after Carrier's request for clarification, amounted to a failure to present that part of the claim and handle it in the usual manner as required by law. That portion of the claim should have been dismissed, and would have been subject to dismissal even if there had been merit in part (a) of the claim.

We dissent.

G. L. Naylor
P. C. Carter
T. F. Strunck
R. E. Black
G. C. White

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS'
DISSENT TO AWARD 14911 (DOCKET TD-15990)**

After a careful review of the Dissent, the reason for the Dissent is found on page eleven:

" . . . where the Board is asked to sustain A COSTLY CLAIM. . . ."
(Emphasis mine.)

The Carrier Member submitted forty-three pages of brief in the Panel Argument and Re-Argument containing:

Over one hundred National Railroad Adjustment Board Awards,
Five full pages of court decisions,
The Railway Labor Act, as amended.

It appears to this Labor Member the author of the Dissent just got himself confused and carried away with pride of authorship and forgot his purpose.

The Award is sound and well reasoned.

George P. Kasamis
Labor Member.