Award No. 15506
Docket No. TD-15950

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOUTHERN PACIFIC COMPANY
(Pacific Lines)

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

(a) The Southern Pacific Company (Pacific Lines), hereinafter referred to as "the Carrier," violated the currently effective agreement between the parties to this dispute, particularly Article 4, Section (c), Article 5, Section (b), and the Memorandum of Agreement dated March 14, 1947 (effective April 1, 1947) when it refused and failed to use Train Dispatcher F. A. Drake to perform work for which he was qualified and entitled to perform on October 19, 20, 21, 22 23 and 24, 1964.

(b) The Carrier shall now compensate Train Dispatcher F. A. Drake for the difference between his actual earnings on the above claim dates and the amount of earnings he would have received had not the violation occurred.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, a copy of which is on file with this Board, and same is made a part hereof as though it were fully set forth herein.

Attached hereto as Exhibit TD-1 is a copy of Memorandum of Agreement dated March 14, 1947 (effective April 1, 1947) and, for ready reference, Article 4, Section (c) and Article 5, Section (b) of the Agreement, referred to in the Statement of Claim supra, are here quoted in full:

"ARTICLE 4

Section (c). Exercising seniority. In filling positions covered by this agreement, ability being sufficient, seniority shall govern. Seniority cannot be exercised except as provided in this agreement."

"ARTICLE 5

Section (b). Filling positions — Extra work. A vacancy or new position of four (4) days or less (not counting rest days) shall consti-

OPINION OF BOARD: The Board is confronted with Carrier's contention that we are without jurisdiction to consider this dispute, as the issue which Petitioner asks us to adjudicate, concerns Carrier's managerial prerogative to fill the Chief Train Dispatcher's position. The position as such is an official position, excepted from the Agreement, and the incumbent is not an "employe" as defined by The Railway Labor Act and by definition of the ICC, Ex Parte No. 72.

The Organization asserts that although the incumbent is excepted from the Agreement, the position itself is subject to the parties Memorandum of Agreement, effective April 1, 1947, whereby relief requirements of this position are set forth, as well as how it will be filled when the incumbent is absent.

The claim has been properly processed to this Board and under Section 2, of the Railway Labor Act, as amended, this Board has jurisdiction to adjudicate grievances growing out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. Since this is a dispute involving application and interpretation of rules in the existing agreement, we will proceed to adjudicate the dispute on its merits.

As previously indicated, both parties agree that there is no dispute that the incumbent of this position is excepted by the Scope Rule, Article 1, Section (a). There is no argument that Carrier has the prerogative to appoint the incumbent to the position of Chief Dispatcher. Further, the parties agree that once this position is filled account of absence, the relieving employe is accorded the benefits of the current agreement.

Under the existing agreements, did Carrier deviate from seniority principals by determining the occupant or filling the position by asserting its prerogative to select relief for the position of Chief Dispatcher?

Paragraph 2, of the Memorandum of Agreement, in our opinion, provides the procedure to select relief for the position of Chief Dispatcher. It reads in part:

> "2. When the chief train dispatcher is absent from his position for any reason, his position shall be filled by a train dispatcher (in the office where such absence occurs) qualified to assume and perform the responsibilities and duties of the chief train dispatcher."

The only restrictions contained in the above is that Carrier shall fill this relief position with a qualified train dispatcher from the same office. Under the circumstances set forth in this claim, Carrier complied with and followed the procedure as set forth in the Memorandum of Agreement.

Petitioner further asserts that past practice, based upon a "gentlemen's agreement" and an "informal contract" with the Carrier, provided a specified procedure for the assignment of Chief Dispatcher's relief work — seniority being the criteria. Carrier emphatically denies this assertion. We find no substantial proof in the record to sustain this contention. To the contrary, it is apparent and undisputed that Article 1, Section (a) of the Agreement clearly excepts this position, and as a result, does not bring the excepted position within the restrictive provisions of the Agreement, which are Article 4 (c) and Article 5 (b) cited by the Petitioner. We find that filling this position

during the absence of the incumbent is at the discretion of the Carrier agreed to by the parties as set forth in the Memorandum of Agreement, effective April 1, 1947.

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 Carrier did not violate the Agreement.

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 April 1967.

CONCURRING OPINION OF CARRIER MEMBERS IN AWARD 15506, DOCKET TD-15950
(Referee Mesigh)

The ruling that the language of the agreement cannot reasonably be given the interpretation imputed to it by the Employes in this case is correct, but the claim should have been dismissed on other grounds which go to the jurisdiction of the Board.

The record shows that the respondent Carrier correctly advised the petitioning Employes that this Chief Dispatcher position is one of the positions that:

> ". . . are not covered by the current agreement by virtue of the fact that they **are officers of the Company . . . are not subject to the provisions of the Railway Labor Act** . . . rates of pay and working conditions . . . are not matters for negotiations with you . . ." (Emphasis ours.)

The General Chairman's letter appealing the claim to Carrier's highest officer states:

> ". . . the Chief Train Dispatcher and the position occupied by him is not covered by the agreement but the relief on that position does come under our agreement . . ."

Thus, the Employes are directly challenging Carrier's right to fill an official position for temporary periods of time. They assert that Claimant had a contract right under the collective agreement with Dispatchers to fill this official position and represent Carrier as Chief Dispatcher for the involved period of six days.

Both the Railway Labor Act and the Awards of this Board are perfectly clear on the point that we have no jurisdiction to adjudicate a claim to an official position. Railway Labor Act, Section 1, Fifth and Sixth; Section 2, Third; Section 3, First (i).

Without the assistance of a referee the Fourth Division has ruled as follows on the point:

FOURTH DIVISION AWARD 10

"The evidence shows that the petitioner (now in service of respondent Carrier as a Special Officer) requests reinstatement to the position of Special Agent, Eastern Division, an official position; therefore, the division is without jurisdiction."

FOURTH DIVISION AWARD 14

"The evidence shows that the petitioner was in general charge of . . . [duties noted] . . . all of which indicates the scope, character and discretionary power with which he was vested. Such duties compare with those of Chief Claim Agent or Assistant General Claim Agent which are classified as 'Official Positions' in ICC Ex Parte No. 72; therefore, the division is without jurisdiction."

Also see our Award 7027 (Rader). We know of no ruling to the contrary; the Awards cited by the Employes are clearly not in point.

When Carrier substitutes one man for another on an official position for a period of six days, or for any other period of time, its right to have a true official who represents Carrier is certainly not affected. The Railway Labor Act defines employes and officials in terms of the "work" they do and not in terms of the length or regularity of their assignment. The work of this position is that of an official.

The Act precludes agreements with "employes" which restrict Carrier in its right to fill official positions, and no exception is made on the basis of the length of time involved in a given appointment, whether for a day, six days, or on a permanent basis.

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

LABOR MEMBER'S RESPONSE TO CARRIER MEMBERS' CONCURRING OPINION IN AWARD 15506, DOCKET TD-15950

What purports to be a "Concurring Opinion" of the Carrier Members in this case evidences such an incredible disregard of the record and issue involved as to border upon juvenility.

Both the record and Award 15506 make it abundantly clear — indeed, the Carrier expressly agreed — that during temporary absence of the excepted Chief Dispatcher his position was to be filled by a train dispatcher in that office. The issue involved was the manner in which the train dispatcher designated to fill the position was to be selected — that and nothing more.

The thrust of the Carrier Members' so-called "Concurring Opinion" (an outright misnomer for the document) directed itself to the contention that Chief Dispatchers are "officials" and that this Board has "no jurisdiction to adjudicate a claim to an official position."

That threadbare chestnut was correctly overruled in Award 15506 as it has been repeatedly overruled in previous Awards of this Division.

With respect to the Carrier Members' apparently uninformed and utterly asinine re-hashing of an issue long since laid to rest by this Board and other agencies, attention is again called to very material facts which the Carrier Members would ignore, either through ignorance or designedly and for undisclosed ulterior motives.

Quite contrary to the major premise of the so-called "Concurring Opinion" that Chief Dispatchers are "officials" and therefore not subject to the provisions of the Railway Labor Act, it has been consistently held otherwise.

(1) On February 5, 1924, the Interstate Commerce Commission, in its Docket Ex Parte 72, adopted the following order, which is still in effect:

"TRAIN DISPATCHERS.

> This class shall include **chief,** assistant chief, trick, relief and extra dispatchers, excepting only such chief dispatchers as are actually in charge of dispatchers and telegraphers and in actual control over the movement of trains and related matters, and have substantially the authority of a superintendent with respect to those and other activities. **This exception shall apply to not more than one chief dispatcher on any division.**" (Emphasis ours.)

(2) In hearings involving agreement rules such as those involved in the docket here in reference the National Mediation Board has held that Chief Dispatchers are SUBORDINATE officials, and therefore subject to the provisions of the Railway Labor Act.

(3) In representation elections involving the train dispatcher craft or class the National Mediation Board has for many years required that Chief Dispatchers be included among those eligible to participate in such proceedings.

(4) This Division has repeatedly and consistently held that the exception as to Chief Dispatchers in train dispatcher agreements extend **only to the appointed incumbent and not to the position itself.**

It is unfortunate that this Board should be called upon to be burdened with such distorted, apparently uninformed, and inapplicable diatribes.

G. P. Kasamis
Labor Member

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