

In conference again with General Chairman Burke on May 28, 1968, he intimated that a compromise settlement of a "call" might be acceptable. Final decision was to be reserved until further discussion with other cases at a later date.

On October 22, 1968, Carrier received advice that this dispute was being referred to the Board.

Copies of March 20, 1961 rules and working conditions agreement between the parties, as amended, are on file with the Board and are made a part of this submission by reference.

OPINION OF BOARD: The facts to which the Carrier admits is that the Carrier's trainmaster committed a technical violation of the scope rule by authorizing a short movement of a train while Claimant was employed as a telegrapher. Claimant was the Senior extra man and would have performed the work performed by the trainmaster if anybody would have.

Carrier makes three assertions by way of absolute or partial defense to this claim. The first is that even if the trainmaster had not authorized the train movement no other dispatcher would have been called out and Claimant would have not received any additional pay under any circumstances. To this defense it must be said that it is merely supposition and cannot be indulged in as a basis for a finding.

Carrier's second defense is that this claim was not handled on the property pursuant to Section 3 First (i) of the Railway Labor Act and therefore must be dismissed for lack of jurisdiction. The claim was progressed properly up to the Carrier's director of personnel who held a conference with the Organization's General Chairman on November 27, 1967. The Organization requested a decision within thirty days from the date of conference and, having failed to receive a decision by January 11, 1968, wrote a letter on that date directed to the director of personnel advising him of its intention to submit the matter to this Board.

Carrier asserts that there was no time limit rule contained in the agreement between the parties and therefore it had no obligation to render its decision within the 30 day limit and this submission was premature. In the absence of any specific time limit on the rendering of decisions on claims, it must be assumed that the parties contemplated a reasonable time. We cannot say that 30 days was unreasonable and, therefore, we must find that the Organization had no other choice but to pursue the remedies available to it before this Board.

The last issue raised by the Carrier is that of the measure of damages. Although Claimant was fully employed under the Telegraphers' Agreement on the date of the claim, the Organization makes claim for one day's pay at pro rata rate of train dispatcher. Carrier argues that, if anything, Claimant should only be made whole by being awarded the difference of what he did make and what he would have made had he been called to perform the work in question.

It does not seem to be consistent with the fundamental purpose of a collective bargaining agreement to award an employee a sum of money for work that he did not perform. It is recognized that the agreement between the parties is to secure to the employees covered thereby a fair rate of pay and other benefits for service to their employer. A full eight hours' pay, in addition to what Claimant was paid for the work he performed on the claim

day, could then be fairly characterized as a penalty against the employer and a windfall to the Claimant.

We therefore concur with the numerous cases cited by the Carrier to the effect that this Board does not have jurisdiction to award or levy a penalty. We, therefore, find that Claimant is entitled to be awarded the difference between his actual earnings and that sum of money he would have earned as a dispatcher for eight full hours on the claim day.

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 Carrier violated the Agreement to the extent as set forth above.

A W A R D

Claim sustained to the extent as set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of February 1970.

SPECIAL CONCURRING OPINION AWARD 17709

Award 17709 correctly holds that the Scope Rule was violated and absent a specific time limit, for Carrier to render a decision, after the Employees waited thirty days it wasn't unreasonable for the employees to pursue the remedy available, this Board.

The Award is in error by adhering to the 'make whole theory'. The Opinion states "... could then be fairly characterized as a penalty against the employer ...", and this Board does not have jurisdiction to award or levy a penalty.

A Carrier cannot violate the Agreement and not expect to pay a penalty any more than an employee can violate a Carrier rule and not expect to pay a penalty.

This Board has, over the years of its existence levied penalties for Agreement violations in hundreds of Awards. Thus, we cannot now hold that we do not have this jurisdiction or authority to so do.

G. P. Kasamis
Labor Member



Award Number 17709

Docket Number TD-18186

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Ellis, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

SOO LINE RAILROAD COMPANY

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

- (a) The Soo Line Railroad Company, (hereinafter "the Carrier") violated the existing Agreement between the parties, Rule 1(c) thereof in particular, when, on March 31, 1967, it permitted and/or required Trainmaster H. W. Ellefson, an officer of the Carrier and an employe not within the scope of said Agreement, to assume primary responsibility for the movement of trains by means of instructions issued directly to the C.T.C. Control Operator at Marquette, Michigan without authority or knowledge of the train dispatcher on duty and in charge of this territory.
- (b) For the above described violation, Carrier shall now be required to compensate Train Dispatcher D. J. Binder one day's pay at pro rata rate of train dispatcher.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties, dated March 1, 1961, effective March 20, 1961, copy of which is on file with this Board, and the same is made a part hereof, the same as though fully set forth herein.

For ready reference, applicable portions of Rule 1, pertinent to this dispute, are here quoted.

"RULE 1

SCOPE

(a) The term "train dispatcher" as herein used shall include all train dispatchers except one chief train dispatcher in each dispatching office who is not regularly assigned to perform trick train dispatcher service; however, necessary relief of such chief train dispatchers because of absence from their positions, except where appointment of chief train dispatcher is made, will be performed by train dispatchers from the office involved, qualified for such work.

(b) Definition of chief, night chief, and assistant chief train dispatchers' positions: Subject to the provisions of Rule 1(a), these classes include positions in which the duties of incumbents are to be responsible for the movement of trains on a Division or other assigned territory, involving the supervision of train dispatchers and other similar employes; to supervise the handling of trains and