



Award Number 17827

Docket Number TD-18351

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, 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 Agreement between the parties, Article 1 (d) thereof in particular, when, on June 26, July 10-11-13-18 and August 12-24, 1968, Carrier required and/or permitted other than those within the scope of said Agreement to perform work covered thereby.

(b) For the above violation, Carrier shall now be required to compensate the individual Claimants below named for each of the dates specified in paragraph (a) above:

J. V. Howard	June 26, 1968	8 hours punitive
J. V. Howard	July 10, 1968	8 hours punitive
L. C. Slack	July 11, 1968	8 hours punitive
M. H. Kassera	July 13, 1968	8 hours punitive
L. C. Slack	July 18, 1969	8 hours punitive
V. H. Copeland	August 12, 1968	8 hours punitivs
M. H. Kassera	August 24, 1968	8 hours punitive

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

For ready reference, Article 1 (d) of said Agreement is here quoted in full:

"ARTICLE 1

(d) CENTRALIZED TRAFFIC CONTROL.

Centralized Traffic Control machines at present in service and in the future installed will be manned and operated by train dispatchers when the machine is located in offices where train dispatchers are employed. When a C.T.C. machine is located in an office where train dispatchers are not employed and it is manned and operated by other employes, a train dispatcher shall have and exercise complete authority over the movement of, and shall control and direct all train movements in such territory."

2. On July 11, 1968, the control operator at North LaCrosse, Wisconsin, attempted to contact the dispatcher on duty at Cicero but was unable to do so due to communications failure. Accordingly, the operator authorized by use of CTC signals controlled from his station the movement of Train 88 from Sullivan, Wisconsin to North LaCrosse Yard.

3. On July 13, 1968, the control operator at North LaCrosse, Wisconsin, received instructions from the dispatcher on duty at Cicero to clear the movement of Train 81 from Winona, Minnesota, to Winona Junction, Wisconsin, by use of CTC signals controlled from his station.

4. On August 24, 1968, the control operator at Prairie du Chien, Wisconsin, attempted to contact the dispatcher on duty at Cicero but was unable to do so due to communications failure. Accordingly, the operator authorized by use of CTC signals controlled from his station the movement of Trains Second 21 and No. 25 from Ports, Wisconsin, to Prairie du Chien, Wisconsin.

The Petitioner is requesting this Board to award eight hours' pay at the punitive rate for each of the above dates to certain named dispatchers who were off duty on their assigned rest days.

(Exhibits Not Reproduced)

OPINION OF BOARD: Carrier contends that on the dates in the claim, except for July 13, 1968, the control operators at St. Croix Tower, Wisconsin, North LaCrosse, Wisconsin and Prairie du Chien, Wisconsin were unable to contact the train dispatcher on duty at Cicero, because of communication failure. The operators, therefore, authorized the movement of trains by use of CTC signals controlled from their stations.

The record shows, without contradiction, that secondary lines of communication exist in each of the locations. At North LaCrosse and at Prairie du Chien Bell telephones are available and are used as a secondary line of communication with the train dispatcher at Cicero. At St. Croix Tower telegraph and telephone facilities are available as secondary line of communication with the train dispatcher at Cicero. At St. Croix Tower telegraph and telephone facilities are available as secondary lines of communication. Carrier has offered no evidence explaining why the operators did not use these communication facilities before authorizing their trains to move. In the absence of such evidence there can be no finding that emergency situations existed on those dates. While trains generally need to be moved with dispatch, there is no showing here that the operators utilized every available communication line to reach the dispatcher before authorizing their trains to move.

Under the rules in the schedule agreement, Centralized Traffic Control (CTC) machines are operated by train dispatchers when located in dispatcher's office. That rule further provides that:

"... When a C.T.C. machine is located in an office where train dispatchers are not employed and it is manned and operated by other employes, a train dispatcher shall have and exercise complete authority over the movement of, and shall control and direct all train movements in such territory."

Train dispatchers only have authority to control and direct train movements. Control operators do not have that right. They may do so only in

emergencies. Since no emergencies existed on the dates claimed, control operators performed dispatcher's duties contrary to the rules in the agreement.

As for July 13, 1968, Carrier states that "the control operator at North LaCrosse, Wisconsin, received instructions from the dispatcher on duty at Cicero to clear the movement of train 81 from East Winona, Minnesota to Winona Junction, Wisconsin, by use of CTC signals controlled from his station."

Employees' submission contains statements by the night chief train dispatcher and the trick train dispatcher denying that either one of them authorized the operator to clear train 81. Carrier says that these statements may not be considered because they were not presented during the handling of this claim on the property.

Carrier was not surprised by these statements. In a letter to the Carrier under date of December 8, 1968, the General Chairman advised that he had the statements and "that the operator did not ask for nor receive authority to make the CTC lineup to authorize movement of the train in question. The statements are dated October 17, 1968, nearly two months before that letter. They merely corroborate what the General Chairman had told the Carrier.

Even without the statements there is no convincing evidence that the operator had authority. Carrier has presented no directed statement or affidavit from the operator attesting to the fact that he received such authorization from the dispatcher. Employees denied that he did on the property. Carrier has failed to meet the burden of proof for an affirmative defense.

It is Carrier's further position that since the monetary relief sought is in the nature of a penalty the claim should be denied because there is no contractual or legal basis for such damages.

There are literally hundreds of awards of this and other Divisions dealing with this subject. That they fail in unanimity is recognized by all who have had occasion to consider this remedy. Many are explanatory of the general rules and the exceptions. Suffice it to say that this neutral has considered and ruled on this issue in a number of instances.

Has the Carrier "deliberately and consistently violated the agreement"? (Award No. 17772) That is not difficult to determine in this case because there is no contention that the control operators were instructed not to perform such dispatcher work; they were not reprimanded for violating the agreements, there is no evidence in the record that the Carrier attempted to discover why the operators did not use the available secondary lines of communication; and there is no evidence that the Carrier seriously tried to find out the truth of the July 13, 1968 incident. Absent that evidence, the Board can only conclude that the Carrier condoned the violation of the contract by the operators and from that it can be reasonably surmised that the Carrier will continue to condone such violations. Under these circumstances a penalty claim may be sustained, otherwise carrier is given a license to violate the agreement with impunity.

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

Carrier violated the Agreement.

A W A R D

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of April 1970.