NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20118
THIRD DIVISION Docket Number TD-19951

Burl E. Hays, 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 referred to as "the Carrier") violated the Agreement in effect between the parties, Rule 13 thereof in particular, when it refused to compensate Train Dispatchers J. O. Swerine, A. F. Burke, Jr., S. J. Nelson and S. R. Johnson each eight (8) hours at the pro rata rate of their respective assigned positions on December 10, 1970 when Carrier had suspended their operation and in effect abolishing train dispatchers' positions without seventy-two (72) hours advance notice.

(b) Carrier shall now be required to compensate each individual Claimant eight (8) hours at the pro rata rate of the respective regular assignment held on December 10, 1970.

OPINION OF BOARD: The facts and circumstances out of which these claims arose are practically the same as in Award 20115. The parties are the same with the American Train Dispatchers Association representing Claimants J. O. Swerine, A. F. Burke, Jr., S. R. Johnson, S. J. Nelson in a dispute with the Soo Line Railroad Company. Each of the Claimants was scheduled to work on December 10, 1970, as train dispatchers.

This Board is of the opinion that Rule 13 of the Agreement was violated for reasons set forth in Award 20115, and that these claims should be sustained.

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 Agreement was violated.

A W A R D

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 25th day of January 1974.

Carrier Members' Dissent to Awards 20115, 20116, 20117, 20118

(Referee Hays)

The employes in these cases relied upon Rule 13 of the Train Dispatcher's Agreement which reads as follows:

> "Seventy-two (72) hours advance notice shall be given train dispatchers affected of abolishment of a regular position."

Nowhere in the record in these four cases is there any competent evidence presented by the employes that any dispatcher positions were abolished. In fact the employes admitted, in the record, that no jobs were abolished when it was stated:

> "In effect the Carrier had abolished the train dispatcher's positions even though no notice of such abolishment was issued."

Rule 13 does not deal with "effect", it deals with positive substance i.e. "a notice shall be given". In the instant cases it is crystal clear that no notices were given. Yet the referee has seen fit to support the employe's position that the Carrier did not comply with rule 13. This Board is not empowered to write rules for the parties but this is exactly what this referee has done in arriving at such an erroneous conclusion.

Even though no trains were moving because of a strike, the dispatcher's positions in case were still in existence - not having been abolished. All claimants had to do was report for work on them to "draw their pay". The positions were their's and it was their responsibility to report for them. It is obvious the reason they did not report for them was because of the strike and their refusal to cross a picket line. It was claimants' right to choose not to cross a picket line, but when they so opted they were not entitled to compensation and the awards of this Board have so held. It was irrelevant whether there was any work to be performed - the claimants' positions were still in existence not having been abolished in any way, shape, form or manner. The referee should have followed the sound reasoning and principles set forth by this Board in Third Division Awards 5858 (Guthrie), 16499 (Engelstein), 14945 (Ives), 16500 (Engelstein), 16746 (Friedman), 19715 (Devine), his own Award 19915, 11102 (McGrath) and Second Division Awards 4494 (Anrod) and 6435 (Bergman) which awards were discussed with him. Since the record in these cases clearly indicates that there was no rule violation by Carrier and further, claimants in cases above chose not to cross the picket lines they did so at their own peril and should not have been compensated for such selection of action.

The awards are erroneous and are of no precedential value.

For the foregoing reasons we dissent.

W. B. JONES

P. C. CARTER

H. F. M. BRAIDWOOD

G. L. NAYLOR

G. M. YOUNG

Labor Member's Answer to Carrier Members'
Dissent to Awards 20115, 20116, 20117, 20118

(Referee Hays)

Under the guise of a Dissent the Carrier Members attempt to strip these well-reasoned Awards of precedential value. These Dissents are nothing more than a reargument of the cases involved, and it is these Dissents rather than the Awards which are erroneous and lack precedential value or any other value.

Violations of contracts are analogous to violations of the law in one respect, i.e. neither of these actions is conducive to admissions of guilt and the accused party is prone to claim innocence of any wrongdoing. Directors of penal institutions often comment that their prison is full of innocent men, i.e. the majority of the inmates deny that they violated the law. However, whether a violation of contract or the law, denials do not create or establish innocence and the facts or evidence must be considered to determine whether or not a violation did occur.

In these disputes Carrier claimed the dispatcher positions had not been abolished and were in existence but withheld payment of the compensation for these assignments or positions. Notwithstanding such denial of compensation, the Carrier in the record and the Carrier Members in these Dissents claim there was no violation of Rule 13 requiring advance notice of the abolishment of a regular position because the notice required under Rule 13 was not given, hence the positions were not abolished. Carrier Members' Dissents studiously avoid commenting on the findings in Awards 20116 and 20117 holding Carrier also violated Rule 4. (Rest Day Rule).

Award 20115, after a complete study of the facts and evidence, concluded stating "Indirectly, Claimants' positions were abolished for that day, without proper notice, and their claims should be sustained. Award 8526 cited as authority states:

> "*** It is a familiar proposition of law that one may not accomplish by indirection what he is forbidden to do in a direct manner. ***"

The reasoning is sound. Many days are spent before a strike call in complying with regulations in the Railway Labor Act. Carrier could have given the due notice provided in Rule 13 if Carrier wished to avoid paying these dispatchers. It appears that, because of the anticipated intervention by the Congress to prohibit this particular strike, Carrier wanted to have

dispatchers immediately available when trains were ready to start running again. Thus, no attempt was made to comply with the Agreement. This appearance is confirmed to be correct in the record adjudicated in Award 20116 wherein another dispatcher, not one of the Claimants, was required to be immediately available when the trains did start running again.

In these Dissents the Carrier Members try to revive the defense Carrier raised to defend its action of withholding payments for positions which Carrier contends and/or admits had not been abolished. This defense, i.e. any loss of compensation was the result of the Claimants' failure to cross the picket line, was considered and rejected in these Awards. Award 20115 ruling on this issue, states:

> "*** The right of Claimants to honor a picket line is not in issue. This Board has recognized this right many times. However, in the instant case we do not think Claimants were required to make a decision regarding crossing the picket line. They knew, and Carrier officials knew, that there was no need for them to go to their assignments because no trains were moving, or about to be moved, as long as the strike was in effect. ***"

The Carrier Members' in these Dissents stated "the referee should have followed the sound reasoning and principles set forth by this Board" and listed the awards which the Carrier Members proclaimed to be based on sound reasoning including this Referee's Award 19915. Award 20115, commenting on Award 19915, which Carrier Members cited and endorsed as sound, states:

> "*** In Award 19915 this Board held: 'There was work available for Claimants but they preferred to observe the picket line.' The situation is different in the instant case because there was no work 'available.' Evidence of this is that within an hour or two after the strike materialized dispatchers on the Third Trick were advised they could leave their positions. Had the trains been running Claimants would have been required to make a decision regarding crossing the picket line, but it was clearly pointed out to them that no trains were moving."

These Carrier Members' Dissents, which are merely rearguments and/or an expression of dissatisfaction with the final decision, do not detract fr.

the value of these Awards. Awards 20115, 20116, 20117 and 20118 are not erroneous nor are they stripped of precedential value by these Carrier Members' Dissents.

J. P. Erickson
Labor Member