C O R R E C T E D

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20137
THIRD DIVISION Docket Number TD-20070

Irving T. Bergman, 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 the effective Agreement between the parties, Articles III(a)1, III, Section 2(e), IV(d), IV(e) and IV(1)3 thereof in particular, by its failure to call Claimant Extra Train Dispatcher C. E. Doggett to perform service on Position No. 1 on December 9, 1971.

(b) Because of said violation, Carrier shall now be required to compensate Claimant C. E. Doggett the difference between one (1) day's compensation at the pro-rata daily rate applicable to trick dispatchers and the pro-rata daily rate applicable to Chief Dispatchers for December 9, 1971.

OPINION OF BOARD: This is a companion claim to those of Award 20136 and Docket TD-20073. The claimant is the same, the alleged violation of agreement is the same, the parties are the same, the facts are the same. There is a difference in the date involved and the amount claimed in Award 20136 but that does not affect the primary issue of alleged violation of Agreement.

In Award 20136, we found that the Agreement was not violated as alleged. The record in this Docket is the same as that submitted by the parties in Award 20136.

We adopt the Opinion of Award 20136 as though it were fully set forth at length in this case.

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

The Carrier did not violate the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 15th day of February 1974.

Labor Member's Dissent to Awards 20136, Docket TD-20069, 20137, Docket TD-20070 and 20139, Docket TD-20073

(Referee Bergman)

Award 20136 is the pilot award in these Dockets with Awards 20137 and 20139 adopting the Opinion contained in Award 20136. These Awards not only failed to consider the main issue in these disputes but show the decision rendered was not based on a thorough study of the record and, therefore, these Awards are palpably erroneous.

Award 20136 endorses an excerpt from the record as a point in Carrier's favor largely because the Organization did not contradict this point but was silent with regard to this Carrier's contention stating:

> "The Carrier has made this point on page 11 of its submission referring to the letter agreement of November 19, 1952 as follows: 'Item 3 effectively allows the Carrier to approve or disapprove an application for the Relief Position covering the rest days of the excepted Chief Dispatcher and applications for any other relief on this position without regard to the seniority of the applicant.' This point was not contradicted by the Organization in the record. On pages 3 and 4 of its Rebuttal, the Organization discussed statements on page 11 of Carriers Submission but was silent with regard to the Carrier's contention as quoted herein."

The acceptance of this point as supporting Carrier's position as the result of the Organization's default is not just specious reasoning but is unmistakable error resulting in erroneous adjudication. The neutral did not peruse the Docket to a sufficient degree to ascertain that this "Item 3", accepted as a point or contention favorable to the Carrier, was, in fact, a direct quote from the Employes' Ex Parte Submission in Docket TD-18768, Award 18419. This Referee has placed the Organization in the untenable position of being faulted for not attempting to impeach its own testimony.

The language in this Item 3 is not confusing or ambigious but deals with the Carrier being allowed to approve or disapprove an application for the Relief Position covering the rest days of the excepted Chief Dispatcher or other relief on the position of the excepted Chief Train Dispatcher. Carrier's being allowed to approve or disapprove an application to perform relief work in the stead of the excepted Chief Train Dispatcher was an issue in the dispute adjudicated in Award 20138 but was not an issue in the disputes adjudicated in Awards 20136, 20137 and 20139.

Award 20136 shows the Referee was not cognizant of the exact issue in the dispute nor the position taken by the Organization when it states "The Organization also maintains that the claimant was entitled to the position under Article IV, paragraph (e), (k) and (l)." Paragraph (k) is headed "Temporary Vacancies" and paragraph (l) is headed "Moving From One Assignment to Another" as Award 20136 states. The Organization did not maintain the Claimant was entitled to work this position under the terms of paragraphs (k) or (l). The Organization did maintain the train dispatcher who did perform the relief work on the claim dates involved in Awards 20136, 20137 and 20139 was not entitled to nor should he have been allowed to either make application for or move onto this specific temporary vacancy under the terms and conditions of paragraph (k) and (l). Award 20138 sustains the claim for time and one-half compensation for the train dispatcher filling this vacancy on that train dispatcher's rest day. The Carrier submitted a common Ex Parte Submission to cover the disputes involved in Awards 20136, 20137 and 20139 and in addition to cover the dispute involved in Award 20138. Notwithstand the common Ex Parte Submission by the Carrier to cover four Dockets, the Referee should have been aware the contention raised by the Employes in the instant Awards was the Claimant, an extra train dispatcher, was not used on a temporary vacancy which, under the instant circumstances and the specific terms of the Agreement, was extra work and should have been filled by the senior extra train dispatcher as provided in paragraph (d). Such senior extra train dispatcher had to be both qualified and available as provided in paragraph (d) and Award 20136 found that "the claimant qualified for the vacancy as stated in this paragraph."

Award 20136 states "Third Division Award 15506 also held that filling the position of Chief Train Dispatcher is at the discretion of the Carrier. It is noted that the Labor Members' Dissent in the case attacking the Concurring Opinion of a Carrier Member, did not disagree with the Findings." This statement is also found to be specious and/or irrational when Award 15506, the Concurring Opinion of the Carrier Members in Award 15506 and the Labor Member's Response to Carrier Members' Concurring Opinion in Award 15506 are read and considered in their entirety. The decision in Award 15506 was based on a special Memorandum of Agreement between the parties holding:

> "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."

The Carrier Members in their Concurring Opinion to Award 15506 did not actually concur with the basis for the decision though they approved the denial of the claim. This Concurring Opinion said the "claim should have been dismissed on other grounds which go to the jurisdiction of the Board.", i.e. Chief Dispatchers are "officials" and that this Board has no jurisdiction to adjudicate a claim to an official position. This contention had been presented by the Carrier involved and was rejected in Award 15506 which proceeded to and did adjudicate the dispute on the merits. The Labor Member did not dissent to Award 15506 as Award 20136 mistakenly states. The Labor Member in Award 15506 made a Response to Carrier Members' Concurring Opinion and, of course, confined this response to the statements or contentions made in Carrier Members' Concurring Opinion. The Referee in Award 20136 fails to recognize the difference between a dissent and a response to a concurring opinion and/or the basis for the decision reached in Award 15506.

Award 20136 states: "Supplemental Award 11110 of the Third Division reviewed prior Awards and concluded that the position of Chief Train Dispatcher is excepted from the Agreement." The Dissent to Award 11110 points to the errors in that Award and the fallacy of the statement quoted above considering the award authority followed (Awards 7027 and 10705) was palpably incorrect. This Dissent also pointed to a precedent set by Awards 2943, 2944, 2986, 3096, 3344, 4012, 5202, 5244, 5371, 5659, 5716, 5829, 5904, 5975, 6292, 6581, 6583, 6746 and 7914 in which it has been held that the exception of the Chief Dispatcher from the Agreement applies ONLY to the one appointed incumbent. Award 20136 failed to consider these Awards cited in the Dissent to Award 11110 and awards subsequent to Award 11110 which were presented to the Referee for consideration. For example -

Award 11560:

> "It is true that the Agreement does not cover wage rates or working conditions of Chief Dispatchers. They are generally outside the Scope of that Agreement. We have held, however, that only the occupant of the position of Chief Dispatcher is excepted and that Train Dispatchers relieving him, for any reason, are entitled to all the benefits of the Agreement and to the Chief Dispatcher's monthly rate. Awards 5371 (Elson), 5904 (Daugherty) and others. ***"

Award 18070:

> "There is a long line of awards by this Board holding that although the occupant of the position of Chief Dispatcher is excepted from the schedule agreement, Train Dispatchers relieving him are entitled to all of the benefits of the Agreement. ***"

Awards are only as sound as the reasoning used in arriving at the decision rendered. Award 20136, and Awards 20137 and 20139 following 20136, indicate such a shallow review of the record was made that neither the issues involved nor the contentions or positions of the parties ever became clarified enough to permit meaningful, sound adjudication of the dispute. Awards 20136, 20137 and 20139 are palpably erroneous and I must dissent.

J. P. Erickson
Labor Member

Carrier Members' Answer to Labor Member's dissent to Awards 20136, 20137 and 20139. (Cont'd)

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H. B. Jones

W. B. Caldwell

J. M. Lynch

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TO
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Notwithstanding the long-winded dissent, there was but one issue involved in each of the disputes covered by Awards 20136, 20137, and 20139, and that was whether Carrier was obligated to fill a temporary vacancy on the Chief Dispatcher position under the seniority rules of the Agreement, when the only restriction in the Agreement is that such positions "will be filled by employes holding seniority under this Agreement". Award No. 20136 is well reasoned, fully supported by the Agreement and precedent awards of the Division. The dissent does not detract from the soundness of the Awards.

Quite apropos here are the comments of dissenter's predecessor on this Board in answer to Carrier Members' dissent to Award 15590 (Volume No. 167 of Third Division Awards):

> "Like a latter-day Don Quixote the author of the so-called 'dissent' rides off in all directions, thundering like a parish elocutionist, and evidencing an incredible disregard for the issue presented by the docket. * * * what is captioned as a 'dissent' is given over to an attempt to reargue a record which the apparent author of the 'dissent' had already twice argued to the Referee. The 'dissent' is a somewhat sonorous if not sniveling Blackstonian discourse which may be intended to impress those who its author may patronizingly regard as less informed in the complex field of jurisprudence."

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