

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20821  
Docket Number TD-20703

William M. Edgett, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association  
(  
(Burlington Northern Inc.

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

CLAIM #1 - Carrier File DI-84(t)-11 12/23/71 B

(a) The Burlington Northern Inc. hereinafter referred to as "the Carrier", violated and continues to violate the Agreement in effect between the parties, Article 1(b) thereof in particular, when on June 16, 1971 instructions were issued by Superintendent T. W. Mackenroth, Seattle, Washington, File B-1806 providing in part that:

"Effective July 1, 1971, or sooner based on certain necessary telephone changes...the handling of all telegrapher vacancies on the Pacific Division will be handled by Ames Larson and will be working in the same office with Division Station Inspector D. K. Sorkness and under his immediate supervision."

and further instructions issued by Superintendent T. W. Mackenroth, on June 30, 1971, File S-485 providing that:

"Effective July 1 Mr. A. L. Larson will assume duties of handling all agents and operators on the Pacific Division. Any requests for leave of absence, time off, etc., should be directed to and addressed to Mr. A. L. Larson. Also timeslips and expense accounts should be mailed to him at 201 S. King Street, Seattle."

which arbitrarily removed from employees covered by the scope rule of said Agreement, work in Carrier's Tacoma, Washington train dispatching office and assigned that work to employees not within the scope of said Agreement.

(b) Because of said violation, the Carrier shall now be required to compensate the senior available qualified extra train dispatcher one (1) day's pay at the pro rata rate of Assistant Chief Dispatcher for each day commencing August 16, 1971 and continuing until said violation ceases with the exception of the period between December 23, 1971 and January 24, 1973, inclusive.

(c) In the event no qualified extra train dispatchers are available on any day or days in the period defined in paragraph (b) above, then and in such event Carrier shall be required to compensate the senior qualified regularly assigned train dispatcher who is available due to observance of his weekly rest day, one (1) day's compensation at the punitive rate of Assistant Chief Dispatcher for each of such days that said violation continues.

(d) Eligible individual claimants entitled to compensation claimed herein are readily identifiable and shall be determined by a joint check of the Carrier's records.

CLAIM #2 - Carrier File DI-84(t)-11 4/5/72 A

(a) The Burlington Northern Inc. hereinafter referred to as "the Carrier", violated and continues to violate the Agreement in effect between the parties, Article 1(b) thereof in particular, when instructions were issued by the Carrier providing that effective January 1, 1972, supervision of agents and telegraphers, including requests for leaves of absence, vacation relief and supervision pertaining to assigning of extra telegraphers and agents would be handled by Ames Larson at Seattle, Washington, working in the same office with Division Station Inspector D. K. Sorkness and under his immediate supervision, that formerly had been handled by train dispatcher employees under the supervision of the Chief Dispatcher at Vancouver, Washington and Klamath Falls, Oregon, which arbitrarily removed from said employees covered by the scope rule of said Agreement, work in Carrier's Vancouver, Washington train dispatching office and assigned that work to employees not within the scope of said Agreement.

(b) Because of said violation, the Carrier shall now be required to compensate the senior available qualified extra train dispatcher one (1) day's pay at the pro rata rate of Assistant Chief Dispatcher for each day commencing with January 10, 1972 and continuing until such violation ceases with the exception of the period between April 5, 1972 and January 26, 1973 inclusive.

(c) In the event no qualified extra train dispatchers are available on any day or days in the period defined in paragraph (b) above, then and in such event Carrier shall be required to compensate the senior qualified regularly assigned train dispatcher who is available due to observance of his weekly rest day, one (1) day's compensation at the punitive rate of Assistant Chief Dispatcher for each of such days that said violation continues.

(d) Eligible individual claimants entitled to compensation claimed herein are readily identifiable and shall be determined by a joint check of the Carrier's records.

CLAIM #3 - Carrier File DI-84(t)-11 1/31/73 A

(a) The Burlington Northern Inc., hereinafter referred to as "the Carrier", violated and continues to violate the Agreement in effect between the parties, Article 1(b) thereof in particular, when on November 9, 1972, instructions were issued by Superintendent J. G. Heimsjo, Spokane, Washington, File C-268 providing that:

"After 4PM Friday, November 17th, supervision of telegraphers and agent presently handled by dispatchers office, Spokane, including station on the Spokane Division, following stations on Rocky Mountain Division:

Noxon, Thompson Falls, Plains, Paradise and following stations on Portland Division:

Ritzville, Connell, Pasco, Kennewick, Prosser, Toppenish, Wapato, Grandview, Sunnyside, Buena, Pendleton, Helix, Attalia, Dayton, Walla Walla, Bruce, Warden, Wheeler

will be moved to Telegrapher Control Center, Seattle, Washington.

After November 15, 1972 Agents and Telegraphers will mail time slips and expense account forms to Telegrapher Control Center, Seattle, Attention G. W. Fleming.

Effective Monday, November 20, 1972 vacation relief, relief account illness, etc. for Agents and Telegraphers should be directed to G. W. Fleming at Seattle. C-268"

which arbitrarily removed from employees covered by the scope rule of said Agreement, work in Carrier's Spokane, Washington train dispatching office, enabled the Carrier to abolish an Assistant Chief Dispatcher position, and assigned that work to employees not within the scope of said Agreement.

(b) Because of said violation, the Carrier shall now be required to compensate the senior available qualified extra train dispatcher one (1) day's pay at the pro rata rate of Assistant Chief Dispatcher for each day commencing November 18, 1972 and continuing until said violation ceases.

(c) In the event no qualified extra train dispatchers are available on any day or days in the period defined in paragraph (b) above, then and in such event Carrier shall be required to compensate the senior qualified regularly assigned train dispatcher who is available due to observance of his weekly rest day, one (1) day's compensation at the punitive rate of Assistant Chief Dispatcher for each of such days that said violation continues.

(d) Eligible individual claimants entitled to compensation claimed herein are readily identifiable and shall be determined by a joint check of the Carrier's records.

CLAIM #4 - Carrier File DI-84(t)-11 4/26/73

(a) The Burlington Northern Inc., hereinafter referred to as "the Carrier", violated and continues to violate the Agreement in effect between the parties, Article 1(b) thereof in particular, when it removed certain work from Carrier's Missoula, Montana train dispatching office relating to supervision of agent and telegrapher forces theretofore performed by the class of employees represented by this Association, and assigned that work to employees not within the scope of said Agreement in the Telegrapher Control Center in Seattle, Washington.

(b) Because of said violation, the Carrier shall now be required to compensate the senior available qualified extra train dispatcher one (1) day's pay at the pro rata rate of Assistant Chief Dispatcher for each day, commencing January 15, 1973 and continuing until said violation ceases.

(c) In the event no qualified extra train dispatchers are available on any day or days in the period defined in paragraph (b) above, then and in such event Carrier shall be required to compensate the senior qualified regularly assigned train dispatcher who is available

due to observance of his weekly rest day, one (1) day's compensation at the punitive rate of Assistant Chief Dispatcher for each of such days that said violation continues.

(d) Eligible individual claimants entitled to compensation claimed herein are readily identifiable and shall be determined by a joint check of the Carrier's records.

OPINION OF BOARD: This docket consists of four claims which were consolidated by the parties. The claims stem from Carrier's decision to place the responsibility for handling Telegraphers in a Telegrapher Control Center at Seattle. The Organization asserts that the following duties were "transferred from the Chief Dispatchers";

1. Employment of Operators
2. Rules examinations for newly employed Operators
3. Maintenance of records of re-examination on rules of all Operators
4. Filling vacancies created by emergencies, illness, vacations, etc. of Operators
5. Assignment of Operators to new positions
6. Responsibility for bulletining of Operators' vacancies
7. Overseeing Hours of Service law application to Operators
8. Maintain Operator seniority records for Hours of Service law inspection by Federal Railroad Administration personnel
9. Assignment of Operators' vacation periods
10. Handling time claims and related work with Operators' Local Chairman
11. Maintaining Operators' seniority rosters
12. Supervision of training of Operators to qualify for various positions
13. Maintaining records showing offices where each Operator has previously worked
14. Maintaining records showing which Operators are currently assigned to each position at each station
15. Approval of overtime claims of Operators
16. Approval of expense claims from Operators

The Organization claims a violation of Article 1 - SCOPE and specifically paragraph b of that Article. Paragraphs a and b read:

"(a) SCOPE.

This agreement shall govern the hours of service and working conditions of train dispatchers.

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 a shift performing train dispatchers' work.

NOTE: A weekly rest day shall be assigned to each excepted chief train dispatcher position as a part of the weekly schedule of work for any train dispatcher assignment.

Relief of excepted chief train dispatchers for their annual vacation, and other temporary periods of absence from their positions, shall be made by qualified train dispatchers from the office involved.

Any permanent appointment to the position of excepted chief train dispatcher shall be made from train dispatchers holding seniority as such, on the same seniority district.

(b) DEFINITION OF CHIEF AND ASSISTANT CHIEF DISPATCHER POSITIONS.

Positions of chief and assistant chief train dispatchers shall 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 employees; to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work."

Carrier's first defense is that claims 1 and 4 must be dismissed because they were not filed within sixty days of the date of occurrence as required by Article 24(f). Claim 1 is based on an occurrence of July 1, 1971 and was not filed until September 24, 1971. The Organization seeks to avoid the effect of Article 24(f) by dating the period of the claim from August 16, 1971 and pointing out that the claim was filed within sixty days of that date. It also argues that the claim is of a continuing nature and therefore can be filed at any time. Neither argument is persuasive.

The record clearly shows that the date of occurrence for claim No. 1 was July 1, 1971. It also shows that the claim is not a continuing claim but is one based on a specific occurrence. The fact that Carrier's liability, if any, would continue for a period of time does not serve to place the claim in the category of a continuing claim.

Claim No. 4 was filed on March 11, 1973. The record shows that the occurrence upon which it is based took place on November 20, 1972. The Organization has argued that Carrier has failed to establish the date of occurrence by probative evidence and that the November 20, 1972 date is simply an assertion on Carrier's part. However, Carrier made that assertion in the handling on the property and the Organization has not come forward with evidence to controvert it. Based on the state of the record before the Board, the conclusion must be that the date of occurrence is as asserted by Carrier. Since Claim No. 4 and Claim No. 1 were not filed within the period provided by Article 24(f) they must be dismissed.

Each of the claims are for "senior available qualified extra train dispatcher". Carrier takes the position that the claims are procedurally defective in that they do not name or sufficiently identify the Claimant. Such identification is required by Article 24(f), according to Carrier. The Board has supported that view in a number of cases. Although Carrier seems to insist that the Claimant, or Claimants, must be named, that requirement seems to be overly stringent. The trend of decision by the Board does support the view that if Claimants are not named they must, at least, be readily ascertainable. In Award No. 14668, the Board held that "(the claimants) must be identified in such a manner as to prevent further controversy concerning their identity." The Board went on to state, "the burden is upon the petitioner to prove by evidence in the record that the identity of the employees involved is known to the Carrier. (Award 11372)"

There is, in this record, no evidence that the identity of the employees involved is known to the Carrier. Nor can it be said that the Claimants have been identified in a manner which would prevent further controversy concerning their identity. The Organization's response to Carrier's persistent objection to the claims on the ground that the absence of specific Claimants violates both the parties' Agreement and the National Agreement has been that "specific names of claimants need not be specified, provided that they are readily ascertainable from Carrier's records". That principle is well established and the Board does not here take issue with it. The problem is that the cases have also held that the record before the Board must show, as a matter of fact, that the names are readily ascertainable. The record in this case does not contain such a showing.

There are a number of reasons for this state of affairs. Intertwined with the problem discussed above is another problem and defense raised by Carrier. The Organization's submission to the Board states that the work which was placed under the jurisdiction of the Telegrapher Control Center was formerly performed by Chief Dispatchers. Carrier has pointed out that "one chief train dispatcher in each dispatching office" is excepted from the Agreement. It argues that what the Organization is complaining about here is the movement of work from one of Carrier's excepted employees to another of its excepted employees. Therefore, Carrier argues, the Organization could not make a valid complaint that work was being taken from employees covered by the Agreement. The rejoinder to this point by the Organization has been to assert that there are Chief Dispatchers who are not excepted from the Agreement. The point has not been taken further and there is no evidence in the record to show whether supervision of telegraphers has been performed by Chief Dispatchers who are excepted from the Agreement or by Chief Dispatchers who are not excepted from the Agreement. If, as Carrier asserts, all it has done is move supervisory duties from one of its employees not covered by the Agreement to another of its employees not covered by the Agreement, it is difficult to see how the Organization can complain that work belonging to employees covered by the Agreement was being removed from such coverage by Carrier.

The burden of showing that employees covered by the Agreement were performing the work complained of necessarily falls upon the Organization. Both parties agree that Chief Dispatchers performed supervision of Telegraphers prior to the changes. Carrier asserts, and the Agreement reflects the fact, that some Chief Dispatchers are excepted from the Scope. The Organization goes on to say that some Chief Dispatchers are not excepted and that, at least by inference, they were doing some or all of the supervision of Telegraphers. However,



this latter point is simply an assertion and there are no facts of record to support it. If the Organization wished to rely on it, it was incumbent upon it to adduce such facts.

The matter of whether the work complained of was performed by employees who were covered by the Agreement or whether it had been performed by employees not covered by the Agreement is related to the question of the identity of Claimants. It is difficult to see how one could say that the identity of the Claimants could be determined without further controversy. There are many instances when the defense of lack of specific named Claimants must be viewed as over-technical and therefore an unfavored defense. However, there are other cases, and this is one of them, when the defense is a sound one and is one which requires the Board to hold that the Claim must be barred. There is solid precedent requiring such a finding in the appropriate case and for the reasons discussed above this is such a 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 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 claims 1 and 4 must be dismissed.

That claims 2 and 3 are barred.

A W A R D

Claims 1 and 4 dismissed. Claims 2 and 3 barred.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulson  
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1975.

Labor Member's Dissent to Award 20821, Docket TD-20703

That the Majority in Award 20821 endorsed an erroneous decision becomes obvious even with a casual review of the Award and the record in Docket TD-20703.

Claims 1 and 4 were dismissed because they were not initially filed within the time limit established in the Agreement. The Employees are the party making the claim and as the petitioner must point out how the Agreement was violated and the facts and circumstances or, in other words, identify what action of the Carrier caused or continues to cause the Agreement to be violated. In Claims 1 and 4 the proposed effective dates of the actions causing work to be taken away from the train dispatcher craft appear in the record. Dates are mentioned in Claims 1 and 4 but the record evidence clearly shows that the Agreement violations resulting in claims occur when this work is performed each day rather than a single cause of action occurring on a single date. Many Awards have held that a single lapse in claim procedure does not cause a claim to be forever payable nor to forever remove work from a class or craft of employees. One Award directly on this point is Award 10644 which states:

"\*\*\* To hold otherwise would lead to absurd results--such as work properly belonging to a given craft being indefinitely lost to it because of failure to take timely action on an appeal, or a Carrier being required for the indefinite future to pay employees for work to which they are not contractually entitled and which is properly being performed by others. The purpose of the Time Limit Rule is to provide for the expeditious handling of claims, not to fasten upon the parties a system wherein a single lapse can produce continuing or repeated injustices thereafter."

The only way that it is possible to find Claims 1 and 4 are dismissable requires ignoring evidence presented in the record for several different dates clearly establishing a continuing performance of work by persons not covered by the Agreement, i.e. a continuing claim, and acceptance of the contested dates of single actions occurring only once as being true and correct.

Labor Member's Dissent to Award 20821, Docket TD-20703 (Cont'd)

As far fetched as the dismissal of Claims 1 and 4 appear to be, the holding that Claims 2 and 3 are barred is even worse. The errant route taken to create a procedural bar about the identity of the Claimants is so obvious in Award 20821 that extended further comment is hardly necessary. Suffice it to say neither the Organization nor the Carrier contended some Chief Train Dispatchers are not excepted from the Agreement while some are. The Majority elected to ignore the fact that only one Chief Train Dispatcher in each dispatching office is excepted from the Agreement and if additional Chief Train Dispatchers were employed, they would be covered by the Agreement. The record shows the work was not transferred to Chief Train Dispatchers (whether excepted from the term "train dispatcher" by the Agreement or not excepted) but was transferred to persons not covered by the train dispatchers Agreement. Chief Train Dispatcher position duties are defined and reserved in Article 1 (b) of the Agreement, notwithstanding one Chief Train Dispatcher in each dispatching office being excepted, and duties or work was the subject matter in these claims.

The method or route endorsed by the Majority to create the "identity of claimant" bar to Claims 2 and 3 are procedural devices not supported by the record. Meaningful adjudication requires a study of the facts and evidence in the record. That Award 20821 is not based on the record in Docket TD-20703 can be found in Award 20821 itself. Award 20821 states "The Organization's response to Carrier's persistent objection to the claims on the ground that the absence of specific Claimants violates both the parties' Agreement and the National Agreement has been that 'specific names of claimants need not be specified, provided that they are readily ascertainable from carrier's records'." The only National Agreement mentioned anywhere in the record is the August 21, 1954 Agreement. The Carrier did not defend against this claim on the basis of this National Agreement nor did the Organization respond to this National Agreement as Award 20821 states. Both parties knew that the American Train Dispatchers Association is not a party to the August 21, 1954 Agreement. The comment in Award 20821 regarding the National Agreement (August 21, 1954) shows without doubt the decision cannot be the result of a study of the facts and evidence in Docket TD-20703.

For these specific errors as well as many others evident in Award 20821, I must dissent.



J. P. Erickson  
Labor Member