

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26496
Docket Number TD-26383

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM:

"CLAIM #1

Please allow 8 hours pay at dispatchers rate for violation of dispatchers scope agreement. On Nov 24 local 777 called 700am at McGehee Eng 2043 Condr ellis Engr Watson Went from McGehee to Talluha and Back to McGehee on Verbal Authority of the Train Master at McGehee. Under General Order no 80 this train only had Authority to go from McGehee to Tulluha. A train order is the only Authority that could get him back to McGehee legally. This is a Violation of the Rules and the train dispatchers scope agreement....

CLAIM #2

Please allow 8 hour at dispatcher rate of pay for violation of dispatchers scope rule on Dec 3 1980 work train eng 2023 condr pugh engr fuller called at Monroe 700am were instructed by dispatcher davidson to go to collinston and copy order for protection against the ferriday local. After arrival of work train at Collinston Condr Pugh states that yard Master George Dent told the work train that 'they are holding the Ferriday local at Ferriday until you get there, just go on'. This is a very unsafe practice and violation of the rules and our scope rule...The work train went from Collinston to Ferriday with only the yardmasters say so." (sic)

OPINION OF BOARD: As a procedural matter, the Carrier raises objection to consideration of these Claims by the Board on the basis of laches. The Carrier notes that the two Claims were filed on November 24 and December 3, 1980, respectively, whereas the Claims were not submitted to the Board until April 25, 1985. This assertion overlooks, however, that more than two years elapsed between the declination by the Carrier's highest officer and the required ensuing conference. No explanation as to this extensive period was offered to the Board. Under these circumstances, the Board finds that the Claims are entitled to review on their merits.

Involved here are the movements of two trains on extra trips not included in the General Orders covering the normal operations of the trains. In one instance, the movement was authorized by verbal authority of the Trainmaster, and in the other, the movement was authorized by the Yardmaster. In neither instance was instruction given to a Train Dispatcher to convey such orders to the train crews.

In defense of its position that Train Dispatcher work was improperly omitted, the Organization points to the following Rules:

"ARTICLE 1

(a) Scope

This agreement shall govern the hours of service and working conditions of train dispatchers. The term 'train dispatcher,' as hereinafter used, shall include Night Chief, Assistant Chief, trick, relief and extra train dispatchers. It is agreed that one Chief Dispatcher (now titled Division Trainmaster on this property) in each dispatching office shall be excepted from the scope and provisions of this agreement.

. . .

(b-2) Definition of Trick Train Dispatcher Positions

This class includes positions in which the duties of the incumbents are to be primarily responsible for the movement of trains by train orders, or otherwise; to supervise forces employed in the handling of train orders; to keep necessary records incident thereto; and perform related work. This definition does not change the work jurisdiction of train dispatchers."

The Carrier refers to its own authority to make general determination of train movement and indeed of all operations. The Board finds such reasoning sound. This, however, does not negate mutually agreed rules to determine how such operations shall be conducted. Article I (b-2) refers to Train Dispatcher duties as being "primarily responsible for the movement of trains by train crew, or otherwise...." The phrase, "or otherwise," clearly indicates Train Dispatcher responsibility for train movement by means other than train orders.

In the instances under review, the Board finds no broadly significant change in authority but rather two instances in which a Trainmaster and a Yardmaster simply by-passed the established procedure of employing the services of a Train Dispatcher to convey orders for and direct the additional train movements.

The Claim must be sustained on its merits. The Board, however, finds that the remedy sought to be excessive and inappropriate. The Claimant seeks a day's pay in each instance because of the Carrier's actions. The Organization seeks the remedy to "maintain the integrity of the agreement." While penalty pay for such purposes is indeed appropriate under some circumstances, the Board does not find such to be applicable here. The time required in each instance would be minimal for the Train Dispatcher function. On one of the days, the Claimant was on his rest day and may or may not have been the appropriate claimant; on the other day, he was otherwise under pay. The offenses, which appear to be isolated in nature, do not require the remedy sought, although the sustaining of the Claim is intended to preserve the Agreement's integrity. The Board's determination not to award pay in this instance has no precedential value in other similar circumstances.

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

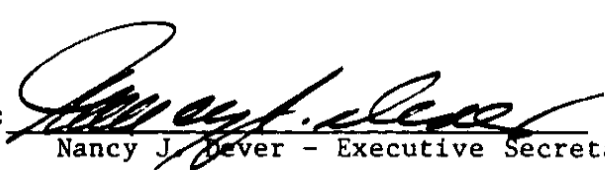
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1987.

LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
to
Award 26496 - Docket TD-26383
Referee Marx

This Award rejected the Carrier's defense on the basis of laches, and properly so in light of the on-property handling.

This Award also sustains the claim on its merits and, therefore, in our opinion it reinforces the numerous awards which hold the responsibility for train movements by any method is exclusively reserved to train dispatchers under this Scope Rule, contained in most Train Dispatcher Agreements in identical language.

Because the Award is correct in these respects, we signify our concurrence in the findings referred to, supra.

We are troubled, however, that no penalty was assessed for the Carrier's breach of its Agreement with the Employees. The sting of this fact is mitigated somewhat by the Award's recognition that "penalty pay . . . is indeed appropriate under some circumstances" and the notation that "The Board's determination not to award pay in this instance has no precedential value in other similar circumstances."

Third Division Awards 2282, 6063, 21663, 23571, and 23928 were submitted in support of the Organization's position there must be a penalty to discourage carriers from violating their agreements. As Award 21663 said, "Some kind of convincer is required."

By contrast, carriers have not been reluctant to impose disciplinary measures to bring errant employees into compliance with their operating rules, assessing costly monetary penalties, even though these employees have not been enriched by their infractions. These Third Division Awards, all involving employees of this same Carrier, are illustrative:

<u>Award</u>	<u>Employee</u>	<u>Offense</u>	<u>Penalty</u>
24387	Trackman	Insubordination	Dismissed from service. Claim denied.
24389	Trackman	Assault	Dismissed from service. Claim denied.

Labor Member's Concurring Opinion and Dissent to Award 26496 - Continued

<u>Award</u>	<u>Employee</u>	<u>Offense</u>	<u>Penalty</u>
24493	Signal Maintainer	Negligence	Dismissed from service. Appeal denied.
24634	Machine Operator	Unauthorized absence	Dismissed from service. Reinstated without pay.
24635	Trackman	Unauthorized absence	Dismissed from service. Appeal denied.
24683	Clerk	Falsified employ- ment application	Dismissed from service. Appeal denied.
24776	Signal Maintainer	Improper perform- ance of duties.	30-day suspension. Appeal denied.
25033	Trackman	Quarrelsome and insubordinate.	Dismissed from service. Appeal denied.
25189	Trackman	Leaving assign- ment.	Dismissed from service. Appeal denied.
25223	Trackman	Unauthorized absence	Dismissed from service. Reinstated without pay.
25229	Signal Maintainer	Improper main- tenance	Dismissed from service. Appeal denied.
25330	Patrol Foremen	Improper inspec- tion and leaving job	Dismissal reduced to sus- pension. Appeal denied.
25422	Patrol Foreman	Improper track inspection	60-day suspension. Appeal denied.
25451	Communications Maintainer	Not stated in Award	30-day suspension. Appeal denied.
25599	Signalman	Negligence re- sulting in fire	30-day suspension. Appeal denied.
25684	Signalman	Fighting	Dismissed from service. Reinstated without pay.
25828	Operator	Faulty train order	60-day suspension. Appeal denied.
25850	Operator	Failure to issue train order	20-day suspension. Reduced to 15-day suspension.
25854	Clerk	Failure to pro- tect defective track	60-day suspension. Appeal denied.
25896	Clerk	Failure to pro- tect vacancy	Dismissed from service. Reinstated without pay.

Labor Member's Concurring Opinion and Dissent to Award 26496 - Continued

<u>Award</u>	<u>Employee</u>	<u>Offense</u>	<u>Penalty</u>
25912	Clerk	Improper absence	Dismissed from service. Reinstated without pay.
26202	Train Dispatcher	Near collision	Dismissed from service. Reinstated without pay.
26419	Assistant Signal- man	Rule G	Dismissed from service. Appeal denied.

This is not to argue that, in some instances, even severe penalties for misconduct are not justified. That is just the point. When a carrier violates its agreements, it should likewise be subject to a penalty commensurate with the offense.

As demonstrated herein, when the shoe is on the other foot, this Board has supported discipline which is intended to bring employees into compliance with a carrier's rules. Third Division Award 6637 said that deterrence is a recognized element in any system of discipline. Third Division Award 12842 said that discipline is administered for education, caution, and benefit rather than as punishment. Third Division Award 16065 said the purpose of discipline is not primarily punitive, but corrective. Third Division Award 20874 said discipline is administered for education, caution, and benefit of the offending and other employees. Third Division Award 21760 said the purpose of discipline is to rehabilitate, correct, and guide employees.

In none of the above cases did the employee reap some monetary benefit from his misconduct, but they were nonetheless assessed a monetary penalty for "education, caution, and benefit".

Unless this Board's Awards assess a monetary cost for "education, caution, and benefit", to "rehabilitate, correct, and guide" them, carriers will continue to test or ignore agreements, to flout the rules they signed.

In the decision rendered by Third Division Award 26202, a discipline case involving these same parties, an employee held to be guilty and reinstated without pay, lost wages of more than \$95,000 for

Labor Member's Concurring Opinion and Dissent to Award 26496 - Continued

his education, correction, and guidance, in a case in which he derived no monetary benefits from his misconduct. Here, the same Carrier is held guilty of misconduct, and is let off without a penalty, presumably because it derived no monetary benefits; or, at least, because no monetary loss was shown by the Employees; they just lost the work.

This kind of disparate treatment cries out for correction.

We dissent to that part of the Award which denies any compensation for Carrier's violation of the Agreement. Carriers understand only one language—that of the economic market place, i.e., what will it cost?

Only by imposition of monetary reparations can a carrier be taught the risk of non-compliance with contractual obligations. Unpunished misconduct is commonly thought to result in disrespect of authority and anarchy. There is no reason large corporations should be insulated from the penalty for misconduct while single individuals are punished for theirs.



R. J. Irvin
Labor Member