NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26593
THIRD DIVISION Docket Number TD-26311

Elliott H. Goldstein, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(St. Louis Southwestern Railway Company

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

(a) The St. Louis Southwestern Railway Company (hereinafter referred to as the 'Carrier') violated its Train Dispatchers' schedule working conditions Agreement, including Article 1 b.(2). thereof, when it permitted and/or required an employee not covered by the scope of said Agreement to exercise primary responsibility for the movement of the trains indicated below, between North Switch Cart MP K-445.26 and Red Junction MP K-450.7:

Date	Shift	Train
9-25-81	second	Extra 8334 South
9-27-81	second	No 143
10-11-81	second	No 143
10-17-81	third	No 130

(b) Because of said violations, the Carrier shall now compensate the Claimants indicated below, one (1) day's pay at the pro-rata rate applicable to Trick Train Dispatchers for each indicated date:

Date	Shift	Claimant
9-25-81	second	K. E. Taylor
9-27-81	second	D. R. Hutcheson
10-11-81	second	J. A. Adams
10-17-81	third	D. R. Hutcheson"

OPINION OF BOARD: On August 31, 1981, General Order No. 40 was issued, effective September 1, 1981. Items 53 and 54 are relevant to the instant dispute, and provide as follows:

> "53. Rule S-71: There is no superiority of train on main track between North Switch Cart MP K-445.26 and Red Junction MP K-450.7. Trains and Engines moving between these points must move at Restricted Speed, and be governed by Instructions by Yardmaster.
>
> 54. Shreveport, Louisiana
> Rule 501 (3) Page 15, Timetable No. 4, the following is added:

Southward trains approaching Cart will communicate with Yardmaster, Shreveport, Louisiana for instructions pertaining to movements between Cart and Red Junction.

Northward trains when ready to depart Shreveport Yard, member of crew will communicate with Yardmaster for route and authority to depart."

At issue here is whether the provisions of Article 1 b.(2) of the controlling Agreement exclusively reserve to Train Dispatchers, Claimants herein, the duty of being primarily responsible for the movement of trains between the North Switch of Cart siding (Mile Post K-445.26) and Red Junction (Mile Post K-450.7). Article 1, the Scope Rule of the Agreement, lists the duties of incumbent Dispatchers in subparagraph b.(2). as follows:

"ARTICLE 1

a. . . . .

b. Definitions.
(1) . . . . .
(2) Trick Train Dispatcher
Relief Train Dispatcher
Extra Train Dispatcher

This class shall include positions in which the duties of incumbents are to be primarily responsible for the movement of trains by train orders, or otherwise; to supervise forces employed in handling train orders; to keep necessary records incident thereto; and to perform related work."

The Organization contends that, pursuant to the foregoing language, the primary responsibility for the issuance of instructions authorizing the movement of trains, whether by train orders or otherwise, is exclusively the Dispatcher's duty. In the instant case, the Organization argues, Carrier substituted instructions issued by a Yardmaster for train orders, as a way of moving trains between the North Switch of Cart siding and Red Junction. In so doing, Carrier violated Article 1 b.(2). by removing the primary duty of Train Dispatchers and transferring it to Yardmaster employees.

Carrier contends that neither Section b(2). of Article 1 nor any other provision of the Agreement has been violated, since there is no express reservation of work nor have the duties been performed by Dispatchers historically, traditionally or customarily to the exclusion of all others. Carrier further argues that General Order No. 40 merely extended the yard limits and gave jurisdiction to the Yardmaster at Shreveport for trains between Mile Posts K-445.26 and K-450.7, an action which does not require the

Organization's approval. Finally, Carrier maintains that General Order No. 40 has not resulted in any Dispatcher positions being abolished nor has any Dispatcher suffered pecuniary loss. Accordingly, Carrier requests that the Board deny this Claim.

After a thorough review of the record in this case and the numerous precedent Awards cited by the parties, we are persuaded that the Organization's position is meritorious. The Scope Rule in this Agreement, unlike those of other classes and crafts, is clear, precise and unambiguous in defining and describing the work of the affected employees. Language identical to that included in Article 1 b.(2). relied upon in the instant dispute has consistently been interpreted as exclusively reserving primary responsibility for the movement of trains to Trick Train Dispatchers. (See Third Division Awards 2070, 5368, 15468, 3136, 8840, 24183). Responsibility for train movements belongs to the Dispatcher; therefore, to the extent that the instructions issued by the Carrier purported to give any such responsibility to the Yardmaster, the Agreement was violated. Carrier's extension of the yard limits on the main track to include the North Switch at Cart siding does not abrogate the Trick Train Dispatcher's responsibility for movements on the main track within such extended yard limits.

The remaining issue of damages has been vigorously argued by the parties. We turn first to the Organization's assertion that the question of damages is untimely raised at this time. In weighing the divergent views regarding this question, we believe that the majority view, and the better reasoned Awards, have held that specific issues relating to damages need not be handled prior to the interpretation of an Award and that to consider such issues is not violative of the long-standing prohibition against new evidence or issues. See Public Law Board 1315, Award No. 2; Interpretation No. 1 to Second Division Award No. 9264; c.f. Interpretation of Third Division Award 14162. Illustrative of this view is Award No. 8 of Public Law Board No. 1844, wherein it was stated:

> "We turn first to the Organization's assertion that the question of outside earnings is untimely raised at this time. It is well known that an interpretation request is not a vehicle for sub rosa reargumentation of a desired claim. Nor may new arguments regarding the claim itself be raised in such a proceeding, any more than in an ex parte submission or in oral argument before the Board. On the other hand, an Award can give rise to questions regarding its meaning and application which theretofore the parties had not had occasion to raise and discuss. In our judgment, it is not improper or violative of the general prohibition against raising new evidence and arguments at the appellate

level to present such questions to the Board in petition for interpretation. Typical of such questions is the instant debate about whether the Award we rendered contemplates the deduction of outside earnings or not."

Having concluded that we have jurisdiction to consider the issue of damages, we must consider the Carrier's argument that even if, assuming arguendo, the Agreement was violated, Claimants suffered no loss of earnings and therefore the Board has no authority to award damages. On this issue, too, there are strong opposing views. Many Awards support the proposition that even where there is a contract violation, a Claimant will not succeed unless there is a showing of actual loss of pay on the Claimants' parts. The opposing line of cases finds that to limit damages, in effect, gives a carrier a license to ignore the contract provisions. A third viewpoint which has also been expressed is the conclusion that each case must be considered on its merits taking into consideration such factors as intent or motive on the part of the carrier.

We find, as did the Board in Third Division Award No. 23928, that to determine intent or motivation on the part of the Carrier, would "only add a new element of uncertainty in the relationship of the parties" and require the Board to rest on that somewhat slippery slope of subjective considerations. We are of the view that a better purpose is served in the long run which clearly provides a guideline for the parties in the future. With that in mind, we have concluded that there is no prohibition from awarding damages where there is no actual loss of pay. That finding is based on our belief that in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses. Numerous other Awards have reached the same conclusion, holding that where, as here, Claimants by Carrier's violation lost their rightful opportunity to perform the work, they are entitled to a monetary claim. See Third Division Awards 21678, 19899, 19924, 20042, 20338, 20412, 20754, 20892. Accordingly, we will rule to sustain the Claim in its entirety.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1987.

DISSENT OF CARRIER MEMBERS
TO
AWARD 26593, DOCKET TD-26311
(Referee Elliott H. Goldstein)

The claim filed by the Organization contended the Carrier violated Article 1 b.(2) of the Agreement when the Carrier permitted and/or required an employee not covered by the Agreement to exercise primary responsibility for the movement of trains between North switch Cart MP K-445.26 and Red Junction MP K-450.7. Throughout its handling of the claim on the property, the Organization contended that the issuance of instructions authorizing the movement of trains, whether by train orders or otherwise, is exclusively the duty of a Dispatcher.

From the outset, Carrier contended that neither Article 1 b.(2), nor any other provision of the Agreement had been violated since there is no express preservation of work provision in the Agreement, nor have the duties been performed by Dispatchers historically, traditionally or customarily to the exclusion of all others.

However, for whatever reason, the Referee has attempted to reconstruct the Scope Rule of this Agreement by stating:

> "The Scope Rule in this Agreement, unlike those of other classes and crafts, is clear, precise and unambiguous in defining and describing the work of the affected employees."

The Award states that language identical to that in this Scope Rule has consistently been interpreted as exclusively reserving primary responsibility for movement of trains to Trick Train Dispatchers, relying upon several Third Division Awards including 15468 and 24183.

The language of the Scope Rules in Awards 15468 and 24183 is not identical to the language in the Scope Rule of the involved Agreement. In 15468 - ATDA vs. Reading Company - the Scope Rule contains restrictive

language that, "...the duties of these classes may not be performed by officers, or other employees." Such restrictive language does not appear in the instant Scope Rule. Likewise, in Award 24183 - ATDA vs. CNW - the Scope Rule contains a restrictive work preservation clause:

> "The duties of the classes defined in Section (a) and (b) of this Rule 2 may not be performed by persons who are not subject to the rules of this agreement."

Again, such a restriction does not appear in the Scope Rule involved herein.

The Scope Rule of the involved Agreement provides that, "This class shall include positions in which the duties of incumbents are to be primarily responsible for the movement of trains..." This Scope Rule does not reserve to the incumbents (Trick Train Dispatchers) the sole and exclusive right to the movement of trains; it simply provides that this is their primary responsibility, i.e., their most important responsibility, among all of their other duties.

In addressing the issue of damages, the Referee states:

> "...we have concluded that there is no prohibition from awarding damages where there is no actual loss of pay. That finding is based on our belief that in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses." (Emphasis added)

In reviewing the Awards relied on by the Referee relative to the Scope Rule, it is impossible to come to the same conclusion. In Award 2070, the Board denied the claim for compensation holding:

> "This record fails to show wherein they have suffered any damage by the arbitrary action of the Carrier. They continued to peform their duties as Train Dispatchers after January 1, 1942. They suffered no loss."

In Award 8840, the Board held:

"Paragraph (b) will be sustained as to all named claimants insofar as such named claimants were available for service as set out in Claim (a)..." (Emphasis added)

In Award 15468, the Board held:

"The claim here is for certain unnamed Claimants, but there is no evidence of wage loss; and this Board has no authority to impose penalties." (Emphasis added)

In Award 24183, the Board stated:

"However, with respect to an appropriate remedy, we note that Claimant's services would not have been required for a full trick if Carrier had complied with the Agreement. Accordingly, we will award Claimant a call, or two hours' compensation at the pro rata rate applicable to Trick Train Dispatchers on February 22, 1980. (See Rule 4(c))."

The Claimants in this case suffered no loss of earnings as they were on duty and under pay while the disputed work was being performed. No overtime was involved, nor was such work performed on a rest day. Hence, no lost work opportunities existed. As recognized by numerous Awards, when there is no evidence of wage loss, none should be awarded as this Board is not empowered to impose a penalty.

To conclude that this Award will not serve as a precedent is to state the obvious. Indeed, the Award has no foundation or basis in the Agreement and does not attain the minimum standard necessary to have any precedent value under the Railway Labor Act. The Referee has attempted to rewrite the Scope Rule of this Agreement to include an exclusivity to certain work under

Article 1 b.(2). The Board is not empowered to rewrite the parties' Agreement.

We dissent.

Michael C. Lesnik
M. C. Lesnik

Martin W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost

November 25, 1987