Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28132
THIRD DIVISION Docket No. TD-26823
89-3-85-3-587

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

CLAIM #1 - SYSTEM DOCKET CR-258

Please allow [R. R. Moungie] 8 hours pay account Supervisor of Train Operations T. H. Gooden reading Hot Box Detector and Hiballing train on Recorder #5 at Location CP 240 on #1 trk. - Train was Hiballed to first trick Toledo East Dispatcher Joe Pohorecki at 3:25p.m. - May 2nd, 1984. This work belongs to the A/Chief Dispatcher.

CLAIM #2 - SYSTEM DOCKET CR-259

(a) Claim [of J. K. Meeker for] 8 hours straight time rate at 129.01 per day acct. G. L. Taynor read a Hot Box Detector tape at MP 319 - #2 track at 2:41 a.m., April 26, 1984, and instructed Toledo West Dispatcher to have train TV-12M - Engine 5050 to proceed. This is Chief Train Dispatchers work and in violation of A.T.D.A. agreement Rule #1.

(b) Claim [of J. K. Meeker for] 8 hours at straight time rate at 129.01 per day acct. G. L. Taynor read a Hot Box Detector tape at MP 403 #2 track at 11:20p.m. April 29, 1984, and instructed Toledo West Dispatcher to have train ELSE-9 Engine 6720 to proceed. This is Chief Train Dispatchers work and is in violation of A.T.D.A. agreement Rule #1.

(c) Claim [of J. K. Meeker for] 8 hours at straight time rate at 129.01 per day acct. G. L. Taynor read a Hot Box Detector tape at MP 229 - #1 track at 1:09a.m. May 3, 1984 and instructed Toledo West Dispatcher to have train TV79 Engine 5015 to proceed. This is Chief Dispatchers work and is in violation of A.T.D.A. agreement Rule #1.

CLAIM #3 - SYSTEM DOCKET CR-260

(a) Claim [of R. C. Mies for] 8 hours at straight time rate of $129.01 day acct. G. L. Taynor read a Hot Box Detector tape on 4-21-84 at 11:15 p.m., location MP 261 Track #2, train TV-13 Eng 3335 and instructed Dispatcher P. Stack to have crew stop train and inspect north side of train @ no reading. This is chief Dispatchers work.

(b) Claim [of R. C. Mies for] 8 hours at straight time rate of $129.01 @ S.O.T.O. T.H. Gooden read a Hot Box detector at 4:11p.m. location MP 229 track #1 on 5-4-84. This is Chief Dispatchers work per Rule #1. He also instructed Toledo West Dispatcher to let train proceed.

(c) Claim [of R. C. Mies for] 8 hours at straight time rate of $129.01 @ S.O.T.O. T.H. Gooden read a hot box detector at 4:12p.m., location MP 403 Track #1 on 5-4-84 and instructed Toledo West Dispatcher to allow train to proceed. This is Chief Dispatchers work per ATDA agreement, Rule #1.

(d) Claim [of R. C. Mies for] 8 hours at straight time rate of $129.01 @ S.O.T.O. T.H. Gooden read a hot box detector at 4:10p.m. location MP 240 track #2 on 5-3-84 and instructed Toledo East Dispatcher to allow train to proceed. This is Chief Dispatchers work per ATDA Rule #1.

(e) Claim [of R. C. Mies for] 8 hours at straight time rate of $129.01 @ S.O.T.O. T.H. Gooden read a Hot Box detector at 4:13p.m., location MP 240 track #2 on 5-4-84 and instructed Toledo East Dispatcher to allow train to proceed. This is Chief Dispatchers work per ATDA Rule #1."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The operative facts aren't disputed. On the Claim dates the Claimants were on duty and under pay when a Supervisor, Train Operations or Assistant Supervisor Train Operations, both non-contract employees, read a hot box detector tape in the Train Dispatching Office, Toledo, Ohio. In protest the Claimants submitted the instant Claims. They were each denied. Thereafter, by separate letters dated May 17, May 18, and May 20, 1984, the ATDA Office Chairman appealed the Claims to the Manager-Labor Relations requesting that they be allowed or, "if not, a meeting on these Claims is requested, please advise us to day and time." The Manager-Labor Relations and the ATDA Office Chairman then mutually agreed upon a conference on September 24, 1984, at which time the three Claims were discussed. Thereafter, the Manager-Labor Relations denied each Claim in three letters dated November 5, 1984.

The Organization argues that the Claims must be allowed either (1) on the basis of a procedural defect or (2) on the basis of their merits. The procedural argument is based on Rule 17 (b), which is quoted in the Organization's submission as follows:

> "When a ...claim is not allowed, the Manager-Labor Relations will so notify, in writing, whoever listed the...claim (employee or his representative) within sixty (60) calendar days after the date the...claim was received or the date the...claim was discussed (whichever is applicable) of the reason therefor. When not so notified, the...claim will be allowed."

The Organization argues that this provision contemplates if the Manager of Labor Relations decided that a Claim is not to be allowed, he will either (1) notify whoever appealed ("listed") the Claim that it will not be allowed, and the reason therefor, or (2) suggest a time to discuss it. When neither of these actions are taken within the pertinent 60 day period they contend the rule mandates that the "...claim will be allowed..."

The Board has yet to see a more oddly worded time limit rule. As written, the facts of this case do not constitute a basis for a default Award. The rule puts no obligation to set a conference within 60 days of the date of appeal. Literally it requires a denial within 60 days of the "applicable" date, which can be either the date of appeal or the date the Claim was discussed. Since a conference was requested the date of the conference becomes the applicable date and no time limit violation can occur <u>if</u> (as in this case) a denial was issued within 60 days of the conference.

On the merits the most applicable rule is the second half of Rule 1 (d). This is because the work in question is not specifically set forth in the Scope Rule. The relevant language reads as follows:

> "...and it is agreed that work not included within the Scope which is being performed on the property of any former component railroad by employees covered by this Agreement will not be removed from such employees at the locations at which such work was performed by history and past practice or agreement on the effective date of this Agreement."

Thus, the critical question is whether the work in question has been historically and customarily performed by the employees <u>at the location</u> involved. Accordingly, evidence as to the lack of systemwide exclusivity is irrelevant.

After reviewing the record, the Board cannot find sufficient enough evidence to conclude that the work in question has been performed historically and customarily by the dispatchers in Toledo. All we have is the assertions contained in the Claim and the appeals that on the Claim date dispatchers were performing the work in question. A mere statement that they were performing the work isn't enough -- in the face of the Carrier's assertions that other crafts also read tapes -- to establish that dispatchers are historically and customarily doing the work. This record lacks even the kind of evidence that was present in a similar case between the Parties (Third Division Award 26381). Therefore the Claim is dismissed for lack of proof.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 25th day of September 1989.

LABOR MEMBER'S DISSENT
to
Award 28132 - Docket TD-26823
Referee Vernon

The Claims should have been allowed, on the Time Limit Rule alone. No reason for disallowance was rendered within 60 days of the date of appeal.

The Carrier argued the Office Chairman asked for a conference if the Claims were not allowed, and that it rendered a decision within 60 days from the conference date. This defense is untrue and unreasonable. In keeping with this type reasoning, the Carrier could ignore a claim for an indeterminate period of time, and when the provisions of Rule 17(b) are invoked, then suggest a conference date, thus buying time and immunity from the requirements of the Rule.

Claim No. 1, for an example, was appealed to the Manager-Labor Relations on May 18, 1984, with a notation:

> "If you agree with this appeal please advise when Mr R. R. Moungie may expect compensation, if not, please advise as to time and date for a meeting on the above claim."

The Manager-Labor Relations made no response at all. Therefore, on August 7, 1984, eighty-two days later, he was written again:

> "The Carrier elected not to do anything regarding these time claims and all have expired according to our agreement. If your office can not advise as to when these claims are to be paid, I will have to forward the file to Mr Swartz for further handling."

The Manager-Labor Relations made no reply, and no conference was had at his level of appeal. The Claim was appealed to the Senior Director-Labor Relations on August 10, 1984.

Since the Manager-Labor Relations did not comply with the Office Chairman's request for a conference by the time his 60-day time limit expired (and in fact, never granted the conference nor made any reply), it was then in default. There was, at that time, no mutually agreed upon date for conference, and the only "applicable" date was the appeal date, May 18, 1984. The Carrier should not be able to default on one 60-day time limit and then belatedly start another running when the first has already expired. Any other interpretation of Rule 17(b) gives the Carrier two 60-day time limits and, therefore, is in contravention of the parties' language and intent.

We, therefore, dissent to the majority's Findings respecting the Time Limit Rule.

* * *

The Award errs as badly with regard to the merits of the dispute.

While correctly holding that evidence of systemwide exclusivity is irrelevant, under Rule 1(d), we are at a loss to understand the majority's view that the Employees did not prove that the work "was performed by history and past practice or agreement on the effective date of this Agreement." The record shows these exchanges between the parties on the merits:

Employees: "This work belongs to the A/Chief Dispatcher."

Carrier: "Examination of Hot Box Detector Readouts is not the exclusive work of the Train Dispatcher."

Employees: "The responsible [sic] of reading and hi-balling trains over these Detectors is the exclusive work of the Asst. Chief Dispatcher as it was on the effective date of our agreement."

Carrier: "The reading of hot box detectors at Toledo, Ohio, has not been traditionally, historically or customarily performed exclusively by dispatchers or employees covered by your agreement."

Employees: "The reading of hot box detector at Toledo, Ohio, was being performed by Train Dispatchers on the effective date of the Schedule Agreement and therefore cannot be performed by other officials or employees at this location."

Carrier: "No single craft of employees was assigned to read the tapes. They were read by members of the A.T.D.A. as well as Delay Clerks. The Delay Clerk positions were subsequently abolished."

Employees: "On September 1, 1979, the employees represented by the American Train Dispatchers Association were performing the duty of reading hot box detectors in the Toledo, OH office."

The Carrier made no reply to the above statement, during handling on the property. The Employees made a bona fide case, satisfying the burden of proof, and when the Carrier presented an affirmative defense, the burden of proof shifted to the Carrier. The Carrier failed to carry that burden, and, therefore, this Dissent is submitted.

Robert J. Irvin
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 28132, DOCKET TD-26823
(Referee Vernon)

The Labor Member is incorrect when he states in his Dissent that:

> "The Manager - Labor Relations made no reply, and no conference was had at his level of appeal."

The Majority correctly determined, from the file, in this dispute that:

> "The Manager - Labor Relations and the ATDA office Chairman then mutually agreed upon a conference on September 24, 1984, at which time the three claims were discussed. Thereafter, the Manager-Labor Relations denied each claim in three letters dated November 5, 1984."

Since the Rule alleged to have been violated by the Carrier allows Carrier to respond either within 60 days of the date received or the date the Claim was discussed, Carrier's response was timely.

The Majority also correctly found that the Organization failed to establish an exclusive right to the work in contention. A sound principle of this Board succinctly stated in Third Division Award 25608, i.e., "...It is well settled in labor relations that the party who asserts a claim bears the burden of prooving sic it...." and in Second Division Award 6603:

> "...The record contains repeated allusions to such practice but not even one instance of such displacement in the twenty-eight year period. Since reiteration of argument is not a substitute for probative evidence, we must reject Petitioner's position....", and restated

See also the following Third Division Awards: 25250, 26251, 26548, 26033, 26414, 25900, 26225, 21725, 26761 for similar language.

This principle has again been restated in this Award:

> "...A mere statement that they were performing the work isn't enough -- in face of the Carrier's assertions that other crafts also read tapes -- to establish that dispatchers are historically and customarily doing the work...."

The reasoning in the resolution of this dispute is sound and based solely on the language of the Agreement as related to the events as they occurred and does follow well-established principles of the Board.

Robert L Hicks
R. L. Hicks

Martin W. Fingerhut
M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P V Varga
P. V. Varga

James E. Yost
J. E. Yost

LABOR MEMBER'S REPLY
to
CARRIER MEMBERS' RESPONSE
to
LABOR MEMBER'S DISSENT
to
Award 28132 - Docket TD-26823
Referee Vernon

The record shows that no response was received from the Manager-Labor Relations, at all, and on August 7, 1984, eighty-two days after Claim No. 1 was filed, he was advised that the time limit had expired and the claim would be referred to the General Chairman for further handling. On August 10, 1984, appeal was made to the Senior Director-Labor Relations.

Therefore, when the September 24, 1984 "conference" was had, the time limit had already expired and the matter was already in the hands of the General Chairman and the Senior Manager-Labor Relations.

This "conference" was nothing more than a belated effort to disarm the Employees' position that the time limit had expired and the Carrier had defaulted.

It is no credit to the majority that this transparent stratagem worked.

No further comments are necessary with regard to the merits; see the Dissent.

Robert J. Irvin
Labor Member