

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28239
Docket No. TD-28418
90-3-88-3-272

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

(American Train Dispatchers Association
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM:

"Claim of unjust treatment to Train Dispatcher J. J. Morrissey when he was removed as Planner Chief Dispatcher on September 25, 1987, and request that he be returned to his Chief Dispatcher Planner position and that he be compensated in accordance with the letter of agreement dated May 29, 1974 for all service performed from the time he was removed from this position until such time as he is restored to this position. Carrier file 460-93-A."

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 employees involved in this dispute are respectively carrier and employees 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 were given due notice of hearing thereon.

The basic facts in this case are set forth as follows: Claimant entered Carrier's service in September, 1958, and was promoted to Train Dispatcher in May, 1971. Prior to the relocation of the Dispatchers' Office from Lafayette, Louisiana, to Houston, Texas, Claimant was assigned as a Planner Chief Dispatcher headquartered in Lafayette. In September, 1987, when the above move and consolidation with the Train Dispatchers Office in Houston occurred, Claimant was one of three train dispatchers appointed by Carrier to Item 3 Planner Chief Dispatcher positions in Houston, Texas. The Item 3 positions were established pursuant to the December 22, 1971 Memorandum of Agreement between the Southern Pacific Transportation Company - Texas & Louisiana Lines and the Train Dispatchers represented by the American Train Dispatchers

Association. The provision thereof which relates to Item 3 positions is referenced as follows: "There may be one Chief Dispatcher position on each assigned Chief Dispatcher's District which may be filled from the Train Dispatchers' Official Seniority List without regard to seniority and will not be subject to displacement rules of this Agreement." By notice dated September 25, 1987, Claimant was apprised that effective the end of his duty tour that day he was to be removed from his position as Planner Chief Dispatcher. There was no reason given for this personnel action, though Claimant was advised that he could exercise his seniority consistent with the current Agreement. By letter of the same date, Claimant requested an Unjust Treatment Hearing and said Hearing was held on November 24, 1987. He was later informed by letter dated December 1, 1987, that he was not found unjustly treated.

In support of the Claim, the Organization contended that Claimant was unjustly treated since he was not accorded due process rights under Rule 25 of the Controlling Agreement. In effect, it asserted Claimant was demoted without a proper Rule 25 hearing. In addition, it argued that Claimant was never informed by supervisory management that his work performance was below normative standards or that his superiors were dissatisfied with his work. The Organization took umbrage to Carrier's assertion that Claimant was not as qualified as the other two Item 3 Chiefs, arguing that his performance was never questioned or compared with the other Item 3 Chiefs. It also maintained that Carrier's statement to the Board that only two such positions were authorized was never raised during the on situs appeals process and thus constituted new argument.

In response, Carrier asserted that the consolidation of the Lafayette-Houston Train Dispatchers Offices necessitated a broader scope of planning and train operations. Consequently, authority for three Item 3 Chief positions was later reduced to two positions. It observed that in view of this change, management decided to remove Claimant from his Planner Chief Dispatcher appointment. It further argued that consistent with the explicit unambiguous language of the December 22, 1971 Dispatchers' Memorandum of Agreement, it was not barred or restricted from removing an employee from one of the three established Item 3 Chief positions. In other words, it contended that since the applicable language of the aforesaid Agreement stated that such positions will be filled without regard to seniority or other regulations of this Agreement (translated to mean current Agreement), Carrier was not prevented from removing an incumbent employee. It argued that to conclude otherwise would be tantamount to creating lifetime assignments.

In considering this case, the Board concurs with the Organization's position that Carrier never notified Claimant of any performance shortfall. In fact, the record indicates that for all intents and purposes, Claimant's performance was consistent with expected norms and standards. Similarly, when Claimant was notified on September 25, 1987, that he was being removed from the Planner Chief Dispatcher position, he was never given any reason for the removal. If it were Carrier's decision then to authorize only two Item 3 Chief positions, it should have notified him of this personnel action. Perhaps this would have prevented a claim filing. On the other hand, it is not estopped from abolishing positions or implementing a planned reorganization, subject, of course, to collective bargaining agreement constraints.

In this instance, however, Claimant was never informed that he was removed for that reason and the first time it is raised is when the Superintendent Houston-Lafayette Division testified in part, at the November 24, 1987 Hearing that "Mr. Morrissey was not removed from service - but rather removed from an Item 3, Chief position because we only have authority for two Item 3 Chiefs." During the on-property handling, this rationale was never advanced; instead Carrier justified its actions upon its analysis of the December 22, 1971 Memorandum of Agreement. Since the critical pertinent language of that Agreement stated that said positions would be filled without regard to seniority or other regulations of this Agreement, Carrier concluded that it also had the reciprocal right of removal.

Upon this record, we agree that Carrier has a rather broad prerogative in appointing dispatchers to Item 3 Chief positions. It also has the right to abolish positions. We agree with the Organization that its broad prerogative relates to the filling of positions and to matters relating to discipline and unjust treatment. Hence, depending upon perceived circumstances, Rule 25 could be invoked. As an illustration, let us suppose that an Item 3 Chief employee was insubordinate. Is he precluded from contesting a suspension or removal from service assessment? If the same employee is removed and the brother-in-law of a manager is assigned the position, is he precluded from contesting this action as unjust treatment? We do not think the December 22, 1971 Memorandum of Agreement contemplated this result. There is no evidence that another employee filled Claimant's position nor evidence that the position is still extant. Since Carrier was not prevented from abolishing this position, and since it did not raise this line of justification at the time it removed him on September 25, 1987, or during the on-situs claim handling, it is new argument and technically inadmissible. As we indicated herein we cannot estop Carrier from abolishing or eliminating positions and we cannot compel Carrier to establish a position. If the position is still extant, Claimant is to be restored to his prior position and compensated for any net loss of wages. If the position had been abolished, we cannot reestablish it, but Claimant is to be compensated for any net loss of wages suffered up until the time of abolishment. Said compensation, if any, shall not include the overtime rate provided in the May 29, 1974 Letter Agreement. This Agreement has no application to these specific circumstances.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1990.

Mark S
3rd Div.
12-2-93 Adopt.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Serial No. 348

INTERPRETATION NO. 1 TO AWARD NO. 28239

DOCKET NO. TD-28418

NAME OF ORGANIZATION: American Train Dispatchers Association

NAME OF CARRIER: Southern Pacific Transportation Company
(Eastern Lines)

The Organization's claim requested that Claimant be compensated in accordance with the letter of agreement dated May 29, 1974, which provided for overtime compensation when an assigned train dispatcher is required to work a position other than his regular position. It is a form of penalty payment. Award 28239 found that the May 29, 1974 Agreement was not applicable to the instant case since the Item 3 chief position was properly abolished. The Board's decision provided that if the position was still extant, Claimant was to be restored to this position and compensated for any net loss of wages. The Board's intention was to make Claimant whole for any loss in net straight time wages. Simply put, this meant that if the difference in compensation between the positions was \$300.00 per month, Claimant was to be reimbursed this amount times the number of months he was in a lower compensated position, if that were the case. It did not contemplate the overtime compensation requested by the Organization.

Carrier's interpretation is correct and on point with Award 28239 decision.

Referee George S. Roukis, who sat with the Division as a neutral member when Award 28239 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 2nd day of December 1993.