

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31834
Docket No. TD-31442
96-3-93-3-448**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

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

STATEMENT OF CLAIM:

"Appeal of 424 individual claims on behalf of various Claimants for a two hour and 40 minute call at the overtime rate of the Assistant Chief Train Dispatcher position when yardmasters at Gang Mills, N.Y. issued instructions to other employees concerning the assignment of locomotive power, and equipment incident thereto; and performed related work as denoted in the original claims."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

As third Party in Interest, the United Transportation Union - Yardmasters Department was advised of the pendency of this dispute and did file a Submission with the Board.

The 424 claims involved all arose during March through June 1991 following the elimination of the Assistant Chief Dispatcher position for the Southern Tier of Carrier's operations. The duties of that position were transferred to and combined with the existing Portage and Delaware Trick Train Dispatcher's desks in Carrier's Albany Division Train Dispatching Office in Selkirk, New York.

Except for the work at issue in these claims, the Organization concedes, in its Submission that all of the other work of the positions, which was reserved to covered employees by the Scope Rule, was properly transferred to the Portage and Delaware desks.

Each claim consists of a pre-printed form with blanks filled in by hand to name the Claimant and provide certain details about the alleged violation. Each form describes the alleged violation as occurring when the Yardmaster at Gang Mills Yard "... issued instructions to other employees concerning the assignment of Locomotive power, and equipment incident thereto; and performing related work relative to the operation of" Each form continues on to allege that the work is reserved to the Dispatchers via the Scope Rule of the Agreement. The thrust of the claims is that the instructions given to train crews by the Yardmaster are asserted to infringe on the reserved work of supervising the distribution of locomotive power.

These parties have had several disputes over the distribution of power. Prior decisions have recognized that the Scope Rule is clear and unambiguous. It does reserve work to employees covered by the Dispatcher's Agreement. See Third Division Awards 16556 and 26137. See also Award 1 of Public Law Board No. 4218. These three decisions pre-date the 424 claims involved here.

In Award 1 of Public Law Board No. 4218, a 1988 decision, the relevant facts were not in dispute. The Board there recognized that it had been the traditional function of non-covered employees working in the Carrier's System Operations Bureau ("Blue Room") to set the Carrier's power requirements. These Blue Room decisions were not found to violate the Agreement. The Award went on to state as follows:

"... that Assistant Chief Train Dispatchers must continue to be an integral and necessary part of the implementation of company decisions with respect to supervision of the distribution of locomotive power. The Assistant Chief Train Dispatchers must be fully involved in the supervision of the handling of trains and distribution of locomotive power. Blue Room Personnel must work through the Assistant Chief Train Dispatchers in order to meet the common goal of effective distribution of locomotive

power. ... [Assistant Chief Train Dispatchers] must continue to be an integral part of the distributive process."

Despite the guidance provided by this Award, it did not describe, in specific terms, what was meant by "... being an integral and necessary part," or by being "... fully involved"

Moreover, the Scope Rule itself provides no specific description of the reserved work. It reads, in pertinent part, as follows:

"Assistant Chief Train Dispatcher: these classes shall include positions in which it is the duty of incumbents 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." (underlining supplied)

In a 1993 decision, Third Division Award 29911 decided a claim between the Organization and a different carrier. On the specific facts, the Board found that a Trainmaster had altered a previous power decision that had properly involved the Dispatcher. The Trainmaster communicated a consist change, to add one more locomotive, directly to carrier's Locomotive Department. After the fact, the Trainmaster informed the Dispatcher. The Board found that the Trainmaster's action improperly bypassed the Dispatcher.

In another 1993 Award, the Third Division, sitting with the same referee as in Award 29911, also considered a number of "supervision of power distribution" claims involving yet another carrier. The carrier there, as here, also used a system-wide control center. The Organization recognized that non-covered employees in the center could make determinations concerning the distribution of power, but it contended that the instructions must be issued by covered employees. The Board, in its Award 29681, denied the claims after making these observations about the Scope Rule:

"We have difficulty comprehending why determinations concerning the distribution of power, made in a system-wide Control Center, is not the type of supervision reserved by the Scope Rule, but the issuance of instructions to carry out those determinations is reserved. The Rule refers generally to supervision, not specifically to communication. The Rule does not require Carrier to use Dispatchers as intermediaries for some tasks, and not for others. * * *

The resolution of this dilemma lies in the arena where the supervision occurs. As noted by Carrier, the utilization of motive power is no longer simply a Divisional or territorial concern. Interdivisional trains will use a locomotive consist across the system, and power distribution decisions must take this into account. Thus, this work goes beyond the scope of dispatching, which is bound by Divisional or territorial boundaries. Such was the decision of Public Law Board No. 3829. When the decisions are made on a system-wide basis, as they are on this Carrier, Public Law Board No. 3829 concluded that they are not covered by the Scope Rule. Neither are the instructions which are issued to effectuate those decisions. We must conclude, therefore, that the Agreement has not been violated." (underlining supplied)

In another 1993 decision, which involved the instant parties, Award 6 of Public Law Board No. 5183 denied several supervision of distribution of power claims. The claims dealt with the actions of non-covered employees in communicating "instructions" concerning power distribution. It is clear from the Majority Award and the Labor Member's Dissent that the Board rejected the Organization's contention that direct telephone communication between non-covered employees violated the Scope Rule.

In each of the instant 424 claims it is generally alleged that Yardmasters issued instructions to non-covered employees concerning the distribution of power. In response to all of the claims, Carrier's representative responded with this assertion:

"In each case, power assignments have already been made by the System Operations Bureau ('Blue Room') working through the Assistant Chief Train Dispatcher, or by the Assistant Chief Train Dispatchers themselves, in accordance with Rule 1 - Scope. In each case, the yardmasters were merely advising the train crews where their locomotive power was located within the Gang Mills Yard."

With the Organization and Carrier assertions thus joined in opposition to one another, the burden of proof remained with the Organization. It was, as a result, required to produce sufficient specific evidence of the content of the Yardmasters' "instructions" to establish, at least on prima facie basis, that the instructions were in violation of the Scope Rule.

Such specific evidence of the actual content of the Yardmasters' instructions is necessary because Yardmasters routinely give instructions to engine crews as a normal part of their duties. Without such specific evidence, the Board would have to indulge in an unacceptable level of speculation in determining whether the Yardmasters' instructions were violative of the Agreement. In addition, the burden of proof also required the Organization to introduce evidence to establish that power distribution decisions did not properly involve covered Dispatchers elsewhere on Carrier's system. If such decisions were properly made elsewhere, the prior decisions establish that merely conveying such information to engine crews is not violative of the Agreement.

The on-property record contains no evidence of the actual content of the Yardmasters' instructions for any of the claims. Nor does this record contain any evidence to show that power distribution decisions were not properly made by covered employees.

Despite the lack of such necessary evidence, the Organization urges that three other considerations establish the validity of the claims. First, it points to the previous payment of identical claims. Second, it contends a March 12, 1991 Carrier letter of instruction conferred locomotive power responsibilities upon Yardmasters. Finally, it emphasizes supporting statements from two knowledgeable Train Dispatchers.

The three Organization contentions do not provide the requisite validation of the 424 claims in dispute. While it is true that Carrier paid some 33 other claims that were submitted in the same time frame using the same claim form, the on-property record does not clearly establish the reasons why they were paid. These assignments differed from the assignments involved in the disputed claims. The March 12, 1991 Carrier letter of instruction does not say what the Organization says it does. Quite to the contrary, our reading of the letter reveals only that it directs Yardmasters to work with both Dispatchers and Blue Room personnel in connection with the calling of trains and the proper dispatching of locomotives. Lastly, the two statements do not provide necessary factual evidence. Both were made approximately two years after the claims arose and contain essentially nothing more than the generalized type of assertion found in the claims themselves.

Since the Organization failed to satisfy its burden of proof in each claim, or at least in a sufficiently representative sample of the claims, these claims must be denied.

Because of our findings regarding the burden of proof, we do not address the remaining defenses raised by the Carrier.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of December 1996.