

The Second Division consisted of the regular members and in addition Referee Martin I. Rose when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Burlington Northern Inc.

Dispute: Claim of Employes:

- 1) That the current agreement, particularly Rule 27 (a) and 98 (c) and Carmen's Special Rules 83 and 90, were violated when other than carmen were used to change wheels at South Junction, Oregon.
- 2) That accordingly, the Carrier be ordered to compensate Vancouver Carmen, W. J. Garrison and M. R. Connor for eight (8) hours at the straight time rate, eight (8) hours at the time and one-half ($1\frac{1}{2}$) rate and two (2) hours at double time rate of pay.

Findings:

The Second 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 employe 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.

On May 29, 1974, two working foremen stationed at Bend, Oregon, proceeded 59 miles north to South Junction, Oregon, to change wheels on two cars. At 4:00 A.M. on that date, a Cline truck with its regularly assigned operator driver, a carman, was dispatched from Vancouver, Washington, to South Junction and worked with the foremen in the wheel changing operation. The Cline truck tied up at 10:00 P.M. that night.

Claimants are carmen regularly assigned on the Vancouver repair track. They were on the established overtime board and were available for call on the claim date.

Petitioner contends that by changing wheels at South Junction the foremen performed work of the carmen craft in violation of Schedule Agreement Rule 27 in that neither a mechanic nor a working foreman was employed at South Junction, and car repair work, including "putting cars on ... wheels" on the road is

assigned to carmen by Rule 90. Petitioner also asserts that the work of the foremen violated Classification of Work Rule 83 and the preservation of contractual rights under Rule 98 (c).

Carrier maintains that the work performed by the foremen at South Junction is authorized by the exception in Rule 27 (a) and the prior uncontested past practice. Carrier argues that Rules 83 and 90 merely define carmen's work but do not guarantee the exclusiveness of such work to carmen.

Rule 27 (a) reads, in pertinent part, as follows:

"None but mechanics or apprentices regularly employed as such shall do mechanics' work as per the special rules of each craft except foremen at points where no mechanics are employed."

The pertinent provisions of Rule 90 state:

"When necessary to repair cars on the road or away from the shops, carmen, and helper, when necessary, will be sent out to perform such work as ... putting cars on ... wheels, and other work of similar character."

We have considered with care the numerous awards cited by the parties in support of their respective positions. Insofar as they involved rules similar to, or the same as, Rule 27 (a), quoted above, these awards are in conflict. Second Division Awards 1761, 3927, 3938 and 4414 interpret the exception stated in the rule to provide authorization of work by foremen only at points where they are employed and no mechanics are employed. On the other hand, Second Division Awards 2919, 4386, 4601 and 5605 applied that exception irrespective of where the foremen were regular assigned.

None of these cases involved the factual situation presented here. In the instant case, Carrier assigned a carman who was the operator driver of the Cline truck, to perform car wheel work at South Junction. By such assignment, Carrier acknowledged the practicality and reasonableness of having carmen perform the work of their craft at that location on the road. In such circumstances, the requirement of Rule 90 that "When necessary to repair cars on the road, ... carmen ... will be sent out to perform such work..." must be regarded as applicable and controlling. Under the Schedule Agreement, the exception in Rule 27 (a) for work by supervision cannot be interpreted to supersede Rule 90 when application of that rule is reasonable and carmen can be sent out to perform the work of the craft on the road in accordance with the rule.

Carrier's reference to an uncontested past practice does not warrant a contrary conclusion. Petitioner asserts that the practice was "unknowingly permitted" and was "out of sight and mind of the carmen at Vancouver" until the Cline truck was dispatched to South Junction. These assertions constitute, in effect, denials of knowledge of the Carrier's practice. The record furnishes

no basis for resolution of the factual issues posed by these denials.

It is well settled that a past practice cannot be held binding unless there is a valid basis for finding long standing and mutual acceptance of such practice by both parties involved. For the reasons indicated, the sufficiency of the element of acceptance or acquiescence on the part of petitioner is lacking here.

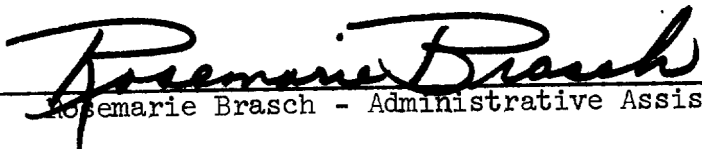
Accordingly, the claim must be sustained, but payment for service not performed should be at the pro rata rate.

A W A R D

Claim sustained to the extent indicated in the foregoing Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of December, 1976.