

The Second Division consisted of the regular members and in addition Referee Theodore H. O'Brien when award was rendered.

Parties to Dispute: { International Association of Machinists and
 { Aerospace Workers
 {
 { Western Pacific Railroad Company

Dispute: Claim of Employees:

1. That under the current Agreement and established practices Machinist C. F. Flynn (hereinafter referred to as Claimant) was improperly denied seven (7) hours compensation on October 14, 1975.
2. That, accordingly, the Carrier be ordered to compensate Claimant seven (7) hours at the straight time rate for October 14, 1975.

Findings:

The Second 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 waived right of appearance at hearing thereon.

On October 14, 1975 Claimant, a Local Chairman, appeared at a formal investigation as the representative of a Machinist. The investigation commenced at 9:00 AM and concluded at 4:00 PM. Since Claimant attended that investigation during his regular working hours, seven (7) hours compensation was deducted from his pay.

The Organization, therefore, progressed the instant claim up to and including the highest Carrier officer designated to handle such disputes. Inasmuch as no settlement of the dispute was reached in the handling on the property, the instant claim is properly before this Board for adjudication.

The Organization contends that under the provisions of Rules 33 and 34(b) of the controlling Agreement, Claimant should be compensated for the seven (7) hours deducted from his pay. The pertinent portions of the cited Rules read as follows:

"Rule 33. Committees: (a) The Company will not discriminate against any committeemen who, from time to time, are delegated to represent other employees, and will grant them leave of absence ..."

"Rule 34. Grievances: (b) All conferences between local officials and local committees to be held during regular working hours without loss of time to committeemen."

Moreover, the Organization alleges that a past practice of compensating Machinist Local Chairmen while representing employees at formal investigations has been in existence on the property for many years. However, the Carrier asserts that no such practice exists, although, on several occasions in the past, the local officers did not dock the Claimant for time spent at formal investigations. In their submission, the Carrier states that any practice having been established exists as a unilateral and discretionary management policy which may be modified or even discontinued by the Company at any time.

A careful review of the prior Awards of the Second Division reveals that Rule 34(b) is not applicable to the instant dispute. Although those Awards do not involve the same parties as the instant claim, they discuss rules which are identical to Rule 34(b) of the controlling Agreement. The Organization declares that Claimant's attendance, as a representative, at the formal investigation of another employee, entitles him to compensation under Rule 34(b) - Grievances. However, it has been clearly established by precedent that a "conference" as referred to in the Grievance Rule, is not the same as a formal investigation which is the fact-finding proceeding in disciplinary actions.

In Second Division Award No. 5342, this issue was addressed as follows:

"An 'investigation' is not a 'conference'. The former is a formal proceeding conducted to ascertain the facts relating to a specific charge ... A 'conference' is an informal meeting of all interested parties to discuss a pending grievance."

We adopt the reasoning of Award No. 5342, and find it equally applicable to this dispute.

Thus, we find no probative evidence to support the Organization's contention that Rules 33 and 34(b) have been violated by the Carrier.

However, on this property, and before the Board, the Organization has argued that there was a "long-recognized and established practice" not to dock labor representatives while representing employees in formal investigations during regular hours. This is conceded by the Carrier in its February 23, 1976 letter stating the current practice.

"when a Local Chairman's activity as a representative of an employe in a formal investigation consumes a substantial part of the assigned hours of his regular assignment, he will not be paid for the time so consumed. Under this policy, it is quite possible as you state in your letter of January 7, 1976, that Claimant, in the past, has not been docked when acting as a representative at a formal investigation...." (Emphasis added)

Clearly, although not required, representatives in the past did not have any deduction made to their daily earnings when engaged in representing employees at formal investigations. This is supported by the Organizations' February 25, 1976 letter in which Claimant had, on three separate occasions, represented Machinists at formal investigation without being docked for the time so spent. This time also involved instances where a substantial part of the normal day was spent in such activity. This evidence was not challenged by the Carrier.

This Board has no difficulty with the rule of contract interpretation that a past practice cannot negate a clause in a contract which is formed in plain, clear and unambiguous language. However, as stated above, the rules relied upon do not provide payment, nor do they deny that such payments may be made. The practice then becomes the means by which the parties have applied the contract to this particular situation. Carrier would have been on better ground had it shown a consistent effort to eliminate the asserted over-payments and enunciated that position. Yet, the record before us clearly indicates that the deduction of compensation to Claimant was the exception, not the rule under the prevailing practice.

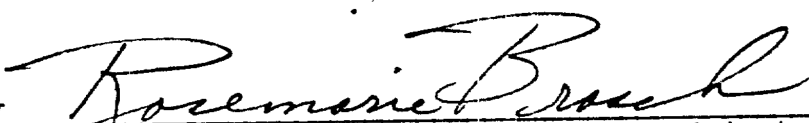
It is the opinion of the Board that there is no legitimate basis for the Carrier to apply a different criteria to this particular incident that is different from the practice followed both before and after this claim. Consistency requires that this claim be sustained.

A W A R D

Claim sustained.

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 22nd day of August, 1979.