Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13760
Docket No. 13594
03-2-00-2-52

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(International Association of Machinists and
(Aerospace Workers

PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"Claim of Employee:

1. The Springfield Terminal Railway Company violated the current and controlling Agreement, effective June 1, 1995, as amended, in particular, but not limited to, Rule 15 and the historical practice on the property when compensation was denied Machinist G. Michaud for time spent representing another IAM represented employee as his "duly accredited local representative" at a hearing called at the behest of the Carrier on May 4, 1999.

2. The claim should be allowed as presented and duly accredited local representative G. Michaud made whole for six hours pay at the straight time rate for time spent at the hearing of May 4, 1999."

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 were given due notice of hearing thereon.

The Claimant is the Organization's Local Chairman. On May 4, 1999, the Claimant attended the disciplinary Investigation of Machinist P. Sicard (ultimately decided and denied by the Board in Second Division Award 13757.) As disclosed by the transcript from the May 4, 1999 Sicard Investigation and as stated by the Carrier on the property in this matter, active representation of Sicard in that proceeding was performed by the Organization's General Chairman J. Cronk. See Tr. 1, 3 of the Sicard Investigation:

* * *

"J. Cronk:	Jay Cronk, general chairman with the IAM, representing Mr. Sicard.

* * *

M. Moore:	Were you also notified that you have the right to be represented by a duly accredited representative of your choosing, subject to the terms of the applicable agreement?
P. Sicard:	Yes.
M. Moore:	Are you accompanied by such individual?
P. Sicard:	Yes.
M. Moore:	And if so, would you please identify him?
P. Sicard:	Gerry Michaud and Mr. Cronk.
M. Moore:	With that, Mr. Sicard, which one will, will you appoint to ask the ask questions?
P. Sicard:	Mr. Cronk."

The Sicard Investigation transcript further shows that General Chairman Cronk questioned witnesses and presented arguments on behalf of Sicard. Although present, the Claimant was not permitted to actively participate in that proceeding. See the Carrier's Submission ("The Carrier did allow Mr. Michaud to

be present during the Hearing, but he was not allowed to speak during the hearing").

Although General Chairman Cronk performed the active representation of Sicard at the May 4, 1999 Investigation, because the Claimant attended the Investigation and because the Investigation was held during the Claimant's regular working hours, the Claimant filed a six hour pay claim for his attendance at the Sicard Hearing. The Carrier refused to compensate the Claimant for that time. This claim followed.

Rule 15.3 provides, in pertinent part:

"Rule 15. Discipline

* * *

15.3 . . . The Employee will have the right to be represented by a duly accredited representative of his own choosing and he and his representative will have the right to question all witnesses. If the hearing is scheduled during the duly accredited local representative's regular working hours, he will be allowed time without loss of pay to represent Employees. . . . "

The issue, then, is whether under the circumstances of this case where the General Chairman performed the active representation of the employee Sicard at Sicard's Investigation, is the Claimant - as Local Chairman - entitled to be paid under Rule 15.3 as "the duly accredited local representative" for his attendance at that investigation?

This is a contract dispute. Therefore "[t]he burden in this case is on the Organization to demonstrate a violation of the Agreement." Third Division Award 34207.

"The initial question in any contract interpretation dispute is whether clear contract language exists to resolve the matter. Because the burden is on the Organization, the Organization is therefore obligated to demonstrate clear language

to support its claim. . . ." Third Division Award 34207, supra. Here, a plain reading of Rule 15.3 does not show that language to be clear.

Rule 15.3 makes several references to "representative." The first relevant reference to "representative" is the provision that at the Investigation "[t]he Employee will have the right to be represented by a duly accredited representative of his own choosing . . . [who] will have the right to question all witnesses" [emphasis added]. That plainly means (as was shown by the Sicard investigation transcript quoted above (Tr. 3) when Sicard was asked to designate whether General Chairman Cronk or the Claimant would ask questions on his behalf and Sicard designated General Chairman Cronk) that the employee under Investigation can have one – "a" - "duly accredited representative" and that one ". . . representative will have the right to question all witnesses." From a plain reading of Rule 15.3, that first reference to representative keeps order in the Investigation by limiting the number of individuals who will be asking questions.

The next relevant reference to "representative" in Rule 15.3 is the pay provision relied upon by the Organization in this case – "[i]f the Hearing is scheduled during the duly accredited local representative's regular working hours, he will be allowed time without loss of pay to represent Employees." The ambiguity comes from the parties' reference in the pay provision to ". . . the duly accredited local representative. . . ." [emphasis added]. Given the first reference to ". . . a duly accredited representative. . . ." to ask questions during the investigation and the second reference to ". . . the duly accredited local representative . . ." for payment purposes, it is plausible as the Organization argues that the local representative - here, Local Chairman Claimant - is entitled to payment for being at the investigation even though another "duly accredited representative" - here, General Chairman Cronk - was the only one allowed to perform the questioning of witnesses at the Sicard Investigation. If the parties intended a different result that, in order to be paid for attending the Investigation, the duly accredited local representative had to be the duly accredited representative asking the questions at the Investigation, there would have been no need to modify the phrase ". . . duly accredited . . . representative . . . " in the payment provision with the word "local." The language would then have read "[i]f the hearing is scheduled during the duly accredited representative's regular working hours, he will be allowed time without loss of pay to represent Employees" which would have been consistent with the Carrier's interpretation. But, the language does not read that way. For payment purposes, the parties inserted the word "local" to modify "duly accredited representative."

Thus, as the Organization argues, under the plain language of Rule 15.3, it is a fair interpretation that the duly accredited local representative is entitled to be paid even if no active representative functions are performed at the Investigation by that individual.

However, in support of the Carrier's position, it is also reasonable to read the two clauses together and that the references to "duly accredited" and "representative" for representation and payment purposes must be references to the same individual. Therefore, under this interpretation, in order to be entitled to compensation, the duly accredited representative must also be the same individual who performs the questioning at the Investigation and, since that was not the Claimant but was General Chairman Cronk who was not "local," the Claimant should not be entitled to payment and the Organization cannot prevail.

The problem here is that both interpretations are plausible. "Where language yields conflicting but plausible interpretations, the language is ambiguous." Third Division Award 34207, supra. Because both interpretations are plausible, Rule 15.3 is ambiguous and the Organization therefore cannot meet its burden based alone upon a plain reading of the language in Rule 15.3.

"One of the strongest tools for interpreting ambiguous contract language is past practice." Third Division Award 34207, supra. In its June 1, 1999 letter, the Organization asserted that ". . . the carrier has always paid Local Representative's conducting hearing's [sic] with the International General Chairman being present and acting as spokesman." On the property, the Carrier acknowledged that there was a past practice of interpreting the language as argued by the Organization. In its November 12, 1999 letter, the Carrier stated ". . . the Carrier acknowledges that local management has condoned the practice of paying the local Chairman for attending hearings in the past. . . ." That same acknowledgment was also stated in a letter from the Carrier dated October 8, 1999 in another matter (where, as the Organization seeks in this matter, the Carrier paid the Local Chairman event though ". . . the local chairman was not the employees representative, that responsibility was bestowed upon the General Chairman for the IAM" with the further attribution that "[t]his is due only to the fact that a misunderstanding was created surrounding this issue, and local management played a part in that misunderstanding"). Further, in its Submission to the Board, the Carrier states:

"The Carrier admits that the local custom at the Waterville shop, since the new Agreement became effective, was to allow one local union officer to be compensated for attending hearings. This was allowed whether the local official represented the accused, or as in this case, watched the General Chairman represent the accused. . . ."

Thus, as the Organization argues, there exists a practice that the Local Chairman has been paid for attending an Investigation even where the General Chairman asks the questions on behalf of the employee. That past practice resolves the ambiguity in the language in Rule 15.3. In this case, the claim therefore has merit. The Claimant was entitled to be paid under Rule 15.3 for being at Sicard's Investigation as "the duly accredited local representative" [emphasis added].

The Carrier's arguments do not change the result.

First, the Carrier argues that while there has been some confusion with respect to enforcement of the pay provisions, the Organization was put on notice that the prior practice of payment would no longer be followed. The Carrier's efforts to eliminate the prior practice by giving notice to the Organization cannot be successful in this particular case. This dispute arose in May 1999 after the Claimant was denied payment for attending Sicard's Investigation. The claim was submitted on June 1, 1999. The Carrier's letters to the Organization attempting to eliminate the practice were not sent until October and November, 1999 - long after this dispute arose. For purposes of this case, the Carrier cannot retroactively eliminate a past practice in that fashion.

Second, on the property in its November 12, 1999 letter, the Carrier asserted that the past practice is not binding because "[l]ocal arrangements do not take precedent over the clear and unambiguous Agreement language which exists in this case." But, "[t]o be a past practice, the conditions in dispute must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Third Division Award 34207, supra. The above discussion concerning the Organization's assertion that a past practice existed; the Carrier's acknowledgment in its November 12, 1999 letter which states that ". . . the Carrier acknowledges that local management has condoned the practice of paying the local Chairman for attending hearings in the past . . ;" and the Carrier's statement in its Submission that such a

practice exists conclusively show that a past practice existed. Moreover, insofar as the Carrier asserts that the language is "unambiguous" so as to preclude consideration of the past practice, as discussed above, the language is subject to several plausible interpretations and is therefore ambiguous therefore allowing the Board to consider the established past practice.

Third, Public Law Board No. 5860, Award 8 involved a different set of facts (and a different organization) where the dispute was whether "duly accredited local representative" could be an individual who is designated by the Organization as the representative on a system wide basis. That is not the dispute in this matter. Compare Second Division Award 13461 (which sustained another organization's claim), but again, also involved a different issue than the one presently before the Board. There, the dispute was also over whether the individual claiming payment was "local" and whether such individual had to be employed by the Carrier. Here, the dispute is whether the duly accredited local representative is entitled to payment for attending an Investigation when the person asking the questions during the Investigation is the General Chairman. Public Law Board No. 5860, Award 8 and Second Division Award 13461 are not on point.

Based on the above, this particular claim will be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 1st day of October 2003.