Award No. 4332
Docket No. 3945
2-P&LE-TWUOA-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

RAILROAD DIVISION, TRANSPORT WORKERS UNION OF AMERICA, A. F. of L.—C. I. O.

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY AND THE LAKE ERIE & EASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

On April 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, May 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 31, 1960 Apprentice Parson was used as a welder because when he went to the paint yard to work Welder S. Puskar replaced him on #6 track. Since this was done and J. Hrebenok is an older employe and a welder the organization requests that he be paid the difference in pay between a helper and a welder for all days worked by Apprentice Parson. Also paragraph eleven (11) of the Apprentice Agreement was violated when Parson was used to do welding work on #6 track.

EMPLOYES' STATEMENT OF FACTS: That Parsons was only an apprentice and according to the Apprentice Agreement had no right to be welding as it was not his fourth year of apprenticeship.

That regardless where Welder Puskar worked while Apprentice Parson welded on #6 track Welder Puskar did take Apprentice Parson's place when Apprentice Parson went to work in the paint yard.

That J. Hrebenok is an older employe than Apprentice Parson and also J. Hrebenok is a welder and if a welder was needed on #6 track then J. Hrebenok should have been used.

That the Apprentice Agreement was violated, paragraph eleven (11).

That this case arose at McKees Rocks, Pa., and is known as Case M-300.

That the Railroad Division, Transport Workers Union of America, AFL-CIO does have a bargaining agreement effective May 1, 1948 and revised March 1, 1956 with the Pittsburgh & Lake Erie Railroad Company and the Lake Erie & Eastern Railroad Company covering the Carmen, their Helpers and Apprentices, (Car & Locomotive Departments), a copy of which is on file

Effective April 19, 1960, therefore, there were two regularly assigned carmen welders working on No. 6 track and when Apprentice Parsons was assigned to the Paint Shop effective June 1, 1960 the number of regularly assigned welders at that location remained the same. No additional carmen welders were assigned to that track effective June 1, 1960, nor were any such positions advertised as a result of the transfer of Mr. Parsons to another assignment.

CONCLUSION: Carrier has shown conclusively that Apprentice Parsons was assigned in a welding program as part of his apprentice training. The organization has failed to show that Apprentice Parsons displaced a mechanic and has failed to present any evidence in support of the validity of the claim.

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 were given due notice of hearing thereon.

D. C. Parsons was employed by the Carrier as a carman apprentice at McKees Rocks, Pennsylvania. He performed welding on thirty-two (32) specified days in April and May, 1960, although he was not in the last year of his apprenticeship at that time.

The Claimant, carman helper J. Hrebenok, was assigned as a rivet heater and worked in such capacity at all times here relevant.. He also was a qualified carman welder and was the oldest carman welder who was not working as a carman during the period here involved. He filed the instant grievance in which he contended that he, instead of Parsons, should have been used to perform the welding in question. He requested payment of the difference between the helper's and welder's pro rata rates for the above-mentioned thirty-two (32) days. The Carrier denied the grievance.

In support of his claim, the Claimant primarily relies on Paragraph 11 of the Apprenticeship Agreement of January 18, 1956 (hereinafter referred to as the "Agreement") which reads as follows:

> "Apprentices shall not work on oxy-acetylene, thermit, electric or any other welding processes until they are in their last year."

1. Paragraph 11 clearly and unambiguously prescribes that apprentices shall not work on welding processes until they are in the last year of apprenticeship. It is undisputed that Parsons was not in his last year of apprenticeship when he worked on welding processes in April and May, 1960. The Carrier admits that the performance of said work by him was a "technical" violation of Paragraph 11 (see: Organization Exhibit No. 4; Carrier's Submission Brief, pp. 6 and 7; Carrier's Rebuttal Brief, p. 2). However, the Agreement does not permit a "technical" or any other violation of Paragraph 11. It plainly and unequivocally prohibits all violations.

In further defense of its admitted violation of Paragraph 11, the Carrier contends that Parsons also performed welding in January and March, 1960, and that other apprentices had been assigned to welding prior to the last year of their apprenticeship without any objections on the part of the Organization or the Apprenticeship Committee established pursuant to Paragraph 15 of the Agreement. The Organization has asserted that it was not aware of such instances and thus could not protest them and that the Committee did not function during the periods in question. We need not resolve the question whether or not the Organization or the Committee had legal grounds. The law is firmly settled that custom or practice are of no probative value in interpreting or applying a labor agreement the wording of which is clear and unambiguous as is here the case with respect to Paragraph 11. See: Award 3873 of the Second Division and cases cited therein. Hence, even if one assumes that the Organization or the Committee were aware of the Carrier's previous violations of Paragraph 11, their failure to file a protest in the past would not adversely affect the application of the express prohibition of Paragraph 11 in this case. See: Frank Elkouri and Edna A. Elkouri, **How Arbitration Works,** Rev. Ed., Washington, D. C., BNA Incorporated, 1960, p. 235 and cases cited therein.

In summary, we find that the Carrier violated Paragraph 11 of the Agreement by assigning Parsons to perform welding on the thirty-two (32) days under consideration.

2. The principle is well established in the law of labor relations that a party to a labor agreement which has violated the terms thereof is generally subject to a penalty to insure compliance with the agreement even though the latter does not explicitly provide such penalty. See: Awards 4312 and 4317 of the Second Division and the detailed discussion of the "penalty" doctrine contained therein. We have found nothing in the record before us which would in any way excuse or mitigate the Carrier's violation of the Agreement. The available evidence indisputably reveals that the Carrier repeatedly disregarded the plain proscription of Paragraph 11 in this and other instances. Under these circumstances, we believe that the instant claim is justified as an appropriate penalty to insure compliance with Paragraph 11 of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of November 1963.