

Award No. 5041
Docket No. 4744
2-CRI&P-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Machinists)

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the terms of the controlling Agreement, the Carrier denied Committeemen D. H. Claseman and L. J. McNulty the right to attend an investigation and represent an accused employe, Machinist S. B. Cooksey, on Sept. 3, 1963.
2. That accordingly the Carrier be ordered to allow the duly authorized Local Committee to attend and act as representative in all future investigations.

EMPLOYEES' STATEMENT OF FACTS: On Tuesday, September 3, 1963, Machinist S. B. Cooksey appeared at the office of master mechanic, Silvis, Illinois, to be investigated for alleged violations of company rules. Mr. Cooksey was accompanied by general chairman of Machinists' E. F. Ufheil and local committee consisting of D. H. Claseman and L. J. McNulty. Master Mechanic J. H. Whipple, Jr., who was the conducting officer, asked Mr. Cooksey if he desired representation and if so, whom. Mr. Cooksey advised that he did desire representation and advised that he desired E. F. Ufheil, D. H. Claseman and L. J. McNulty to represent him. Mr. Whipple advised that he had received a letter from the office of G. E. Mallery with instructions that only one representative would be allowed to attend investigations. When Mr. Cooksey was forced to decide on one representative, he chose E. F. Ufheil to act in that capacity and D. H. Claseman and L. J. McNulty, the duly authorized local committee was forced to leave the hearing room. After protest, the hearing was held with E. F. Ufheil as the only one present from the organization.

This dispute has been handled in accordance with the agreement, but the carrier has declined to make any adjustment.

The agreement effective October 16, 1948, as subsequently amended, is controlling.

and an award bottomed on the premise that a valid local agreement existed on this subject is clearly wrong, because the authorized carrier representative never approved such an arrangement.

The interpretation of the rule is what is in dispute—**unclouded by any local practice**—as no agreement in behalf of local practice exists, and the carrier feels it is entitled to an interpretation from the board on the rules involved, **absent any other factor**. The interpretation of the carrier is exactly the same as that of the carrier in Award 3260 under similar rules. The board in that case did interpret the rules, as should have been done in Award 3845—but which was not done.

Your board will further note the statement of claim in Award 3845 read, in part:

“1. That under the **controlling Agreement** Carmen Committeemen F. A. Gragg, O. B. Robertson and B. W. Rollins were unjustly denied pay while attending investigation during working hours on July 2, 1958.”

while the statement of claim in the instant dispute reads:

“1. That under the terms of the **controlling agreement** the Carrier denied Committeemen D. H. Clasemen and L. J. McNulty the right to attend an investigation and represent an accused employee, Machinist S. B. Cooksey, on September 3, 1963.

2. That accordingly the Carrier be ordered to allow the duly authorized Local Committee to attend and act as representative in all future investigations.”

Your board needs no reminder that it is unable to rewrite the rules of the agreement, but this is what the employees would ask your board to do.

Rule 32, which by its nature and design is not applicable in this dispute, covers conferences between local officials and local **committeemen**. Rule 34 pertains to an employee's representation by his duly authorized **representative**.

The employees under part 2 of their claim ask your Board to say that these two different words be enforced as equal. Such a change can be made only through the processes of negotiation, mediation, arbitration, etc. As pointed out already, the employees have not been able to secure what is here asked through negotiation with management.

Furthermore, under Award 3845 the claimants attended the investigation but were denied pay. Here, claimants did not attend the investigation and lost no time.

The carrier feels the foregoing is most conclusive to the fact that position of the employees is totally without agreement support and the claim should be denied.

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.

The Claimants are local committeemen who, along with the General Chairman, were orally designated as his representatives by an employee under investigation. The claim involves their right as local committeemen to attend the investigation without loss of time. The claimed right does not appear in Rule 34, the Discipline Rule, but constitutes the second paragraph of Rule 32, the Grievance Rule, which provides:

"All conferences between local officials and local committeemen to be held during regular hours without loss of time to committeemen,
* * *."

The only cited reference in the rules to the representation of employees in discipline cases is this provision of Rule 34:

"At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses."

Thus, the only reference to representation in the Agreement is to the singular.

But the Organization relies upon Award 3845, in which this Division said:

"The Carrier's contention is that the incident here involved was a discipline investigation under Rule 34, and was not incidental to claims or grievances under Rule 32, and therefore was not within paragraph 7 of the latter rule.

"But the Employees point out that this paragraph was adopted in 1935 and retained in subsequent agreements without change, and that during all that time both the Carrier and the Organizations have recognized that the local committees were entitled to represent employees in the handling of disputes, controversies and investigations with local officials during their working hours, without loss of time. Without denial by the Carrier they cite forty such instances of discipline hearings at four points in Arkansas, Kansas and Illinois between 1941 and 1958, and state that it is only a partial list. In view of this record the claim must be sustained."

Three errors in Award 3845 are to be noted:

First: The reference in the first paragraph cited to "paragraph 7" of Rule 32 is erroneous, since the rule has no such paragraph; the reference should instead have been to "the second paragraph" of the rule.

Second: In the first paragraph of "Position of Employees" in Award 3845, this provision is incorrectly designated as part of Rule 35, instead of Rule 32.

Third: The second paragraph cited from Award 3845 is too broad in finding an established recognition "that the local committees were entitled to represent employees in the handling of disputes, controversies and investigations with local officials during their working hours, without loss of time." What the record showed, and what the Board should have found, instead of the words quoted, was an established recognition that "local committeemen are entitled to attend investigations during their regular working hours without loss of pay."

All evidence submitted in proof of the established custom was of numerous investigations at various points on Carrier's system at which committeemen were "present with no loss of time while attending investigation," but with no reference to representation of the employee under investigation.

Furthermore, the claim in that case was that the committeemen "were unjustly denied pay while attending investigation" and their right to pay, which was sustained, was the only question before the Board.

The Carrier questions Award 3845 as contrary to the second paragraph of Rule 135, which reads:

"No local mutual agreement will be made on these rules except on approval of the parties signatory hereto."

But the practice shown here was not local; in fact, it is well settled that an established practice cannot be proven locally, but only by general or widespread application.

The Railway Labor Act does not empower this Board to direct the future conduct of disputants, but only to settle disputes.

Consequently, upon a showing similar to that involved in Award 3845, our conclusion is that the Claimants were entitled to attend the investigation during their regular working hours without loss of time, and should have been permitted to do so.

AWARD

Claim sustained to the extent indicated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February, 1967.