Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7012
SECOND DIVISION Docket No. 6695
2-C&O-EW-'76

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (System Federation No. 41, Railway Employes' Department, A. F. of L. - C. I. O. Electrical Workers
(The Chesapeake and Ohio Railway Company (Chesapeake District)

Dispute: Claim of Employes:

1. That the Chesapeake and Ohio Railway Company violated the current agreements, particularly the Memorandum of Agreement made effective July 1, 1952, paragraph 10 thereof, and Rules 27 and 31, by their failure to recall cut-off employes holding seniority rights at Newport News, Virginia, before assigning Employes holding seniority in the Carrier's System Electrical Force to perform certain electrical work at Newport News, Virginia.

2. That, accordingly, the Chesapeake and Ohio Railway Company be ordered to make monetary restitution to Claimants H. D. Ross, H. J. Cook, C. T. Thornton, and W. T. Reynolds, holding Apprentice Classification; and Electrician Helpers W. J. Drummon, O. H. Lawrence, C. W. Johnson, W. R. Lamand, and F. E. Taylor, for 160 hours pay each, at their respective rates of pay, account of the aforementioned claimants being in furloughed status at the time Carrier assigned to, and performed work at Newport News, Virginia, with System Electrical Forces, which work commenced on or about June 19, 1972.

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.

Claimants in this case were four electrician apprentices and five electrician helpers who assert that Carrier violated the Agreement by failing to recall them from furloughed status to perform certain specified electrical work at Newport News, Virginia. The record shows that Carrier used a Road Electrical Construction Force of five electricians, commencing on or about June 19, 1972 to perform work described as follows:

> "Construction of a 4160 volt, 3 phase, 4 wire 'Y,' primary line, for approximately 600 ft.; installing a pad-mounted 225 KVA transformer, rated 4160 volts, 3 phase, 4 wire 'Y' to 120/208 'Y,' e phase, 4 wire with primary lightening and fuse protection; installing new service entrance conductors and main distribution panel in basement of terminal building including one branch circuit panel in telephone room."

Thus, the instant claim alleges that Carrier violated the Memorandum of Agreement of July 1, 1952, especially paragraph 10 and Rules 27 and 31 of the Schedule Agreement when it used Road Construction Force elctricians instead of the furloughed apprentices and helpers at Newport News to do the described work.

Initially, Carrier challenged jurisdiction of this Division to hear the case because Petitioner had submitted an identical claim to the Fourth Division. This problem was obviated on August 8, 1974 when our brothers on the Fourth Division dismissed without prejudice the claim filed before them for want of jurisdiction and expressly deferred to our handling of the claim on the Second Division. See Award 3077, Docket 3083.

With respect to the merits of the claim Carrier maintains that by accepted custom and practice large scale electrical construction work is assigned to the Road Electrical Construction Force and is not work regularly performed by shop electricians. Moreover, Carrier points out that no road helpers or apprentices were used to assist the road force electricians and that there were no furloughed shop electricians at Newport News but only furloughed shop apprentices and helpers. Finally, Carrier contends that by clear language buttressed by custom practice and tradition paragraph 10 of the July 1, 1952 Memorandum of Agreement is applicable to mechanics but not apprentices and helpers. Carrier raised several other points in presentation before the Division but, consistent with long standing principles we shall not consider these matters not raised or discussed on the property.

A central part of this dispute is the question of whether the words "shop employees" as used in Paragraph 10 includes helpers and apprentices, or not. Carrier argues that only mechanics are covered by that phrase and that Petitioner has acquiesced in this interpretation over the years. We have reviewed carefully the record and do not find substantial evidence of an unvarying mutually accepted and time-honored past practice of excluding apprentices and helpers from the coverage

of paragraph 10 from which we could infer that such was the intent of the parties. Moreover, even if arguendo there was evidence of such practice it is well established that where contract language is clear and unambiguous a conflicting custom or practice does not serve to alter its plain meaning. See Awards 1898, 2210, 3505, 3873, 4591, 5365, 5547, 6025, 6036, 6056 and 6438 et. al.

Paragraph 10 states as follows:

> "10 Assignment of Work: Except in emergency beyond the control of the Railway Company System Electrical Force employes will not be required to perform work regularly performed by shop employes at points where shop employes are on suspension, per Rule 27, but may be so assigned if there are no cut off employes at the point, or if cut off employes at the point are recalled and given opportunity to work."

As we read the foregoing language it nowhere differentiates between or among shop mechanics, helpers or apprentices but uses the all-inclusive term "shop employees". If the parties intended such a distinction we must presume they would have so stated. We cannot through arbitration alter, amend, add or delete from the plain words used by the parties for to do so would usurp the proper role of the negotiators. Accordingly, we cannot accept Carriers argument that Paragraph 10 is not at all applicable to helpers and apprentices since the clear and unambiguous language is to the contrary. To so hold, however, is not totally dispositive of the instant claim.

While Paragraph 10 may not be held generally inapplicable to helpers and apprentices we are pursuaded that a rule of reasonable interpretation consistent with the obvious meaning of Paragraph 10 requires Petitioner to show that the contested work in question in a particular case was work regularly performed by the Claimants, be they mechanics, helpers or apprentices, in that given case. Thus, the question remains as to whether the work performed by the System Force mechanics on and after June 19, 1972 was work regularly performed by the furloughed employees who are Claimants herein. Petitioner has the burden of proof on all essential aspects of its claim and a vital facet of this claim is pursuasive evidence that the work performed by the System Force is work regularly performed by the Claimants. There is some evidence which would tend to show that the work in question is within the capability of shop mechanics. But a showing of clear and convincing evidence has not been made by Petitioner that the work in question was regularly performed by these Claimants and this evidentiary failure is fatal. On the basis of this finding, therefore, we are constrained to dismiss the claim for failure of Petitioner to carry the requisite burden of proof.

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Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of February, 1976.