Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7182
Docket No. 7016
2-LT-USofA '76

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx Jr. when award was rendered.

Parties to Dispute: (United Steelworkers of America, AFL-CIO
(The Lake Terminal Railroad Company

Dispute: Claim of Employes:

(1) That under the Agreement of September 27, 1955 and subsequently revised on August 21, 1957, and February 1, 1967; specifically Rule 14 Section 3(h) 1 & 2 and the Memorandum of Agreement between the Lake Terminal Railroad Company and the United Steelworkers of America, dated November 23, 1974, the Carrier violated the seniority and contractual rights of Car Shop employee R. Riggen when it improperly denied him the right to the position of a Carrier Operator on November 26, 1974.

(2) That accordingly, the Carrier be ordered to compensate Mr. Riggen, beginning on December 9, 1974, and for every day thereafter that an employee, junior in seniority to Mr. Riggen, was used as a Carrier Operator, eight (8) hours pay at the Carrier Operator's rate up to and including May 2, 1975, in addition to all other earnings, as penalty for this violation.

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.

The Carrier argues that the claim be dismissed because of the Organization's failure to follow the specific procedure required in Rule 13, Section 1 (b), which states in part:

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of

notice, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision."

The Carrier claims, and the Organization does not deny, that the Organization failed to follow the latter part of this procedure.

The Organization argues that such failure should be overlooked, since the Carrier heard the matter at the second and third steps on the property without raising the procedural defect as a bar to advancing the the claim through the various steps. Further, the Organization claims that the procedure, or lack thereof, which it followed had been practiced for many years without objection from the Carrier.

Past practice, however ingrained and tolerated by the parties, cannot be used as a defense to defeat clear and precise language of a collective bargaining agreement. In some instances, such practice might be valid basis to prevent one party from relying retroactively on agreement language, but even this does not apply here.

The record shows that Carrier, on November 21, 1975, advised the Organization in a previous matter that:

> ". . . However, it has come to our attention that the Organization is not complying with Section 1, Paragraph (a) (the context of this letter is sufficiently explicit for it to be understood that the correct reference is to Paragraph (b)) under Rule 13 of the current Schedule Agreement, in that written notice of rejection of written confirmation of decisions of denial by Company representatives on each step of appeal has not been given within the specified time limits prescribed thereunder. . . . Time claims and/or grievances not properly handled in accordance with applicable rules on all stages of appeal, such as in the instant case, will be considered closed in accordance with said applicable rules."

This letter was received by the Organization some months prior to processing of the present claim. In the Board's view, this is sufficient to alert the Organization that strict complicance with Rule 13 was to be expected, and that the past practice of ignoring part of this procedure, if indeed such was the past practice, would no longer be condoned.

Clear language of the Agreement, reinforced by prior fair warning of its applicability, was sufficient to require the Organization to proceed strictly by the terms of the Agreement.

A W A R D

Claim dismissed.

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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 30th day of November, 1976.