Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7211
SECOND DIVISION Docket No. 6986
2-BNI-CM-'77

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

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I.O. (Carmen)
(Burlington Northern Inc.

Dispute: Claim of Employes:

1) That the current agreement, particularly Rule 27(a) and 98(c) and Carmen's Special Rules 83 and 90, were violated when other than carmen were used to change wheels at Gateway, Oregon.

2) That accordingly, the Carrier be ordered to compensate Vancouver Shop Carmen G. D. Swanson for seven (7) hours at straight time rate and eight (8) hours and twenty (20) minutes at the time and one-half (1½) rate for April 30, 1974.

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.

On the claim date, Carrier utilized Foremen to perform certain work which the Organization asserts should have been performed by Claimant under specified rules of the Agreement. The work was performed at a geographic location where neither carmen nor foremen were employed.

After a thorough study of the record in its entirety, we find that an interpretation of Rule 27(a) controls this particular dispute:

> "None but mechanics or apprentices regularly employed as such shall do mechanics' work as per the special rules of each craft except foremen at points where no mechanics are employed..."

Claimant concedes that, under the cited rule, foremen employed at a point where no mechanics are employed may perform mechanics' work, but that exception is limited solely to the point where foreman is employed.

Conversely, Carrier contends that the cited rule permits foreman's work performance at any location where mechanics are not employed.

We concede that the rule can be read so as to give meaning to both interpretations. The apparent ambiguity is underscored by the fact that conflicting Awards have been issued by this Board interpreting the language in question.

Under these circumstances, the practices of the parties have a significance to our determination. Claimant concedes that foremen have performed in similar circumstances in the past, but seek to excuse failures to complain at the time. This past practice, coupled with the wording of the rule, compel us to concur with Carrier's interpretation of the rule.

A W A R D

Claim denied.

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 25th day of January, 1977.

LABOR MEMBER'S DISSENT TO AWARD NO. 7211 - DOCKET NO. 6986

In reaching its conclusion in Award No. 7211, the Majority states in part:

> "After a thorough study of the record in its entirety, we find that an interpretation of Rule 27(a) controls this particular dispute:
>
> > 'None but mechanics or apprentices regularly employed as such shall do mechanics' work as per the special rules of each craft except foremen at points where no mechanics are employed...'"

The Majority refused to recognize Rule 90 which was set forth in the Employes' Submission and the Labor Member's Brief. That rule clearly provides that when it is necessary to repair cars on the road or away from shops, Carmen will be sent out.

The work performed giving rise to this dispute was repairing cars on the road away from shops.

The effect of the Majority's erroneous Award would, if allowed to stand, make roving Carmen out of Foremen and would completely nullify Rule 90. That fact was pointed out to the Majority in panel discussion and set forth in Labor Member's Brief. Furthermore, procedence was cited where the Majority in Second Division Award 4254 so held.

The Majority erred where it stated in part:

> "Claimant concedes that foremen have performed in similar circumstances in the past, but seeks to excuse failures to complain at the time."

That statement by the Majority is emphatically denied. The Majority obviously accepted the contentions found in the Carrier Member's Brief as fact when it clearly is not fact.

The Employes made no concession whatever that foremen had performed such repair work on the road away from shops. What they did say was that if it was done it was without their knowledge and consent. Abundant precedence was cited to support their position that even if a practice existed it did not preclude the enforcement of a clear and unambiguous rule. The Majority completely ignored that fact.

The Majority again erred when it failed to consider the fact that Carmen were assigned to and were employed at the location where the foremen performed the work. The foremen were assisting Carmen.

The Majority chose, however, to use as precedence, Awards cited by Carrier which involved entirely different circumstances and facts, and none of which involved foremen assisting carmen.

Referee Martin I. Rose, in Second Division Award N o. 7197, sustained the Claim of Employes involving the same parties, the same circumstances and the same foremen. In that Award, the Majority held in part as follows:

> "None of these cases involved the factual situation presented here. In the instant case, Carrier assigned a carman who was the operator driver of the Cline truck, to perform car wheel work at South Junction. By such assignment, Carrier acknlwledged the practicality and reasonableness of having carmen perform the work of their craft at that location on the road. In such circumstances,

> "the requirement of Rule 90 that 'When necessary to repair cars on the road,...carmen...will be sent out to perform such work...' must be regarded as applicable and controlling. Under the Schedule Agreement, the exception in Rule 27 (a) for work by supervision cannot be interpreted to supersede Rule 90 when application of that rule is reasonable and carmen can be sent out to perform the work of the craft on the road in accordance with the rule.
>
> Carrier's reference to an uncontested past practice does not warrant a contrary conclusion. Petitioner asserts that the practice was 'unknowingly permitted' and was 'out of sight and mind of the carmen at Vancouver' until the Cline truck was dispatched to South Junction. These assertions constitute, in effect, denials of knowledge of the Carrier's practice. The record furnishes no basis for resolution of the factual issues posed by these denials.
>
> It is well settled that a past practice cannot be held binding unless there is a valid basis for finding long standing and mutual acceptance of such practice by both parties involved. For the reasons indicated, the sufficience of the element of acceptance or acquiescense on the part of petitioner is lacking here.
>
> Accordingly, the claim must be sustained, but payment for service not performed should be at the pro rata rate."

The Majority in Award No. 7211 had the same data before it as did the Majority in Award 7197. The conclusion in Award No. 7211 was obviously based on the Majority's failure to separate the facts from Carrier's allegations which were amply refuted by the Employes, and its tendency to expand one rule (27) at the expense of completely nullifying and making void and meaningless another rule (90).

Further, in its conclusions the Majority states in part:

> "We concede that the rule can be read so as to give meaning to both interpretations."

If that was correct, which it is not, then the Majority should

have considered the damage its interpretation would have on other rules (90) which are clear and unambiguous.

This Board held in Second Division Awards 4097 and 4334 that:

> "...The law is well settled that, when one interpretation of an ambiguous provision in a labor agreement would lead to harsh or inequitable results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be applied."

The Award is erroneous and demands our dissent.

C. E. Wheeler
Labor Member

Labor Member's Dissent to
Award No. 7211, Docket No.
6986.