Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8554
Docket No. 8016
2-CRR-CM-'81

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

Parties to Dispute:
(Brotherhood Railway Carmen of the United States and Canada
(
(Clinchfield Railroad Company

Dispute: Claim of Employes:

1. That the Clinchfield Railroad Company violated the terms of the current controlling agreement when they refused to allow furloughed four-year Carman H. L. Franklin, Erwin, Tennessee, to displace an Upgraded Carman Regular Apprentice who had been transferred to Bostic Yard, N.C., and upgraded to Carman following his furlough from Erwin, Tennessee.

2. That accordingly, the Clinchfield Railroad Company be ordered to extend furloughed Carman H. L. Franklin his contractual right to displace the Upgraded Carman, and to compensate him eight (8) hours' pay at straight time rate for each shift which the Upgraded Carman has worked retroactive to June 28, 1977, in addition to all earnings while working under the Relief Work Rule.

3. That the Clinchfield Railroad Company be further ordered to make furloughed Carman H. L. Franklin whole with respect to all rights, privileges and benefits associated with his railroad employment, such as, but not limited to, vacation, health and welfare, and insurance benefits.

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.

This case, though simple on its facts, is vexatious.

The carrier asserts as a threshold matter, that the present claim is barred in that it is based on precisely the same set of facts as a prior claim filed by the present Claimant and subsequently dropped by the Organization. We have duly considered the prior cases and authorities urged upon us by the Carrier in this regard. One can, indeed, plausibly argue that the present claim is identical to the old and thus "stale" and barred. However, one can also (as the Organization does) maintain with considerable cogency that the present claim is either "new" or "continuing". Without elaborating in unnecessary detail on our rationale,

carmen ... become available" would be meaningless surplusage unless the provision had system-wide applicability across seniority points.

We do not find this argument wholly persuasive. The "will not be retained ... as four-year carmen ... become available" phrase would not necessarily be an outright and total redundancy as applied to employees at a single point of seniority. For instance, it is conceivable that this phrase could have been intended to assure against a far-fetched interpretation of Article III such as one to the effect that upgrading should result in an automatic conferral on an upgraded apprentice of the minimum four years of seniority ordinarily necessary to achieve carman status. It should be noted too, that affirmation of the obvious is often contained in labor agreements, particularly in clauses or articles which (as is the case with Article III) provide for exceptions from the norm or for special privileges (here, the Carrier right to upgrade apprentices). In any event, the Article III clause contested here was evidently drafted for and contained in a national agreement and adopted subsequently by the Parties to this case. It is probable that the language was intended to or, at least, does in fact have, a different emphasis or meaning in each of the various contracts in which it appears, depending on the differing, all-important provisions in those contracts regarding the significance of point seniority, the right to transfer or displace from point-to-point under certain circumstances, etc.

Second, and more important, the Organization contends that a past practice has been established by the Carrier which clearly supports Claimant in this case. This practice consists of two proved instances and, possibly, a third (disputed) instance (over a more than twenty year period), of four-year carmen displacing upgraded apprentices at seniority points where the journeymen carmen had no seniority. These displacements were accompanied by documents signed by a foreman of the Carrier which seem, on their face, to support the Organization's interpretation of Article III as providing system-wide rights for four-year carmen vis-a-vis upgraded apprentices. This is, admittedly, persuasive evidence, and though there are but a few instances of a not quite well-established practice here, such a "practice" could, under certain circumstances, be controlling where the relevant contract language is sufficiently vague and ambiguous.

However, while there clearly is some degree of ambiguity as between Article III and Rule 17, we cannot find that that ambiguity is so profound or significant that the interpretation of these clauses in their interaction should be controlled by a practice consisting of no more than two or, possibly, three instances extending of no more than two or, possibly, three instances extending over a twenty-year period of contract implementation. Rule 17 is, after all, as the Carrier contends, clear and specific and is with respect to the vital subject with which it deals, comprehensive and all-encompassing. Any exception to the unambiguous and sweeping pronouncement of Rule 17 would have to be found to have been clearly the intention of the parties as evidenced by some precise and specific language in the agreement; in our judgment, Article III does not meet such a standard.

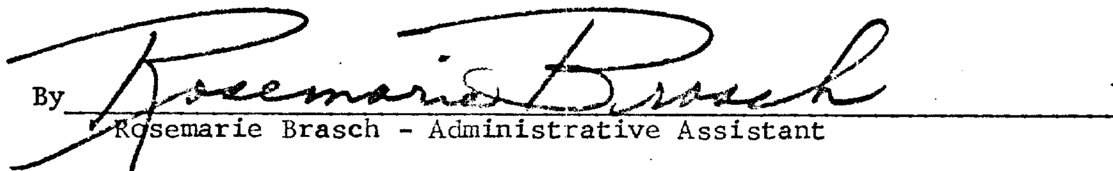
To put it simply, we find that the quantum of ambiguity in the relevant contract clauses involved in this case is not nearly great enough for the interpretation of these clauses to be controlled by the few instances of past practice presented by the Organization in support of its position.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board



By Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 7th day of January, 1981.