Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9017
SECOND DIVISION Docket No. 8963
2-L&N-CM-'82

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

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

Dispute: Claim of Employes:

1. That the Louisville and Nashville Railroad Company, improperly removed Committeemen R. Wells and J. D. Loftin from Carriers payroll and/or "docked" them four (4) hours for attending a formal investigation as Committeemen representatives, while representing a fellow employe (Carman G. B. Reed) during regular assigned working hours, March 28, 1979.

2.(a) Accordingly, the Louisville and Nashville Railroad Company, should be ordered to compensate Carmen R. Wells and J. D. Loftin four (4) hours each at the straight time rate or that which was deducted from their payroll for attending the investigation held March 28, 1979, and

(b) That the Carrier should be instructed to return to its former practice of compensating the on duty Committeemen for attending the investigation of its employes during on duty hours.

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 Claim involves the interpretation and application of Rules 32 (b) and 36. They read as follows:

"Rule 32 (b) All conferences between local officials and local committees will be held during regular working hours without loss of time to committeemen or employes represented."

"Rule 36 The Company will not discriminate against any committeemen who are delegated to represent other employees and will grant them leave of absence and free transportation subject to the provisions of Rule 44."

On March 28, 1979, the Railroad Company held an investigation. The employee under investigation was accompanied by local chairman T. F. Polley and the Claimants, who are the other members of the local committee. The investigation was held during the working hours of the Claimants. Subsequent to the hearing, the Carrier "docked" the pay of the Claimants for the time they spent at the hearing. It is noteworthy that it is undisputed that the local chairman was paid for this time the same as if he had worked on his regular job that day. The claim represents an attempt to recover the wages lost as a result of the reduction in pay for the Claimants.

The Organization makes a number of arguments in support of their position that the Claimants are entitled to pay for attending the investigation. First, they note that Rule 32 and Rule 36 refer to "committeemen". They contend the term is used in the plural sense, therefore, it is proper that each member of the local committee of three, which includes the local chairman and the claimants, is entitled to be paid for attending the investigation. Second, they argued that there is a long standing practice of paying members of the local committee who attend investigations during working hours. In this regard they submit eighteen affidavits from various local union officials and a statement from a former General Chairman. In addition they direct our attention to a situation which occurred August 18, 1978, where the Carrier did pay two members of a local committee for attending an investigation.

It is the Carrier's position that the payment requested by the Organization is unwarranted. They contend that the portion of the Agreement at issue must be read in light of the fact that the entire agreement is between the Carrier and five different shop craft unions. The Agreement of which Rule 32 and 36 are part of is signed and applicable to not only the Carmen but to the Electricians, the Machinists, the Sheet Metal Workers and the Boilermakers Organizations. In this respect the Carrier says:

> "The word 'committee' as mentioned in the above two rules means a group comprised of a representative from each of these five crafts and is not to be construed in the manner advanced by the Carmen in this dispute that it means a group of elected officers of the Carmen's protective committee."

In other words, the Carrier suggests the term "committee" or "committeemen" refers not to a committee of several committeemen of a single organization but to the committee comprised of one representative from each of the crafts that negotiated the multi-craft contract. Therefore, as we see it, the Carrier would have us conclude that the rule doesn't mandate payment to more than one member of each craft (namely the local chairman) who comprises the multi-craft committee. The Organization's interpretation, the Carrier suggests, would have them paying for all persons who may be members of the Carmen's local committee while attending investigations. This is not supported by the rule, they contend. Moreover, the Carrier points out that only one other craft signatory to the Agreement has progressed a similar claim and they failed to progress it beyond the declination by the Carrier's Director of Labor Relations. They also noted the other crafts have never progressed such claims. Next, the Carrier argues that the Agreement

is unambiguous and that no amount of past practice can be thought to prevail as a result. They cite us to a number of awards which hold that past practice cannot nullify clear and unambiguous provisions of a contract. In respect to the letter of the former General Chairman, they produce a letter from a former Labor Relations official who contends the Carrier is not obligated to make the payments demanded by the Organization.

The Carrier also argues that the best evidence that the Rules do not support their contention is that on September 15, 1980, the Organization filed a Section 6 notice seeking to modify the Agreement. The modification they were seeking, asserts the Carrier, is conclusive acknowledgement that they now do not have a rule to provide the remedy they are seeking before the Board. They direct our attention to the following portion of the Section 6 notice:

> "All investigations shall be held during the first shift without loss of time to committeemen, or employes attending as witnesses. Employes charged and their duly authorized representatives shall have the right to be present throughout the entire hearing, and shall be permitted to examine and cross-examine all witnesses."

In respect to the Section 6 argument the Employees registered an objection with the Board that the Section 6 notice submitted by the Carrier was not discussed on the property in the handling of this grievance and therefore it is in violation of Circular No. 1 and cannot be considered as evidence.

In defining the critical issue to be decided we note that there is no argument in this record whether an investigation is a conference within the meaning of the rule or that the local chairman is entitled to pay. The issue is and therefore our decision is limited to what is meant by the term "committee" and "committeemen" and whether the Carrier must pay the Claimants for attending investigations.

The Carrier argues that the term committee or committeemen is unambiguous. They contend that it is clear that the language refers to the Carmen's committee but to the committee of the five shop craft unions. The Board disagrees that the contract language is unambiguous. We believe it is obvious that there is considerable ambiguity surrounding the words. While the Carrier's interpretation of the critical words is plausible and deserving of consideration, we believe that the Organization's interpretation is also tenable. The terms are subject to at least two meaningful interpretations in the context of this case and therefore we cannot conclude that they are unambiguous. In this regard, we must rely on past practice to determine what the parties intended the language to mean. It is a well established axiom of contract interpretation that undisputed past practice will be taken as evidence of the intent of the parties and the meaning of ambiguous agreement language.

In this case, the past practice of both parties overwhelmingly supports the position of the Organization. The 18 affidavits presented by the Organization purport that members of the local carmen committees at various locations have never been docked from attending investigations. Some of the statements purported

the practice to exist as far back as the effective date of the Agreement which was September 1, 1943. The Carrier fundamentally doesn't dispute the existence of the practice. As a matter of fact the record contains the aforementioned letter from the former Carrier official which among other contentions did admit that "for many years" ... "Committeemen were permitted to accompany local Chairmen at investigations without loss of time from their assignments when investigation was conducted during their working hours." Further, he stated:

> "Insofar as shopcraft employees were concerned, I know that for many years and up to the time of my retirement in many instances one and sometimes two committeemen did accompany the local chairman at investigations during their working hours and so far as I know they were uniformly permitted to do so without loss of time (money)."

The Carrier and the letter from the former official does however dispute that the past practice is controlling and further contend that its discontinuance did not violate the Agreement as the language is unambiguous. They, as mentioned previously, rely on the arbitral principle that past practice no matter how well established cannot outweigh clear and unambiguous language. We have no quarrel with this principle and in fact endorse it where applicable. However, in light of our finding that the language is surrounded by considerable ambiguity the principle relied upon by the Carrier is not applicable. In absence of clear language, we have only past practice to rely on. If the framers of the Agreement intended the language to make a reference to only one committeeman from each craft and not to extend payment to committeemen other than the local chairman, it is not apparent. If the distinction, which the Carrier argues is clear, was intended to be applicable it has been obliterated by long standing uncontroverted past practice to the contrary. There is little doubt that the parties have for many years applied the rules, in their ambiguity, so to provide for the compensation of one or two committeemen in addition to the local chairman when attending investigations. While this practice is a burden to the Carrier, it is a practice that in the face of ambiguous language they have acquiesced to for a very long time. We find the past practice to be controlling. If the Carrier no longer wishes to follow the long standing practice and wishes to abolish it, they should do so through negotiations (See Third Division Award 4086).

In arriving at our conclusion, we have given no weight to the Section 6 notice introduced by the Carrier. There is no evidence that the Section 6 notice or the arguments surrounding section 6 notices, were a matter of record in the handling of this dispute. The Rules contained in Circular No. 1 are well established and fundamentally sound. We cannot consider evidence which was not handled between the parties during the handling of the case. To consider evidence that the parties themselves have not exchanged or considered not only would be prejudicial but chaotic in that it would reverse a well-entrenched principle. We must display great deference and give controlling weight to this time-honored axiom of this Board.

In conclusion, it is our finding that the Organization has shown, in the face of ambiguous language, that there is overwhelming past practice which indicates the claim for these members of this Organization is warranted. Our decision

turns on the basis of this uncontroverted historical practice.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April, 1982.