Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11468
SECOND DIVISION Docket No. 11379
88-2-87-2-17

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

PARTIES TO DISPUTE: (Brotherhood Railway Carmen of the United States and Canada
(
(Fruit Growers Express Company

STATEMENT OF CLAIM:

1. That the Fruit Growers Express Company violated the controlliing Agreement, specifically Rules 22 and 24, when R. W. Blair was furloughed on October 4, 1985 Carman Blair has over two years seniority on Carman R. D. Perry who was not furloughed and remains working while Carman Blair is still furloughed.

2. That accordingly, the Fruit Growers Express Company be ordered to compensate Carman R. W. Blair for eight (8) hours per day, forty (40) hours per week, for all time lost by Carman Blair from October 4, 1985 until he is restored to the service, plus all benefits and vacation rights as he would have accrued under a normal flow of circumstance as if he had never been furloughed.

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 employes 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.

The instant dispute involves Rule 24 of the Agreement. The interpretation of that Rule by the Carrier resulted in Claimant's furlough. Although Claimant was furloughed, a junior Carman was not effected by the reduction in force.

Rule 24 of the Agreement reads as follows:

"Seniority

(a) Seniority of employees shall be determined by length of service in one of the following departments and shall be confined to the point at which employed. An employee transferring or bidding from one department to another will retain his seniority in his original department and become the youngest man in the new department as of the date of his transfer:

SIX SUB-DIVISIONS OF CARMEN:

Machinist	Wood Mill
Blacksmith & Forge	Paint
Sheet Metal	Mechanical Refrigeration
Electrical	Repairman
Junior Mechanics	Switching Crew
Helpers	Air Brake
Laborers	Other Carmen

Sub-divisions in these departments may be agreed upon between the Shop Superintendent and local committee, subject to the approval of the Mechanical Superintendent and the General Chairman."

The Organization asserts that in the printing of the current working Agreement the title "Six Sub-Divisions of Carmen" was printed over the wrong column. Said title should have been printed over the right-hand column designating the sub-division of Carmen. It is the Organization's position that the Carrier did not follow the Agreement when it designated Mechanical Refrigeration a "department" rather than a "sub-division." The Organization presents further probative evidence in the form of an early Agreement (July 1, 1945), a March 30, 1953 letter from the General Mechanical Superintendent to the General Chairman and strong rebuttal argument that denies that Mechanical Refrigeration could be called a "department."

The Carrier contends that the Claimant was properly furloughed. In the Carrier's view, reduction in force is by department seniority. Given Rule 24 it is not relevant that Claimant was the senior Carman. Since Claimant was junior in seniority in the Mechanical Refrigeration department, he was correctly furloughed while the senior employee in that department was retained. The Carrier denies that a printing error or past captions clarifies the issue and makes the Rule clear. It points to Organization memos from the General Chairman to the Local Chairman dated July 23 and October 12, 1984 that support its interpretation. It provides numerous examples wherein it has followed this interpretation in the past at various points without the Organization filing a claim. The Carrier also includes affidavits attesting to the past practice of considering Mechanical Refrigeration as a department and without a response or protest from the Organization.

Our review of the instant case is that unlike Award 11467 the Organization has provided more fundamental evidence to demonstrate that Mechanical Refrigeration was and is a sub-division and not a department. There is clear evidence from the July 1, 1945 printed Agreement that the Subdivision caption was printed in error over the wrong column. Once correctly shifted to the right-hand column, the Agreement is clear. The Carrier's reliance upon past practice therefore is not determinative. Past practice has weight only when the language of the Agreement is ambiguous. The Board agrees fully with Third Division Award 24423 which stated that:

> "...we are estopped by the Railway Labor Act 1926, as Amended, and the decisional law of all the Divisions from rewriting a labor Agreement. We can only construe and apply what the parties intended."

It is clear in this record that the parties intended that Mechanical Refrigeration was a sub-division. As such, the Carrier has violated the Agreement and Part 1 of the Claim must be sustained.

Having determined that there was a violation of the Agreement, the Board is left with the issue of compensation. Herein, we find that the action of the Carrier was based on a practice that had been followed without protest by the Organization. The Carrier's continuation of such practice, where acquiescence occurs, cannot now result in compensation as requested in Part 2 of the Claim. The Organization has the right to insist upon compliance with the Agreement, but it cannot thereby hold the Carrier responsible for a relied upon past practice. This is consistent with past Awards of the Third Division (Awards 26436, 25930).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of April 1988.

CARRIER MEMBERS'
DISSENT TO AWARD 11467
(DOCKET NO. 11374)
CONCURRING AND DISSENTING OPINION TO
AWARD 11468 (DOCKET NO. 11379)
(Referee Marty E. Zusman)

The Board exceeded its jurisdiction in rendering these Awards. Without any authority from the Railway Labor Act, the Majority has ruled that the parties were in error in the way they drafted and structured their collectively bargained Agreement which was signed, executed and published. In lieu of considering a more appropriate disposition, the Majority chose to determine how the Agreement ought to read and to penalize Fruit Growers Express Company on the ground that the Agreement does not read the way they thought it should. This is a fundamental departure from the Board's authority under the Act, which gives this Board the role of interpreting, not rewriting, agreements.

Award 11468 particularly represents an ultra vires act. The Board is limited by the Railway Labor Act to interpretation and application of agreements as they are written. It is beyond the pale of any reasonable exercise of this statutory authority for the Board to reorganize the language and the form of the Agreement for the sole purpose of accommodating the speculations of one of the parties. The Board has no authority whatever to rewrite an agreement by shifting captions or deciding to adjust the placement of words in the text of an agreement to achieve a particular result. The agreement between the parties is always in evidence, and the rule the Board has consistently followed until these Awards, is that the Board must take the agreement as it finds it.

The rearrangement of the parties' language is not even justified as an attempt at clarification. The Majority would have been well advised to heed the conclusions of Third Division Award 24423, as quoted in its Findings, and reject the

Organization's invitation to rewrite the Agreement. It is interesting to note that no protest was filed when Rule 24 was published containing the alleged "printer error" or through various revisions and printings of the Agreement.

Moreover, moving the caption does not render the provision "clear." The Rule was as clear with the caption where the parties to the Agreement placed it as it became after the Majority rewrote the Rule by moving it. The obvious difference is that leaving the Rule as the Board found it would have required a denial of the claims.

One example will illustrate the confusion, rather than clarity, that the Majority's rewrite of the Rule would cause. The Majority's revision of the Rule attempts to elevate "Junior Mechanics, Helpers and Laborers" to the status of a Department. During progression of Docket 11379 on the property the Organization's General Chairman stated in his December 18, 1985 appeal addressed to the Vice President Operations:

> "Although we are not fully convinced that Mr. Nelson is correct in placing Junior Mechanics, Material Deliverymen (Helpers), and Laborers as separate departments, we are in full agreement that they should be carried on separate seniority rosters with no rights to bid on Mechanic's positions." (Emphasis added)

Similarly, the Majority's action would lead to the removal of "Other Carmen" as a Department. Yet, that is the roster where most of the Carmen are listed, including the Claimant in Award 11468. The Organization's representatives have recognized "Other Carmen" as a Department for over 30 years.

The Board has exceeded its authority by rewriting the parties' Agreement. That problem is compounded because those efforts disregard a relationship and an interpretation of the Agreement that have been in place for many years. The Majority's action improperly resolves the issue and serves only to create new problems for all concerned.

The applicable provision in Rule 24(a) which is quoted in both decisions states in part:

> "Seniority of employees should be determined by length of service in one of the following departments..."

There has been a separate roster for Mechanical Refrigeration Repairmen ("MRR") for decades. Service earns seniority which is evidenced by the position of employees' names on a departmental roster. Such rosters are evidence of the existence of various departments under the Rule.

This inseparable relationship between a department and the separate rosters maintained on the Company's property under the Rule has been recognized consistently. In fact, even the Statement of Claim in Award 11467 requests restoration to the Mechanical Refrigeration Repairmen's roster, with a specified seniority date "...in that department." (Emphasis added). In handling the claim that led to Award 11467 on the property, the General Chairman also stated that the Organization was seeking a seniority date in the MRR Department.

The record also contained an illustration of the long history of departmental seniority and the agreed upon practice of maintaining separate rosters for each. For example, the record contains a "Paint Department" roster listing 13 painters. The Company could hardly ignore the rights of the employees on that roster when assigning painter work. The painters' roster is the source of seniority for painters, just as the MRR roster recognizes MRR seniority. The Majority's decision simply eliminates the rights of employees on those rosters to specialized work. If that had been the parties' intention, it is difficult to imagine why they would have taken the trouble over all these years to keep separate rosters for painters, MRR or any other skilled employees.

The system agreed upon by the parties in their Agreement recognizes the unique organization of the work of the Carmen's craft on this Company's property. The separation of the listed departments required accumulation of experience or training before an employee could move into one of those departments.

The effect of these Awards will be an effort to force the Company when furloughing any employees, no matter what type of work on the property has been reduced, to lay off employees who have worked and trained to acquire a needed skill such as MRR, painting, air brake, etc., who are on rosters covering these specialties. For example, as apparently happened in the situation leading to Award 11468, the volume of work in some departments at the Claimant's location declined. However, the volume of work for employees on the MRR roster did not decline. The Company furloughed employees not on that roster who lacked the skills required to meet the Company's needs at the time. This is the system the parties bargained for, and set out in their Agreement.

On the other hand, the reasoning of the Majority and the new system they try to create in these Awards, contemplates retaining or calling other Carmen to positions who may never have done the work that requires particular skills, lack training to do it properly and whose experience has been in repair and maintenance of car bodies or other unrelated work. The new system the Majority seeks is unfair to employees who trained to acquire special skills (often on their own time) and even to those required to perform unfamiliar tasks with little or no experience. Finally, such changes interfere with the Company's right and ability to operate its business efficiently and without the need for putting unskilled people into positions when there is a ready force, and there is an Agreement in place that contemplates keeping a separate roster for that work force. The Majority's action completely disregards

both the scope of this Board's authority and the impact of their baseless decision on the Company's operations, and must be considered a nullity.

Rule 24(a) is not a model of clarity. The Majority's decision gets around the clear evidence of past practice which should have guided their understanding of Rule 24(a) by rewriting the Agreement and shifting the caption. Once the Majority takes that extraordinary step, they are able to conclude that the strong evidence of practice in the record should have little or no bearing on the substantive aspect of the claims because the Agreement was now clear. This is an extraordinary result, which ignores this Board's rules for interpreting agreements in the light of past practice.

The record reveals that the practice on the Carrier's property at least since 1954 was to accord the status of a separate department to the Mechanical Refrigeration Repairman, at least with respect to the seniority issue. That practice was accepted by the Organization as early as 1954.

It has been held that failure to protest a course of conduct under an agreement provision can deprive the claimant of the benefits of such neglect. This Board has consistently relied on a well-established rule of law generally applied in the interpretation or application of a labor agreement, namely, that custom or past practice may be used to determine the meaning of an agreement which on its face is ambiguous, doubtful or indefinite. This rule is based on the premise that, for the purpose of ascertaining the true intention of the parties to such an agreement, their consistent and long-continued actions or conduct might be even more important than what they say or do not say in the agreement.

In the face of the consistent conduct of the parties and the record as a whole, the Organization failed to sustain its burden of proof in either case that Rule 24 was so clear as to justify disregarding the practice as to the substantive issues.

An objective reading of the language of the Rule as written, and a review of its application coupled with its history and evaluation as outlined in the record, reveals that Rule 24(a) was ambiguous before the Majority attempted to rewrite the Agreement. The Rule remains ambiguous. Accordingly, the long-standing practice as to the treatment of seniority of MRR employees should have controlled.

Awards 11467 and 11468 purport to interpret the same Rule. Yet, those Awards contain various inconsistencies which suggest that both Awards are suspect.

In Award 11467, the Majority found an ambiguity in Rule 24 and turned to past practice to interpret it. In Award 11468, the Majority found no ambiguity in the provision and rejected practice as a guide for its interpretation. The reason offered for the different reading of the same Rule is that in Award 11468 "...the Organization has provided more fundamental evidence...", identified as "...clear evidence from the July 1, 1945 printed Agreement that the Subdivision caption was printed in error over the wrong column." This is hardly persuasive. The identical Rule and identical evidence were also involved in the other claim where the provision was found to be ambiguous.

Of course, this additional "evidence" is not "evidence" of anything. The Rule per se is "evidence" only of the fact that the parties agreed to adopt certain language. These claims involve <u>interpretation</u> of that language. The Majority ruled that an interpretation (based upon their own reconstruction of the provision) offered by one of the parties constitutes legal "evidence" to support its conclusion. The source of this pure conjecture was wishful thinking of the General Chairman in a letter of record. This not only suggests a naivete but a serious misconception of the Board's function.

Furthermore, the Majority found in Award 11467 that "...nothing in Rule 24(a) ... allows it to determine whether Mechanical Refrigeration is a distinct department

... or a subdivision...." This is difficult to reconcile with Award 11468. In reading the same Rule (albeit after changing it) the Majority exhibited no reluctance about its right to determine that the parties in Rule 24 clearly intended that "...Mechanical Refrigeration was and is a sub-division and not a department...", and that "...it is clear ... the parties intended that Mechanical Refrigeration was a sub-division."

The parties to this Agreement have lived with their understanding of its meaning for nearly 35 years. Now, the Majority has decided to determine what the parties meant. There is no plausible reason for a body such as this Board, which the governing statute intended to be objective, to reformulate the parties' Agreement to reach a strained result and proceed to announce that the restructured Agreement constitutes legal "evidence" to support its erroneous conclusion. The Majority's assumption of the role of both advocate and judge in this context is even more troubling in light of the inconsistent ways the two supposedly related Awards interpret the same Rule. Such bizarre procedure strains the confidence of the parties' in the arbitration process.

The Majority places much reliance on a March 30, 1953 letter. In Award 11467 the Majority finds: "The letter states agreement." This conclusion was reached, the Award notes, because the correspondence involved is between people in the Organization and the Company who had "...decisional authority to interpret said Rule...." The fact is the letter is not an "agreement" in form or content. It contains no offer to change the basic Agreement and contains no evidence of acceptance which is essential and customary if it were intended to elevate the letter to the level of an agreement. The content of the letter merely recites an on-going disagreement between the parties on the issue of departments and sub-divisions. It is outrageous that the Majority gave more weight to that letter,

which does not in any sense reflect "agreement" of the parties, than to the Organization's own internal documents created after the 1953 letter. To the extent that the 1953 letter contains an opinion of a then-Carrier Superintendent, that "evidence" is superceded by later documents and by more than 30 years of practice on the property.

This Board clearly ignored the Railway Labor Act and exceeded its jurisdiction by changing the applicable provision and disregarding the long and continuous past practice on the property. With the exception of the denial of any compensation in Award 11468, the two Awards are inconsistent and have no support under the facts, agreement provisions, practices, interpretations or precedent. They should have been denied in their entirety.

We dissent.

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