

The Second Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood Railway Carmen/Division of TCU
(CSX Transportation, Inc.
(Chesapeake & Ohio Railway Company)

STATEMENT OF CLAIM:

1. That the Chesapeake and Ohio Railroad Company (CSX Transportation, Inc.) (hereinafter "carrier") violated the provisions of June 1, 1979 Upgrading of Helpers and Apprenticeship Agreement, when on January 3, 1989 the carrier offered to upgrade Carman Helpers and Painter Helpers to Carman Tentatives and Painter Tentatives positions respectfully without first obtaining an understanding between the proper Labor Relations officer and the General Chairman of the Craft in accordance with the aforementioned Agreement.

2. That the Carrier further violated the Agreement when they granted these employes an improper retroactive seniority date which affected other employes.

3. That accordingly, the carrier should be instructed to return those individuals to their former classification as Helpers that the carrier allowed to be upgraded in violation of the aforementioned Agreement.

FINDINGS:

The Third 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.

As a result of the merger of several railroads to create the existing Carrier, freight car heavy repair functions of the various railroads, to a great extent were transferred to the Raceland Car Shops. In light of the magnitude of the program, there were not enough journeymen painter and carmen

employed at Raceland to perform the necessary work. Prior to 1989, the Carrier recalled every tentative painter and tentative carman on the Raceland rosters. The Carrier resorted to soliciting journeyman painter and carmen who had been furloughed on other locations at the former C&O Railway and various General Chairmen representing the craft in question on other lines of the Carrier were requested to assist in finding journeymen who would be willing to work in the 1989 repair program. Furloughed machinists were also offered jobs in the carman craft at Raceland.

Despite the efforts of the Carrier, a shortage of painters and carmen continued to exist. In order to fill the vacant jobs, the Carrier found it necessary to offer Painter Helpers and Carman Helpers the opportunity to be upgraded to tentative status. The instant grievance arises out of the Carrier's action of unilaterally upgrading Painter Helpers and Carman Helpers, who had previously relinquished their respective Helper positions, without first entering into a "special written agreement" as provided by Article II, Section 3, Paragraph (d) of the June 1, 1979 Agreement.

The dispute between the parties involves an interpretation and application of Article II, Section 3, Paragraphs (b) (c) and (d) which, in relevant part, are set forth as follows:

"(b) Helpers promoted to tentative or temporary mechanic under agreements in effect prior to the effective date of this Agreement who had an option of establishing mechanics seniority or returning to the ranks of helper on completion of the required number of days to qualify as a journeyman mechanic will be required to make their election, in writing, within 30 days after notification by Management of completion of the 732 days on mechanics work required under this Agreement by submitting the 'Exhibit A' previously applicable to the local officer with copy to the Local and General Chairmen. Failure to make this election within the 30 days will be considered as an election to return to the helper ranks. * * *

(c) Employees promoted under this Agreement will lose all rights to the job they left and if returned to their former classification, apprentice or helper, by election or failure to qualify for the position to which promoted, they will be compelled to take whatever position may be open in their craft and class * * *.

(d) Employees returned to their former classification under paragraph (c) above will forfeit all tentative mechanic seniority accumulated and will not again be considered for upgrading except by special written agreement between the General Chairman and the appropriate Labor Relations officer."

Article II, Section 3, Paragraphs (b) and (c) refer to two (2) distinct groups of employees. Paragraph (b) applies to "Helpers promoted to tentative or temporary mechanic under agreements in effect" prior to the June 1, 1979 Agreement. This group of employees is to be contrasted with "[E]mployees promoted under this Agreement" or, in other words, employees who will be promoted in the future under the June 1, 1979 Agreement, that are included in Paragraph (c). The parties reinforced the rights of the employees referred to in Paragraph (b) by providing in Article IV, the following:

"Except as specifically stated herein, the provisions of this Agreement shall not have any effect on the status or rights of any employee, working or furloughed, whose status was determined prior to the effective date of this Agreement."

Thus, an employee who had been upgraded under an Agreement prior to June 1, 1979 was an employee "whose status was determined prior to the effective date" of the June 1, 1979 Agreement. It is implicit in Section 3, Paragraphs (b) (c) and (d) that although the employees referred to in Paragraph (b) had been promoted they also had the right to return to their former classifications with the right to be upgraded again in the future.

This is borne out by the reference in Paragraph (d) to "Employees returned to their former classification under paragraph (c)" These employees "forfeit all accumulated tentative mechanic seniority" under the terms of Paragraph (c) and "will not again be considered for upgrading except by special written agreement between the General Chairman and the appropriate Labor Relations Officer." It is of great weight that the forfeiture of accumulated tentative mechanic seniority and the express prohibition for considering the employees described in Paragraph (c) for upgrading except by special agreement contained in Paragraph (d) applies solely to the Paragraph (c) employees. By its express terms, Paragraph (d) does not apply to the employees described in Paragraph (b).

It is axiomatic that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. Thus, by expressly providing that the terms of Paragraph (d) apply to employees described in Paragraph (c), must be taken to mean that the parties intended to exclude the employees described in Paragraph (b).

In filing the instant grievance, the Organization alleged that the Carrier violated Paragraph (d) when it offered promotion to Painter Helpers and Carman Helpers "after the Helpers had already refused to be upgraded since June, 1979." The Organization failed to identify any employees whom it alleged had been upgraded improperly. After the Carrier pointed out the Organization's failure to identify the Helpers, the Organization identified eight (8) Painter Helpers, whom it alleged were upgraded in violation of Paragraph (d).

The eight (8) employees who were identified had been promoted in the past and subsequently had returned to their former classification. All eight (8) employees had been offered promotion again on or about January 3, 1989. Five (5) of the employees, G. Caines, G. Leesburg, D. Ramey, G. Shope and E. Cook, were previously promoted to the tentative painter position under Agreements in effect prior to the June 1, 1979 Agreement. Thus, they are employees included within the intent and meaning of Section 3 (b). The remaining three (3) employees did not serve sufficient time to be upgraded to journeyman, but were upgraded to "tentative."

Based upon the "on-property record," Article II, Section 3, Paragraph (d) of the June 1, 1979 Agreement has not been violated. Moreover, the Organization has not satisfied its required burden to establish that the Carrier violated Article II, Section 3, Paragraph (d) of the June 1, 1979 Agreement.

Finally, it should be pointed out that the Carrier acted consistent with its contractual right to upgrade helpers. Article II, Section 1 of the June 1, 1979 Agreement, provides as follows:

"Section 1. Upgrading Order

In the event of not being able to employ mechanics with three years' experience at the trade who are of good moral character and habits, qualified apprentices of the craft may be advanced to 'mechanic-tentative' in accordance with their seniority. If more employees are needed, qualified helpers of the craft may be promoted. If this does not provide sufficient employees to do the work, persons who have had experience in the use of tools may be employed. Such employees will not be retained in service as tentative mechanics when qualified three-year mechanics become available."

Clearly, the Carrier acted within its rights as set forth in Article II, Section 1.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Beder - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of September 1992.