Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34009
Docket No. MW-32539
00-3-95-3-443

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Rail Corporation (former Denver and Rio
(Grande Western Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, by letter dated January 18 and 29, 1994, the Carrier advised that effective immediately all purchases of prescription glasses by the Company for employes on the former D&RGW are cancelled and that this change would standardize the Company's safety glasses policy over the entire system (System File D-94-16/BMW 94-357)

(2) As a consequence of the violation referred to in Part (1) above, the newly imposed safety glasses policy on The Denver and Rio Grande Western Railroad Company shall be rescinded and the Carrier shall reimburse any Maintenance of Way employe who purchased prescription safety glasses subsequent to the implementation of the new policy on January 18 and 29, 1994."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The record reflects that since at least the 1960's the Carrier has required that employees wear eye protection that meets certain standards and that employees who wear prescription eye glasses were deemed to meet that requirement. Moreover, since that same time the Carrier customarily and historically furnished prescription eye glasses to those employees. On January 18 and 29, 1994 the Carrier notified employees that "... all purchases of prescription safety glasses by the Company ... are canceled." The Organization asserts that such action violated Rules 41 and 42 which provide, respectively, that "(t)he Company will furnish ... such general tools as are necessary to perform ... work ..." and (t)he Company shall continue to furnish necessary safety devices to properly protect employees ...."

The Carrier first argues that the claim must be dismissed because it is vague and indefinite and because it does not identify the Claimants on whose behalf the claim is brought. The Organization first replies that the argument is now made before the Board for the first time and, alternatively, if properly before us it contends that the claim is not vague and indefinite. We find that the Carrier's procedural arguments are properly before us in that they were first raised in the handling on the property in its letters of April 5 and July 25, 1994. With regard to the merits of the argument, both parties cite to us authority in support of their positions. The Organization relies on Third Division Award 29578 where the Board held that the failure to name all of the Claimants whose rights were violated did not defeat the claim where the necessary information was within the records and knowledge of the Carrier. The Carrier on the other hand cites to Second Division Award 6556. We believe however that Second Division Award 6556 is distinguishable. Although the Carrier is correct that the claim in that case failed to identify the Claimants, a close reading of the Award indicates that the Board dismissed the claim because the Organization in that matter failed to meet its burden of proof on the facts in support of the claim rather than a defect in the pleadings. Moreover, we too believe, as did the Board in Third Division Award 29578, that the identity of the individuals who at one time had their safety prescription eye glasses purchased for them and who, after the Carrier's new policy was implemented, purchased them on their own can be easily identified.

We then turn to the merits of the dispute. First, we find no Rule support for the claim in Rule 41 because we agree with the Carrier that by no stretch of the imagination can prescription safety glasses be included within the ordinary meaning of "tools" as used in the Rule. However, Rule 42 presents a different case. We find no hesitation in concluding that prescription safety glasses are a "safety device" within the meaning of the Rule. Thus, since the Carrier agreed in the Rule to "continue to furnish" safety devices it was obligated to do so and could not end its policy of doing so.

Assuming arguendo, and as argued by the Carrier, that prescription safety glasses are not "safety devices," we would still sustain the claim. The Carrier has failed to rebut the record evidence that since the 1960's the Carrier has furnished prescription safety glasses to employees. Thus, there can be no question that a long-standing, identifiable, and mutual past practice was in place. More importantly, any such past practice can be the basis for an implied contractual obligation as it forms the expectations of the Carrier and the Organization as to their respective obligations and rights. Accordingly, the claim is sustained and the January 1994 policy must be rescinded. In addition, the matter is remanded to the parties to determine those employees affected by the unilateral change to the policy so that their remedy can be calculated.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of April, 2000.