Award No. 12644
Docket No. SG-11986

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Louisville and Nashville Railroad Company:

> In behalf of Signal Maintainers J. E. Strong and E. E. Gaines and Signal Helpers C. D. Wiseman and E. G. Spencer for eight hours' pay each at their respective straight-time rates of pay for their regular assignment in addition to what they earned while working off their regular assignment on August 22, 1958, at Calla, Kentucky. [Carrier's File: G-265-3; G-265]

EMPLOYES' STATEMENT OF FACTS: Signal Maintainer E. E. Gaines and Signal Helper C. D. Wiseman are regularly assigned to a signal maintenance territory with assigned headquarters at Beattyville, Kentucky. Their assigned territory extends from Mile Post 150 (Pryse) to Mile Post 180 (St. Helens, Kentucky). Signal Maintainer J. E. Strong and Signal Helper E. G. Spencer are regularly assigned to a signal maintenance territory with assigned headquarters at Jackson, Kentucky. Their assigned territory extends from Mile Post 180 (St. Helens, Ky.) to Mile Post 213 (Whick, Ky.).

On August 22, 1958, Signal Maintainers Gaines and Strong and Signal Helpers Wiseman and Spencer, hereinafter referred to as the claimants, were required by the Carrier to leave their regular signal maintenance assignments and go to Calla, Ky., to perform construction work on the signal maintenance territory assigned to Signal Maintainer V. D. Hill. The specific work that they were required to perform was construction work in connection with building a new pole line and the dismantling of an old pole line at Calla, Ky.

In view of the fact that the claimants were taken off of their regular assigned positions on August 22, 1958, and required to work on the assigned territory of another signal maintenance position, the following claim was filed in their behalf by **Local Chairman E. E. Gaines** with **Mr. J. F. Wiseman, Signal Supervisor,** under date of **September 7, 1958:**

OPINION OF BOARD: Petitioner and Organization pursue this claim on the theory that it is violative of Rules 7, 15, 27 and 49, all of which are quoted in the Organization's original ex parte submission and need not be outlined here. They base their argument principally however on Rule 27 entitled Changing Positions or Shifts. Essentially this rule prescribes the changing of an employe from one assigned position to another unless an emergent situation has developed. They maintain that no such emergency existed in the instant case, and indeed the record itself substantiates this fact. The Carrier merely avers that the reason for the transfer was that work required to be done was important. (R.20) Carrier however defends its action by stating that such transfers have a record of long practice which precedes the last collective bargaining agreement of both parties. The Organization replies that "this board stated in Award 7195 evidence of practice cannot abrogate the rule, although it may bar past violations. Either party may at any time require the practice to be stopped and the rule applied according to its terms (Awards 5872, 5979 and 6144)." The Organization later maintains that the Carrier failed to present the defense of practice during the progressing of the dispute on the property, and specifically objects to a series of letters incorporated in the Carrier's submission. These letters are from supervisory officials which categorically state that such transfers have been made in their respective areas of jurisdiction. They maintain that these letters should have been presented on the property, and in the absence of this having been done, the Carrier is now estopped from pleading practice as a defense without prejudicing its position. The Organization quotes from a long line of awards of this Board which hold that practice is not necessarily controlling: 5978, 7914, 9040, 9245, 3979, 4543, 4904, 5013, 5166, 5314, 5979, 7195, 2926, 4428, 5526, 6308, 6563, 6840, 5654.

An examination of the record reflects that in the Organization's original ex parte submission (R.10), they quote a letter under date of July 17, 1959 from Director of Personnel Scholl to General Chairman McCamy. The second paragraph of that letter states that at a conference June 16 when this issue was being discussed, the Carrier stated that it was past practice for maintainers and helpers of adjoining territories to assist a maintainer in performing small projects as was done in this case. It is therefore evident that practice was to be the defense and indeed the only defense. The letters from the supervisory officials were dated in April but the record is silent as to whether they were shown to the Organization. We do not think however that failure to do so was fatal, since the Carrier as evidenced by the aforementioned letter, had obviously decided to use practice as its defense. The fact that this was said at the Conference in question has not been denied by the Organization. We think therefore that the defense of practice must be allowed and that the estoppel doctrine which the Organizations would urge us to adopt, should be denied.

The long line of awards cited by the Organization espousing the principle that practice is not necessarily controlling is impressive, but we are swayed by the fact that the practice here at issue antedated the last collective bargaining agreement of the parties. We subscribe to the theory enunciated in Award 5747 in which this Board held: "When a Contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the Contract itself."

We are of the opinion that this is a more sound position and must therefore deny the claim.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1964.

DISSENT TO AWARD NO. 12644, DOCKET NO. SG-11986

Award No. 12644 is a palpable error in that it not only goes contrary to every principle and standard of contract or agreement interpretation ever established by reasonable men, but is also contradictory to itself. The effect of the award is to destroy a portion of a written agreement between the parties — an agreement which was hammered out across a bargaining table and which this Board, established solely for the purpose of **interpreting existing agreement,** has no power or authority to change through the guise of an interpretation.

The award is contrary to principles and standards of contract interpretation because it allows what it finds to have been a practice between the parties to take precedent over a clear and unambiguous Agreement Rule. Precedents, both those which hold practice to be controlling and those which hold that it is not, are not at variance with the holding that practice cannot supersede an unambiguous rule. See Award No. 6840 and many others.

The award is contradictory to itself because it denies the claim after holding and finding that:

> "* * * the practice here at issue antedated the last collective bargaining agreement of the parties. We subscribe to the theory enunciated in Award 5747 in which this Board held: 'When a Contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the Contract itself.'"

and:

"They base their argument principally however on Rule 27 entitled Changing Positions or Shifts. Essentially this rule proscribes the changing of an employe from one assigned position to another unless an emergent situation has developed. They maintain that no such emergency existed in the instant case, and indeed the record itself substantiates this fact. The Carrier merely avers that the reason for the transfer was that work required to be done was important."

Clearly the "practice" was abrobated by the contract terms it antedates. This being so, and the majority concurring in Award 5747, the Agreement was violated and the claim should have been sustained.

The admission of the Carrier's "evidence" of practice is violative of the rules of this Board and contrary to the practice of the Board. As shown in the record, the Carrier's evidence was not amassed until handling of the claim on the property had been concluded and was never presented to the employes or their representative. Stripped of this inadmissible evidence, the Carrier was left with nothing but bald assertion as to practice — evidence without probative value in any form. See Awards Nos. 10639, 11080, 11128, 11887, 11959, 11964, 11966 and 12012.

Award No. 12644 is a contemptible error; therefore, I dissent.

W. W. Altus
Labor Member