

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to afford Mr. G. V. Pfistner a seniority date on the Columbus Division B&B Inspector Seniority Roster equal to his Columbus Division B&B foreman seniority date on the Columbus Division B&B Foreman Seniority Roster (System Docket MW-728).

(2) The Carrier shall allow Mr. G. V. Pfistner a B&B inspector seniority date identical to his B&B foreman seniority date on the Columbus Division Seniority Roster."

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.

Claimant has established and holds seniority as a Bridge and Building (B&B) Helper and Mechanic dating from June 19, 1978 and November 1, 1978 respectively. As of December 3, 1984, Claimant was awarded a position of B&B Foreman on the Columbus Seniority District, however, he was not shown on subsequent rosters. On April 24, 1989, Claimant protested the exclusion from the Bridge and Building Columbus Seniority District Roster, and further protested the omission of his name from the Columbus Seniority District Roster for Inspectors.

On October 25, 1989, the Manager of Labor Relations informed the Claimant that his name would be added to the Columbus District B&B Roster in the classes of B&B Foreman and B&B Assistant Foreman with a seniority date of

December 3, 1984. However, the Carrier advised the Claimant that there was no basis for granting him seniority as an Inspector by virtue of being awarded the Foreman position.

Claimant and the Organization objected, pointing out that historically and by long-standing practice, the names of employees assigned to Foreman positions simultaneously were placed on the B&B rosters with the same date on the B&B Foreman, B&B Assistant Foreman, B&B Mechanic, B&B Helper and B&B Inspector classes. Carrier responded that said practice should have been abandoned when the language of the Rule 1-Seniority Classes was modified in 1982; although Carrier concedes that some managers continued to adhere to the old practice under the new rule.

For its part, the Organization maintains the Carrier's contention that Rule 4, Section 1(a) specifically prohibits the parties' practice of placing the names of employees assigned to B&B Foreman positions on the Inspector's class roster is incorrect. According to the Organization, the long standing practice of awarding employees seniority as Inspector when they have attained seniority as a Foreman has continued under the current Agreement. Organization points to the fact that 20 of the 25 Inspectors listed on the 1989 Columbus Division Roster were listed on the same dates that they had established seniority as B&B Foreman on the B&B Foreman roster, and that the Carrier is "sophistically ignoring a long-standing interpretation of the rules" which have been historically applied by the parties.

It is the Carrier's contention that under the former Pennsylvania Railroad BMW Agreement effective December 16, 1945, Inspectors in the B&B Department were a separate class within the Bridge and Building Department roster. However, Carrier asserts that the 1982 Agreement set up a distinct category of Inspector, and therefore Inspector is no longer considered a class within the Foreman category. According to the Carrier, if a B&B Helper secures an appointment to a B&B Foreman's position, he would establish identical dates as an Assistant Foreman and a B&B mechanic, but is no longer eligible to secure the date as an Inspector. Carrier concedes that from February 1, 1982 to November 14, 1983, employees obtaining B&B Foreman positions were "erroneously" granted Inspector seniority, however, Carrier contends that this improper application has ceased and "past practice cannot nullify unambiguous contract provisions."

It is well-known that this Carrier was formed by an act of Congress from a group of bankrupt Eastern freight railroads. Among the former component railroads was the Penn Central. At start-up of Conrail several rules apparently were carried forward essentially unchanged from the Penn Central /BMW Agreement. However, the record does not contain the seniority rule and seniority roster language from the old Penn Central contract; indeed, no citation or reference to that language was made in handling on the property. The evidence does indicate that Rules 1 and 4 of the Agreement now in dispute read, in pertinent part, as follows:

"RULE 1 - SENIORITY CLASSES

The seniority classes and primary duties of each class are:

Bridge and Building Department

A. Inspector Roster:

Inspector

Inspect bridges, buildings and other structures.

A-1. Inspector Scale Roster:

Inspector Scale

Inspect scales.

b. Bridge and Building Roster:

1. B & B Foreman

Direct and work with employees assigned under his jurisdiction.

2. Assistant Foreman

Direct and work with employees assigned to him under the supervision of a Foreman.

3. B & B Mechanic

Construct, repair and maintain bridges, buildings and other structures.

4. B & B Helper

Assist B & B Mechanic."

"RULE 4 - SENIORITY

Section 1. Seniority date.

(a) Except as provided in Rule 3, Section 5, seniority begins at the time the employee's pay starts. If two (2) or more employees start to work

on the same day, their seniority rank on the roster will be in alphabetical order. An employee assigned to a position of higher class than trackman will begin to earn seniority in such higher class and lower class on the same seniority roster in which he has not previously acquired seniority from the date first awarded an advertised position in such higher class. He will retain and accumulate seniority in the lower class from which assigned. An employee entering service in a class above that of trackman will acquire seniority in that class from the date assigned to an advertised position and will establish seniority as of the same date in all lower classes on the same seniority roster."

The Organization made timely objection to Carrier's introduction of new evidence and argument for the first time in its submission to the Board, and we may not consider that de novo material. The following exchange sets forth the positions and evidence joined in handling on the property:

"Objection to Managers Denial

This is a Roster Protest for the position of B&B Inspector on the Columbus, Ohio Seniority District.

The claimant bid in a B&B Foreman Position but was not placed on the Roster. He protested the Roster and now as agreed to by all the parties he is being placed in his proper place on the Foreman Roster. The claimant has also asked that his name be placed on the B&B Inspectors Roster with the same date of his Foreman Seniority. Here is where the parties differ.

On the Columbus Seniority District the practice is and has been up to now that when an employee is awarded a B&B Foreman position his name will be placed on the Foreman Roster and the Inspector Roster with the same date.

Examples of this are H.J. Murdock, S.A. McDade, A.A. Craig, T.M. Gilbert, R.N. Williams, R.W. Smith, R.E. Prosser, J.K. Lafferty, L. Hackney, J.S. Gilbert, E.A. Sellers, J.D. Serio, W.F. Washmuth, M.T. Cohee, B.R. Campbell, R.L. Ritterbeck, R.M. Peery, E.G. Gallis, L. J. Sacher, and R.D. Alexander. Of the 25 Inspectors listed on the Roster 20 of them have the same date on the Foreman Roster. Four of

them do not have the same date because they bid an Inspectors position in first before bidding a Foreman job in. The Inspector pays less than the Foreman and that's why they were not put on the higher Foreman's Roster at the same time as they acquired their Inspector Date.

We are asking that the claimants name be placed on the Inspectors Roster with the same date of his Foreman Seniority.

Either we are right with our one date or they are all wrong with their 20 dates."

"We disagree with your contention G. V. Pfistner should be given a B&B Inspectors date on the basis of alleged practice on the Columbus Division which purportedly allowed an employee awarded a B&B Foreman position to acquire seniority on the B&B Inspectors roster concurrently. You are cognizant the provisions of Rule 4 Section 1(A) does not provide for obtaining seniority in another class without first being awarded a position in that class. Records show G. V. Pfistner never was awarded a B&B Inspector's position, thus he has no seniority in that class.

In view of the foregoing, your roster protest is denied."

Carrier points out that arbitration tribunals, including the Board, frequently have held that even a long-standing past practice must yield in the face of contrary language which is clear and unambiguous. See Third Division Awards 28034, 20711. However correct that principal might be in the abstract, its application requires a concrete factual showing of unambiguous language which admits of only one interpretation. In the particular set of facts set forth on this record it has no application. For many years prior to the 1982 Agreement, when the Carrier promoted an employee to B&B Foreman's position, the employee was also awarded seniority as a B&B Inspector. The language of Rule 1, as amended in 1982, might colorably be interpreted to vary that practice of applying Rule 4 but it is not crystal clear that the Parties intended thereby to abandon the practice. Further, it is not disputed that this practice continued subsequent to 1982.

In Third Division Award 2436 the Board held:

"It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties." See also Third Division Awards 5167 and 18548.

See also Third Division Award 29057:

"One of the tools of interpreting ambiguous contract language is past practice. It is indicative of what the Parties intended the language to mean and how it should apply."

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.