AWARD NO. 9
NMB CASE NO. 9
UNION CASE NO. 9
COMPANY CASE NO. 9

PUBLIC LAW BOARD NO. 6493

PARTIES TO THE DISPUTE:

DELAWARE & HUDSON RAILWAY COMPANY, INC.

- and -

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Case No. 9: Claim the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Mr. J. Kosier of Seniority Territory #2 to perform work (weld a frog) on Seniority Territory #3 at Kenwood Yard on May 9, 2000, instead of Seniority Territory #3 employe J. Doubleday (Carrier's File 8-00151 DHR).

(2) The Agreement was violated when the Cartier assigned Mr. E. Hawver of Seniority Territory #2 to perform work (weld a frog) on Seniority Territory #3 on the Freight Main Line at Mile Post 476.94 on May 26, 2000, instead of Seniority Territory #3 employe J. Blanchfield (Carrier's File 8-00158).

(3) As a consequence of the violation referred to in Part (1) above, Claimant J. Doubleday shall now be compensated for eight (8) hours' pay at his respective straight time rate of pay.

(4) As a consequence of the violation referred to in Part (2) above, Claimant J. Blanchfield shall now be compensated for eight (8) hours' pay at his respective straight time rate of pay and one-half (.5) hour's pay at his respective time and one-half rate of pay.

Public Law Board 6493upon 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 Board has jurisdiction over the dispute involved herein.

Parties to said dispute exercised the right to appearance at hearing thereon.

PLB No. 6493

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OPINION OF BOARD: Trackmen and Track Foremen employed by the Delaware & Hudson Railway Company, Inc. ("Carrier") are subject to the terms of the Collective Bargaining Agreement between Carrier and the Brotherhood of Maintenance of Way Employees ("Organization"). Portions of that Agreement most pertinent to this case read as follows:

SENIORITY TERRITORIES

4.13 The seniority territories are identified as follows:

Territory #1.
Sunbury, Pennsylvania to Terrace Drive, East Binghamton, New York.

Territory #2.
Terrace Drive, East Binghamton to Schenectady interlocking, and South to Voorheesville, including yards at Binghamton, Oneonta and Schenectady.

Territory #3.
Voorheesville to Albany, up to Mechanicville, West to Glenville, North to Whitehall, including yard at Whitehall. Also Saratoga Springs to North Creek, and Fort Edward to Glens Falls on Lake George Branch.

Territory #4.
Whitehall to Rouses Point, including branch line from South Jct. to Fredenburg Falls.

Territory #5.
S. K. yard only, at Buffalo.

Territory #6. (System Equipment Operators)

System
The seniority territories may only be changed by agreement between the designated Carrier officer and the General Chairman.

* * * * * *

APPENDIX J

* * *

. . . the existing seniority boundaries restricted the assignment of employees adjacent to the boundaries of one seniority territory **to assist** employees adjacent to the boundaries of the adjoining territory during short term projects.

* * *

. . . short term assignments, for periods of up to five (5) working days, **in the above circumstances** would not be counter to any provisions of the Agreement.

The provisions of this letter do not affect the right of the Carrier to assign employees across seniority boundaries during emergencies.

Except for Carrier's assertion that since 1990 there has been a mutually recognized "past practice" concerning the interpretation and application of Appendix "J", which the Organization contests, the facts in this case are not in material dispute. The two named Claimants, J. Doubleday and J. Blanchfield, are regularly assigned to their respective positions at Kenwood Yard at Albany, New York in Seniority Territory #3. Claimant Doubleday has established and holds seniority as a Welder Helper on the Third Subdivision and Claimant Blanchfield has established and holds seniority as a Welder on the Third Subdivision - Seniority Territory #3 and were so assigned at the time that this dispute arose. Mr. J. Kosier and Mr. E. Hawver are regularly assigned to the same classification on the adjoining seniority territory, Seniority Territory #2. Mr. J. Kosier holds seniority and is regularly assigned as a Welder Helper on the Central Bridge Gang at Central Bridge, New York, on Seniority Territory #2; while Mr. E. Hawver holds seniority as a Track Welder and is regularly assigned as such on the Central Bridge Gang at Central Bridge, New York, on Seniority Territory #2. In the absence of any system seniority agreement, Seniority District #2 employees like Messrs. Kosier and Hawver have no seniority rights on Seniority District #3 and, *vice versa*, Seniority District #3 employees like Messrs. J. Doubleday and J. Blanchfield have no seniority rights on Seniority District #2 .

The first of the two consolidated claims arose on Tuesday, May 9, 2000, when the Carrier assigned Mr. Kosier, (the Welder Helper from Seniority District #2) to work with the regularly assigned Welder at Kenwood Yard in performing welding repair on the track frog as part of the switch turnout connecting Track Nos. 4 and 5 at Kenwood Yard (on Seniority Territory #3). Welder Helper J. Kosier performed the subject welder helper work at Kenwood Yard, from 7:00 A.M. to 3:00 P.M., for a total of eight (8) hours at the welder helper straight time rate of pay. Tuesday, May

9, 2000 was a regularly scheduled workday assignment for Claimant Doubleday but on that day Carrier had assigned him to perform welder helper work on a different project at a different location on Seniority Territory #3.

In the second of the claims, the Carrier assigned and used Mr. E. Hawver, the Welder from Seniority Territory #2, to direct and complete scheduled welding repair on the point and wing of the track frog located at the northernmost turnout at Mile Post CPF 477 on Seniority Territory #3. On Friday, May 26, 2000, Mr. Hawver performed the subject welding work from 7:00 A.M. to 3:30 P.M., for a total of eight (8) hours at his respective straight time rate of pay and one-half (.5) hour at his overtime rate of pay. Friday, May 26, 2000 was a regularly scheduled workday assignment for Claimant J. Blanchfield but on that day Carrier had assigned him to perform welding work on a different project at a different location on Seniority Territory #3.

Under the plain language of Rule 4.13, the Claimants' seniority was confined to Seniority Territory #3 but their seniority entitled them to the Welder and Welder Helper work opportunities inuring to their regular assignments within the territorial limits of Seniority Territory #3, including the work at issue on the Third Subdivision on the claim dates. Indeed, the Parties mutually acknowledged this intent as a predicate to entering into the exceptions set forth in Appendix J. It is a well-established principle that where seniority is confined, work is also confined. Among the numerous awards wherein this Division has enunciated this principle are Awards 2050, 2689, 3627, 4653, 4667, 4700, 4803, 5261, 5413, 5950, 6021, 6331, 6473, 6627, 6931, 11152, 11752, 14623, 17931 and 24584. Thus, we conclude that by proving that Carrier assigned Mr. Hawver and Mr. Kosier, whose respective Welder and Welder Helper seniority was confined to Seniority Territory #2, to perform Welder and welder Helper work on the claim dates in Seniority Territory #3 during

the hours of Claimants' regular assignments, the Organization made out a *prima facie* violation of Claimants' seniority rights under Rule 4.13.

Carrier defends against these claims by asserting an affirmative defense, *i.e.*, that its use of the Seniority Territory #2 employees to perform work in Seniority Territory #3 was expressly authorized by the following language of Appendix J (Emphasis added):

> This has reference to the proposal of the Carrier, made during the recently concluded negotiations, to establish system seniority.
>
> The proposal was discussed at length during which you expressed vigorous concerns with respect to the establishment of a broadly based seniority territory.
>
> At the same time, the Carrier expressed concern about the fact that the **existing seniority boundaries restricted the assignment of employees adjacent to the boundaries of one seniority territory to assist employees adjacent to the boundaries of the adjoining territory during short term projects.**
>
> The Carrier agreed to withdraw the proposal on **the understanding that short term assignments, for periods of up to five (5) working days, in the above circumstances would not be counter to any provisions of the Agreement.**
>
> The provisions of this letter do not affect the right of the Carrier to assign employees across seniority boundaries during emergencies.
>
> * * * * * *

There is no showing of emergency in this record so the last paragraph is not involved in this case. Nor, unlike the case decided in NRAB Third Division Award 35442, is there any question that the duration of the cross-territory utilization of the Seniority Territory employees did not exceed the "Short term assignments" time limits of Appendix J. Thus, as the exchange of correspondence on the property shows, the issue in dispute in the present case eventually narrowed to a question not addressed at all in Award 35442, *i.e.*, whether the employees from Seniority Territory #2 were in fact assigned by Carrier on claim dates **"to assist"** the employees in the adjacent or adjoining territory within the mutually intended meaning of those quoted/emphasized words from Paragraph 3 of Appendix J.

The NRAB Third Division consistently has held that Agreements are to be applied as they are written and that exceptions are not to be added under the guise of interpretation. Among the awards holding to this effect are Awards 219, 1248, 2557, 2839, 2940, 7957, 8219, 18280, 18305, 18423, 19633, 20231, 20276, 20345, 20367, 20410, 20711, 20844, 20956, 21061, 21478 and 22748. Where each of the Parties to a collective bargaining agreement has a different understanding of what was intended by certain language, it is generally recognized that the party whose understanding is in accord with the ordinary meaning of that language should prevail in the absence of misrepresentation, fraud or mistake. *See* Hanon & Wilson Company, (S. Katz 1967), 67-2 Arb ¶ 8583. *Accord*, Stewart Hall Company, 86 LA 370, 372 (Madden, 1985). It is also a fundamental principle of contract construction that words used by the Parties should be given their ordinary and popular meaning in the absence of an indication that they were intended mutually to convey some special meaning. *See* Walter Jaeger, Williston on Contracts, § 618 at 705 (4th Ed. 1961). The Restatement of Contracts (Second) is in accord: "In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence." (Restatement, N.13 at § 202, comment e.)

The common English language definition of the verb "assist" is "to give aid or support to (someone)" or "to act as an assistant in a subordinate or supportive function". The common English language definition of the noun "project", as in work project, is "an enterprise carefully planned to achieve a particular aim." Thus, in Appendix J the Parties agreed that, notwithstanding Rule 4.13 and even in the absence of an emergency, Carrier had a limited reserved right to assign Seniority Territory #2 employees to act in support or aid of Seniority Territory #3 employees, for up to five

(5) working days, on projects being performed by Seniority Territory #3 employees in Seniority District #3.

In this case, however, instead of using the employees from the adjoining territory as assistants or helpers on projects which the Claimants were assigned to perform on claim dates, Carrier used the Seniority Territory #2 employees as substitutes or replacements for Claimants while they were re-assigned to perform entirely different projects at different locations on Seniority Territory #3. Given the plain meaning of the words "to assist" and "projects", such utilization of the Seniority Territory #2 employees was not permissible under the literal language of Appendix J. In that connection, we find the following holding from NRAB Third Division Award 14321 directly on point and dispositive: "It is elementary that there is an etymological distinction between supplementing or augmenting and substituting. In the former, we add to something: in the latter, we put in place of something".

In denying the claims, Carrier relied principally on the generic assertion that there was a "past practice" of making assignments under Appendix J which was allegedly contrary to the literal language of that provision, *supra*. However, no details are provided in this record concerning the frequency, scope, openness, mutual acknowledgment or consistency of that alleged "past practice". For its part, Carrier asserted (Emphasis added):

> It is the Carrier's position that the 2nd Sub Division employees did go into the 3rd Sub Division to assist the 3rd Sub Division employees. **It is the Carrier's position that the intent of "assist" in Appendix "J" did not require that the 3rd Sub Division employees be physically present and this has been the past application of Appendix "J" through out the D&H.** The Claimant was in fact working, at the time of the alleged violation, in another part of the 3rd Sub Division territory and accordingly, the 2nd Sub Division employees did assist the 3rd Sub Division employees in their territory.

Carrier's generic assertion of a binding "past practice" under Appendix J of assigning adjoining territory employees in lieu of employees on the adjacent territory, to perform a project on the adjacent territory, whether or not the employees in the adjacent territory are also working on that project, is contested by the Organization and unsupported by any probative evidence. The Organization articulated its countervailing position as follows (Emphasis added):

> Carrier plainly failed to present any evidence whatsoever that the Organization has ever approved, consented or acquiesced to the Carrier's allegation that the parties' intent of "'assist" in Appendix J did not require that the 3rd Sub-Division employes be physically present during the reassignment of 2nd Sub-Division employes, or visa versa. The Carrier raised its assertion as an affirmative defense to the instant claim. **A review of the record will firmly establish that the Carrier failed to present any evidence whatsoever that a practice existed which would permit the Carrier to reassign work on a seniority district to be performed by employes on another seniority district in the absence of the regularly assigned employe.**

Based upon a careful review of the case record and extensive oral argument and re-argument, both at the original hearing and in extensive discussions of the proposed decision by the Board in three Executive Sessions, Carrier's bare assertion of a binding "past practice" under Appendix J of assigning adjoining territory employees in lieu of employees on the adjacent territory, to perform a project on the adjacent territory, whether or not the employees in the adjacent territory are also working on that project, is not persuasively demonstrated. Given the state of this record, we simply are unable to make an informed determination as to whether or to what extent there existed a mutually binding "past practice"which was at variance with the plain and unambiguous words of the applicable contract language.

The sustaining awards in Cases no. 9 and 10 are thus based on the records presented in those particular cases and the literal words of Rules 4.13 and Appendix J. No opinion is expressed or implied by the Board as to whether persuasive proof of the existence of an open and notorious,

mutually recognized and consistently "past practice" at variance with that literal language might have produced a different result. As to appropriate remedy, NRAB Third Division Awards 30181, 31828 and 32440 are but a sampling of authoritative precedent which sustained claims for proven seniority district violations and paid compensatory damages to such so-called "fully employed" Claimants.

AWARD

1) Claims sustained.

2 Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

3 Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the meaning, application or implementation of this Award.

Dana Edward Eischen, Chairman

Stuart A. Hurlbert for
Union Member 9/9/2005

Howard N. Buchanan
Company Member