Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION
Referee Harold M. Weston

Award No. 2641
Docket No. 2629

PARTIES TO DISPUTE: The American Railway Supervisors Association

Chicago and North Western Railway Company

STATEMENT OF CLAIM: It is the claim and request of the Petitioning Organization that:

1. Respondent Carrier violated Rule 1, Scope of the effective Agreement when on May 9, 19, 20, 21, 22, 23, 26, 27, 1970 Carrier assigned employees other than Agreement covered Supervisors to fill Supervisors vacancies at Green Bay, Wisconsin.

2. Carrier shall be required to pay the following Supervisors one days pay each at Penalty Rate of time and one-half for each day on which said violation occurred as follows:

A. C. Reynolds	-	May 9 and 23, 1970.
G. H. Horn	-	May 19 and 20, 1970.
S. P. Wimmer	-	May 21 and 22, 1970.
R. E. Nickle	-	May 26 and 27, 1970.

OPINION OF BOARD: This dispute stems from Carrier's use of Mechanical Department employes to fill extended temporary vacancies on the second shift engine foreman position at Green Bay, Wisconsin, on May 9, 19 through 23, 26 and 27, 1970. The employes assigned to the vacancies had no seniority as supervisors. The foreman regularly assigned to the position was on vacation from May 10 to 16 and laid off from May 17 to June 3 because of organization business and personal reasons.

It is Carrier's position that it possesses the right to use mechanics rather than foremen to fill temporary enginehouse foreman vacancies when, as is true here, no furloughed foreman is available. It bases this right on Sections 3(a), 5(c) and 8(a) of the Supervisors Agreement as well as past practice and an oral agreement entered into by Carrier with the General Chairman on January 28, 1969.

Rule 3(a) shows how seniority for regularly and temporarily assigned foremen will be determined while Rule 5(c) concerns restoration of forces and filling positions on assigned relief days and Rule 8(a) bulletin requirements. Neither Rule 3(a), 5(c), 8(a) nor any other provision of the Supervisors' Agreement provides expressly or by fair implication that mechanics have priority over foremen in filling foreman position vacancies.

Carrier's assertion that past practice over a period of twenty years recognizes its right to use mechanics to fill such vacancies is denied by Petitioner and is not substantiated by the evidence. The record does not show that a number of such assignments were made in which both parties acquiesced to the disputed practice. Since there is insufficient evidence regarding the point, Carrier's past practice argument is not persuasive.

However, Carrier maintains that when the parties considered a claim by a regularly assigned foreman at Escanaba for a day's pay at time and one-half because a mechanic had been used to fill the foreman's position on one of his relief days, the General Chairman acknowledged that the practice mentioned by Carrier had been in existence for twenty years but contended that such vacancies should be filled by foremen, the General Chairman indicating that he was primarily concerned with the filling of day-to-day vacancies and he had no objection to using prospective foremen on extended vacancies such as vacation vacancies. According to Carrier, it was agreed at that time, on June 28, 1969, that if no furloughed foreman was available, a foreman on his rest day could fill a "spot" or "emergency" vacancy of less than a week's duration.

General Superintendent Ellis issued a letter of instructions on February 28, 1969, to all his master mechanics stating that he had agreed "when possible we will not use mechanics as a relief foreman if an off-duty foreman has indicated that he desires to be called when a temporary vacancy arises. x x x However, if the vacancy is expected to last a week or longer, then it is proper to set up a mechanic for the job in order to provide foreman training for the mechanic."

Of course the letter of instructions of February 28, 1969, does not constitute an agreement since it was not signed by the General Chairman or even so far as the record shows, addressed or sent to him. According to Petitioner, the only verbal agreement was that, for training purposes, a mechanic could be used to fill a foreman's vacancy during the time the foreman was on his annual vacation. Petitioner denies that there was any agreement to limit the use of a foremen on his rest days to vacancies of less than one week.

An oral agreement is, of course, perfectly valid and will be enforced. However, one of its practical shortcomings is that it is often difficult to establish its precise terms and that is why parties normally reduce important agreements to writing. Here a sharp conflict exists between the parties as to the terms of the oral agreement. The letter of instructions does not help us solve the issue because it is purely of a unilateral nature and we cannot even hold that the General Chairman should have objected to it within a reasonable time if he disagreed with its provisions because it was not directed or made available to him so far as the record indicates. Each of the parties may well believe that its interpretation of the agreement is correct but we are not in a valid position to determine the conflict without further proof.

Where employes and their work are covered by a collective bargaining agreement, those employes are entitled to perform such work unless a clear commitment exists to the contrary. If a different principle were followed, an agreement covering wages, hours and conditions of employment could lose much of its meaning since one of its most important objectives is the protection of the work within its scope.

We have denied numerous cases because we were not satisfied that the evidence established that work was covered by the agreements there involved. Here, however, there is no question but that the disputed work belongs to a foreman's position and is protected by the Supervisors' Agreement. It was therefore improper and a violation of the Scope Rule to use mechanics in preference to foremen to perform the duties of the foreman position in controversy. We are not persuaded by the evidence that any agreement between the parties or past practice on this property warrants a contrary result.

The claim will be sustained.

FINDINGS:

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

The carrier and the employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing but were granted privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: E. A. Killeen
E. A. Killeen
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1971.