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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6365
Docket No. 6199
2-BN-EW-'72

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That in violation of the current Agreement, Electricians C. Norder, C. Wells, E. Alexander, P. Smith, J. Collum, A. Mirallegro, R. Jacob, J. Rutherford, R. Frauenfelder, J. Daly, W. Miller, A. Fiore, and S. Merkle, are improperly assigned to a work week with rest days other than Saturday and Sunday.

2. That accordingly, the Carrier be ordered to:

(a) Assign the aforementioned Electricians to a proper work week, Monday through Friday, with rest days of Saturday and Sunday.

(b) Make these mentioned Electricians whole by compensating them additionally in the amount of four (4) hours at pro rata rate for each Saturday and Sunday on which they performed service beginning with August 22 and 23, 1970, and continuing for all Saturdays and Sundays thereafter on which they are assigned to rest days other than Saturday and Sunday.

(c) In addition to the money amounts claimed herein, the Carrier be required to pay the named Electricians an additional amount of six (6) percent interest payment per annum commencing with filing of claim on September 17, 1970, and continuing until the claim is adjusted.

Findings:

The Second 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 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.

Parties to said dispute waived right of appearance at hearing thereon.

This claim was initiated by the Petitioner on September 17, 1970. It invoked Rule 34(d) of the Controlling Agreement, claiming a continuing violation of Rule 1, paragraphs (c) and (f) in that the Carrier was scheduling employees represented by the Petitioner on a staggered work week basis with other than Saturday and Sunday rest days at Carrier's 14th Street Passenger Yards, Chicago, Illinois.

There is no disagreement between the parties with reference to the fact that the complained of schedule has been in effect since May, 1958 and that prior thereto there was for many years a staggered work week, of a slightly different nature, for several Electricians employed at the 14th Street Yard.

The thrust of the Petitioner's case rests on two key factors. First, that there is a continuing violation of paragraphs of Rule 1 of the Controlling Agreement entered into between the parties effective April 1, 1970, affording it the right to grieve at anytime that the alleged violation is continuing; Second, that the April 1, 1970 Agreement was a first contract between the Organization and Burlington Northern Inc., said Carrier being a new Company which came into existence early in 1970 and that the terms and conditions for employees covered by it were to be adjusted in accordance with the provisions of the April 1, 1970 pact.

Burlington Northern Inc. was created by the merger of five railroads, all of which were in contractual relations with the Petitioner, into one Company. The 14th Street facility at which claimants were employed was one operated by Chicago, Burlington and Quincy Railroad, one of the carriers merged into the Burlington Northern, and the claimants were employees of said carrier up to the date of the merger in 1970. The current Controlling Agreement contains the following:

> "Rule 98.
> (b) This Agreement supersedes all previous and existing agreements, understandings and interpretations which are in conflict with this Agreement covering employes of the former Great Northern Railway Company; the former Northern Pacific Railway Company; the former Chicago, Burlington and Quincy Railroad Company; the former Pacific Coast Railroad Company; and the former Spokane, Portland and Seattle Railway Company of the craft or class now represented by the organizations party to this Agreement. (This paragraph refers to agreements, understandings and interpretations which were in effect prior to April 1, 1970.)
>
> (c) It is the intent of this Agreement to preserve preexisting rights accruing to employes covered by the Agreements as they existed under similar rules in effect on the CB&Q, NP, GN and SP&S Railroads prior to the date of merger;...
>
> (d) Nothing in this Agreement is intended to supersede the benefits, rights and obligations of the parties under the September 25, 1964 National Agreement, the Merger Protective Agreement of December 29, 1967, Merger Implementing Agreement No. 1 signed on the date of this Agreement." (Emphasis supplied)

This clearly establishes that all parties concerned agreed that, except as specifically provided for to the contrary, the new agreement was to continue in effect the basic premises of the agreements and understandings which had been in effect between the Petitioner and its affiliates and the five Carriers merged into Burlington Northern Inc.

A careful examination of the paragraphs of Rule 1 of the April 1970 agreement and the agreement in effect between Petitioner and Chicago, Burlington and Quincy shows no meaningful difference. The concepts and tenor thereof are absolutely the same.

We must assume, and nothing in the record herein discloses otherwise, that the Organization representing the Claimants, an affiliate of the Petitioner and an active participant in the negotiations for the 1970 Agreement, was fully aware of the work week schedule under which the Claimants were working at the time. The record also does not indicate, and therefore we presume that it did not occur, that the spokesmen for the claimants, at any time during the negotiations, made any reference to the condition now protested. The complained of schedule was put into effect in May, 1958 and the electricians operated in accordance with it for approximately thirteen years prior to April, 1970 without formal protest or grievance. It must therefore be assumed that the employes involved and their representatives did not consider it a violation of Rule 1. If it was not violative of the prevailing rule for that many years and the current rule is comparable to, if not, allegedly exactly the same, as the current one, it is difficult, if not well nigh improper for us at this time to entertain the Petitioner's claims. It is fundamental that it is incumbent upon a party to a collectively bargained agreement to alert the other side of discontenting standards and conditions and its intent to overcome same through provisions of the agreement so as to afford the opposing side an opportunity to bargain with reference thereto. To do otherwise lulls such party into a belief that except as changed, modified or amended by agreement, the prevailing conditions of employment were acceptable and could be continued for the term of the new agreement. It is for this reason that the legal doctrine of estoppel exists. This was well and succintly set forth in Third Division Award 15877 (Ives) as follows:

> "***Acquiescence is conduct from which may be inferred assent. Under the doctrine of equitable estoppel a person may be precluded by his silence when it was his duty to speak, from asserting a right which he otherwise would have had."

We cannot hold that it is proper to invoke Rule 34(d) for an alleged violation which was in effect for these many years, during which there was ample opportunity to secure correction of the condition, if in fact contractually warranted, or a revision of the provisions of Rule 1 could have been sought in negotiations to effectuate the desired change.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September, 1972.