Award No. 6294
Docket No. 6141
2-EL-CM-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 45, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Carmen)

ERIE LACKAWANNA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1) That the Carrier acted arbitrarily and capriciously in depriving Carman Robert Schroll of working on his regular assigned day, December 15, 1969 in violation of the current Agreement.

2) That accordingly, the Carrier be ordered to compensate aforesaid employe eight (8) hours pay at the pro rata rate of pay for December 15, 1969.

EMPLOYES' STATEMENT OF FACTS: Carman Robert Schroll, regularly employed at Marion Diesel Shop, Marion, Ohio, hereinafter referred to as Claimant, by the Erie Lackawanna Railroad Company, hereinafter referred to as the Carrier.

On December 15, 1969, Claimant reported for work on his regularly assigned shift, approximately five (5) minutes before his starting time.

The Carrier refused to permit Claimant to work, claiming that Claimant did not call in eight (8) hours before his regular starting time that he was reporting for work.

On December 13, 1969 and again on December 14, 1969, Claimant called the office to report that he would not be able to work on those two days due to illness.

The Agreement effective July 1, 1951 between the Erie Railroad Company and the Employes of the Mechanical Department is controlling.

POSITION OF EMPLOYES:

Rule 16(c) of the current Agreement states:

"If an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work on account of

has become a part of the labor agreement although not explicitly expressed in it. See: United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582; 80 S. Ct. 1347, 1352 (1960). It follows that the practice can be changed or discontinued only through a modification of the agreement. Section 3, First (i) of the Railway Labor Act does not confer authority upon us to do this."

See also Third Division Awards 10174, 11647, 14229 and 14230.

Common sense and logic dictate that certain rules have to be made and enforced for any business to operate in an orderly and efficient manner. It was because of incidents similar to here involved that Carrier issued the order that effective January 1, 1967, employes reporting back would be required to do so not less than 8 hours prior to the starting time of their regular shift. And for nearly 3 years prior to the involved case the directive was accepted and adhered to by the employes and Organization without complaint. By issuing the directive Carrier was merely acting consistent with the principle that it has the right, except where limited by agreement or law, to operate its business in the most efficient and economical manner possible (Second Division Awards 2916, 3630, 4775, 4670, 4706 among others). Carrier also was cognizant of the principle that it has the right to promulgate and enforce reasonable rules of procedure (Second Division Award 4074, Third Division Awards 8502 and 9047). It is only reasonable that Carrier should not be required to wait until a shift begins before it knows that the incumbent of a position is going to return to work or whether another employe has to be called in his place, which precludes performance of a full day's work by the employe who has to be called. Attention is also directed to the provisions of Rule 5(c) of the agreement reading:

> "Employes called or required to report for service and reporting but not used will be paid a minimum of four hours at straight time rates."

which, of course, requires Carrier to pay 4 hours to a replacement who is called and then sent home because the regular employe shows up for work. Carrier submits that claimant has no legitimate cause for complaint as a simple telephone call consistent with the order would have prevented the incident. A single telephone call and there would not have been two employes present to fill one position, and Carrier's cost would have been reduced to a straight time day rather than pay claimant's replacement 8 hours time and one-half, which was required in this case or a 4 hour called-not-used if he had been sent home instead of claimant. It is manifest from that which Carrier has said that any loss of earnings by the claimant is his own fault and not that of the Carrier, which standing alone negates this claim.

Any and all other issues not specifically dealt with herein are deemed immaterial and irrelevant to the claim and are categorically denied.

Based upon the facts and authorities cited, Carrier avers that this claim is wholly without merit or support and respectfully submits that same should be denied in its entirety.

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.

An employe called in sick on two successive days, "as early as possible", complying with Rule 16(c) of the Agreement. The employe's regular starting time was 3 P. M. The first day he called in at 12 o'clock noon, the second day he called in a 10:50 A. M. but on the third day he appeared for work at 2:55 P. M. without further notice. The Carrier had called in a replacement on each of the first two days after being notified by the claimant and also called in a replacement for the third day at 2:30 P. M. The Carrier claims the right to send home the claimant and retain his replacement on the third day because of a bulletin dated July 1, 1967, which requires employes who have reported off sick to report back to work at least eight hours prior to starting time. The Carrier claims that this practice has been in effect for several years and that the bulletin has been accepted and recognized by the Organization as proper. The Carrier also claims that it did not violate any Agreement, rule or practice by the requirement of the bulletin.

The Organization claims that the Carrier had no right to create the Order contained in the bulletin without prior notice and negotiation because it is an amendment to Rule 16(c) of the Agreement. It also claims in its rebuttal, for the first time, that a protest had been filed, and attached Exhibit "N", a letter dated March 31, 1967 addressed to Local Federation No. 7 as evidence that the bulletin was to be removed following a conference with Carrier representative Mr. Carlson. The letter states that Mr. Carlson would send Mr. Keenan to Marion to meet with the Local Federation to dispose of the matter. The letter also instructed the Local crafts to attempt to settle pending claims resulting from the bulletin, with Mr. Keenan during his visit to Marion.

The employes' submission included as exhibits the correspondence in furtherance of the claim. None of the letters made any reference to the protest or to the employes' exhibit "N". Employes' exhibit "G" is a letter to Mr. Carlson from the General Chairman dated May 28, 1970. It made no reference to the conference with Mr. Carlson or to the action to be taken by Mr. Keenan in 1967 with reference to the bulletin of January 1, 1967. Mr. Carlson's answering letter dated June 10, 1970 employes' exhibit "H", made no reference to the conference or to Mr. Keenan. On the contrary, Mr. Carlson's letter stated that when the claimant had not reported by 2:30 P. M. on the day in question, his replacement was called in and that this has been the practice for the past two years. Mr. Carlson's letter stated that this does not conflict with the rules and, "is in effect at other points on the E L system." The General Chairman replied to Mr. Carlson by undated letter, employes' exhibit "I", stating simply that he disagreed with the denial and would submit the claim to the General Manager-Labor Relations. Employes' exhibits "J" and "K" are the letters to the General Manager-Labor Relations and his answer denying the claim. Neither letter referred to the conference with Mr. Carlson in 1967 and the action to be taken at that time as set forth in Employes' rebuttal exhibit "N". The letters of the Organization referred to above were consistent in the claim that the bulletin dated January 1, 1967 was not negotiated.

The Carrier states and the Organization does not disagree that a two man carpenters crew was involved. If the Carrier failed to fill a vacancy work would suffer. When the employe called in advance on two successive days that he will not report for work, the Carrier acted reasonably on the third day by assigning a replacement when it heard nothing further from the employe by 2:30 P. M. for a 3 P. M. work schedule. This action was not arbitrary or capricious.

The bulletin dated January 1, 1967 provides a reasonable solution for this situation. The requirement to give notice in advance that the employe will return to his regular work schedule after an absence is not an amendment to Rule 16(c) because it does not change that Rule in any respect.

Nothing contained in the employes' submission or rebuttal contradicted the Carrier's letters stating that the action taken in this case had been the regular practice. A regular practice has the same force as a Rule or Agreement as has been found in prior Awards.

In summary, no Agreement or Rule has been violated by the reasonable practice followed in this case by the Carrier. If the bulletin dated January 1, 1967 had no status as an Order, it had the effect of notice to the employes that this practice would be adhered to. The record of this case does not indicate that the employes were not aware of the practice, or that it has not been the practice. As stated in prior Awards of the Second Division, the Carrier has the right to operate efficiently and economically within the limits of the Agreement, established Rules and applicable law.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 4th day of May, 1972.

Keenan Printing Co. Printed in U.S.A.