Award No. 9396

Docket No. CL-8353

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: This is a claim of the System Committee of the Brotherhood that:

(a) Carrier violated and continues to violate the past practice in the Offices of Superintendent—Western Division, Chief Mechanical Officer, and General Storekeeper at Sacramento by its failure and refusal to permit employes in those offices to be absent from duty in the afternoon, beginning not later than 1:00 P. M., on the work day immediately preceding Thanksgiving and New Years days subsequent to September 1, 1949.

(b) The past practice of permitting the employes in the above referred to offices to work not later than 1:00 P. M. on the day preceding Thanksgiving and New Years, and be compensated for eight hours on such days, shall now be restored.

(c) All Employes who, subsequent to September 1, 1949, have been required to remain on duty beyond the number of hours established by custom and past practice prior to September 1, 1949, in the above referred to offices, shall now be compensated at the rate of time and one-half for all time worked after 1:00 P. M. on such days, in addition to compensation already received for service on such days.

EMPLOYES' STATEMENT OF FACTS: Prior to the inauguration of the 40-hour week, effective September 1, 1949, the clerical employes in the office of the Superintendent of the Western Division, the office of the Chief Mechanical Officer and the office of the General Storekeeper at Sacramento, California had for many years been permitted to work not later than 1:00 P. M. on the days preceding Thanksgiving, Christmas and New Years, for which service they were allowed eight hours pay.

Effective with the inauguration of the 40-hour-week, the practice of allowing the employes to be off in the above offices on the day before Thanksgiving and New Years was discontinued, whereas the practice with respect to time off on the day before Christmas was continued.

Award 3509, the following quotation showing confirmation by the Vice President and General Manager, Carrier's Chief Operating Officer:

> "During the year 1943, a dispute arose in the office of Superintendent, Western Division, concerning proper application of second paragraph of Rule 13. Claim was progressed on behalf of an employe required to work on Saturday afternoon. The claim was progressed to office of Vice President and General Manager and then remanded for further discussion between Superintendent and General Chairman. This further discussion was held June 29, 1943. Employes' Exhibit "C" describes the settlement reached in conference between Assistant Superintendent and General Chairman, indicating that the described understanding was concurred in by the Superintendent **and confirmed by Vice President and General Manager.** It is the position of the Brotherhood that this understanding becomes the adopted policy insofar as it affects the work of all employes governed by second paragraph of Rule 13. We respectfully request your Honorable Board to so hold."

On the other hand, it is of benefit to this dispute in showing that no recognized practice of long duration has existed on the property. If such were evident, why was the matter under discussion? Where does this support a claim for four hours at time and one-half as presented by the Organization in paragraph (c) of its claim? Obviously, it confirms Carrier's statements that prior handling was on a basis of service requirements. Quite as obviously, the record in the Superintendent's office, cited above, shows that the claim is merely a subterfuge to gain a new rule without complying with the requirements of Rule 64.

Carrier emphatically states the only practice in effect has been to give individual consideration to closing certain offices before holidays, in each instance the decision being based upon service requirements. At no time has a failure to release employes on the day preceding a holiday or variations in the hour of closing been considered a violation of any agreement, practice or interpretation until the present dispute. There also have been many instances where all employes in an office could not be released at the same time, or some not let off at all. Certainly, the Organization knows that service requirements and variations are a necessary consideration if they progress the rule change under Rule 64. Carrier's prior citing of the former Saturday afternoon rule and current Sick Leave (Rule 52) and Vacation (Rule 51) Rules clearly shows the questions involved in negotiating such rules.

In conclusion Carrier reiterates that a uniform and long-continued practice of granting time off on working days preceding Thanksgiving and New Year's Day has never been followed on this property; that the employes had never before filing the instant claim considered that they were entitled to such time off as a matter of right nor has the Carrier so conducted itself over the years as to foster such a belief; and that there is no justification under the rules for the monetary claim here made on behalf of unnamed employes for penalty payments at the time and one-half rate. The claim is only an attempt to gain a change in the Agreement provisions without following the specific provisions of Rule 64.

For the above reasons Carrier urges that this claim be denied in its entirety.

OPINION OF BOARD: It has been shown convincingly that for many years it had been the practice for clerical employes in the offices here involved

to work only five hours and not later than 1:00 PM on the day immediately preceding Thanksgiving, Christmas and New Years Day. Upon the inauguration of the forty hour week, September 1, 1949, this practice was discontinued except as to the day before Christmas and claim is made for compensation for work done on those half days.

Carrier denied that the practice as shown was such as to establish a binding obligation for its continuance and further asserts that the practice was abrogated by the adoption of the Forty Hour Week Agreement.

Several awards before this Division have considered the effect of the adoption of that Agreement to abrogating similar established practices. Awards 5278, 6469 and 6912 of this Division have held that such practices were abrogated by the adoption of the Forty Hour Week Agreement and Awards 5005, 5082, 5394 and 6787 have held to the contrary.

In Award 5005 the Division seems to rely mainly on the provision of the Forty Hour Agreement as there adopted, reading:

> "Except as expressly modified by the provisions of this Agreement, the said Agreement effective September 1, 1946, as heretofore amended, shall remain in full force and effect."

and noted that the rule was not modified as to the established practice. Such rule was not included in the applicable Agreement as adopted on this property. On the contrary there was retained in the Agreement Rule 63, reading:

> "These rules shall supersede and be substituted for all rules or existing agreements, practices and working conditions in conflict therewith."

In Award 5394 the conclusion that the Forty Hour Week Agreement did not abrogate the practice seems to be based on Decision No. 17 of the Forty Hour Week Committee in applying Article II, Section 3 (j) which provides that "Existing rules which provide for the number of hours constituting a basic day shall remain unchanged". That rule was omitted from the agreement before us and is quite contrary to Rule 63 which was retained therein. Like conclusion in Award 6787 seems also to be based on Decision No. 17 which, as we have noted, is not applicable here.

The Forty Hour Week Agreement established a revolutionary change in practice as to days of work and rest. It set up a work week of forty hours, consisting of five days of eight hours each, without excluding the hours here claimed. It specified the holidays on which work would be paid at overtime rate without including the half holidays here claimed. It deleted Article II, Section 3 (j) of the Chicago Agreement and retained Article 63, declaring that it superseded existing practices. The practice as to half holiday on December 24, apparently has been continued but those here claimed were immediately discontinued. We think they were abrogated by the Forty Hour Week Agreement as adopted by the parties here.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of May, 1960.