Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28034
THIRD DIVISION Docket No. CL-27676
89-3-87-3-167

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Illinois Central Gulf Hospital Association

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10160) that:

1. Beginning February 3, 1986, Company violated the current Clerks' Agreement, including Rules 25, 26, 28 and 30 among others, when it discontinued the long-established past practice of two fifteen-minute paid breaks each workday.

2. Company shall now be required to pay each employe covered by the Clerks' Agreement thirty minutes' overtime beginning February 3, 1986, and continuing each workday until the two fifteen-minute paid breaks are reestablished."

FINDINGS:

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

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

The Illinois Central Gulf Hospital Association (Association), established in 1911, is a not-for-profit provider of health care benefits for employees and retirees of the Illinois Central Gulf Railroad, its officers, and the Association. The Railroad does not own or operate the Association, per se, but apparently has a controlling interest in the Association's Board of Directors; with the balance of the Directors consisting of the chief officers of labor organizations representing various crafts or classes of employees of the Railroad. From 1916 until 1974, the Association owned and operated the Illinois Central Hospital in Chicago, Illinois. With the sale of the Hospital in 1974, however, all remaining employees of the Association were moved to a new office facility in Homewood, Illinois.

Since 1955 clerical and office employees of the Association have been represented by BRAC (now TCU), covered by the terms of successively renegotiated Collective Bargaining Agreements between that Organization and the Association. The original Agreement of January 1, 1955 was revised June 1, 1976, and was in effect, except as amended, in 1986, when the present Claim arose.

Rules of the Agreement particularly relevant to the present case are Rules 25, 26, 28 and 30, reading, in pertinent part, as follows:

"Rule 25 - Day's Work and Work Week

(a) Except as otherwise provided in these rules, eight (8) consecutive hours exclusive of meal period shall constitute a day's work.

NOTE: The expression 'positions' and 'work' used in Rules 25, 30 and 34 refer to service, duties or operations necessary to be performed the specified number of days per week and not to the work week of individual employees."

"Rule 26 - Meal Period

(c) Unless agreed to by a majority of the employees, the meal period shall not be less than forty-five (45) minutes nor more than one (1) hour."

"Rule 28 - Changing Starting Time

(a) Regular assignments shall have a fixed starting time and rest days, which will not be changed without at least thirty-six (36) hours written advance notice to the employees affected."

"Rule 30 - Overtime

(a) Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

More or less contemporaneously with the closing of the Illinois Central Hospital in 1974, and the resultant move to Homewood, management of the Association notified employees by Memorandum of August 19, 1974, as follows:

"We will continue to have our 15-minute rest periods as a group at 9:45 a.m. and 2:45 p.m.

Because of limited space for lunchroom facilities, we will have two 45-minute lunch periods which will be 11:30 a.m. and 12:15 p.m. Note the assigned lunch schedule. Be prompt in returning from your lunch period in order that your other co-workers may also enjoy a full lunch period.

Arrive at your desk each workday at 7:50 a.m. Work should not be put away before 4:30 p.m., and remain seated until 4:35 p.m."

The practice of Agreement-covered employees taking two (2) paid fifteen-minute rest breaks, one in the morning and one in the afternoon, during the eight-hour workday, in addition to the unpaid forty-five minute lunch period, continued unabated from 1974 until 1986. It is noted that the revised Office Regulations promulgated by the Association in June 1985, contained the following continuation of the past practice regarding the two (2) paid daily rest breaks:

"F. Rest Breaks/Lunch

1. Since breaks are a paid benefit, we encourage you to take them each day. Breaks cannot be used for make-up time. Any make-up time should be done before or after your regular work hours or during lunch subject to your manager's prior approval.

2. Rest breaks (15 minutes) should be taken anytime from 9:00 a.m. up through 10:30 a.m. and 2:00 p.m. up through 3:15 p.m. Please consider your fellow workers while taking your breaks.

3. The lunch period (45 minutes) should be taken from 11:15 a.m. up through 1:45 p.m. Please indicate on your time card the actual time taken for lunch.

4. Every Friday, the 45 minute lunch period can be combined with one of that day's 15 minute breaks in order to take an hour lunch. If this option is desired, please so indicate this on your time card.

5. Please let your manager know if you wish to make an exception to the above time limits."

Commencing January 1986, the Board of Directors mandated Association management to cut operating costs and approved, among other economies, elimination of the two (2) paid rest breaks for unionized employees covered by the Agreement. Effective February 3, 1986, Association management revised the reporting and quitting times, eliminated the paid breaks, and gave covered employees the option of individually selecting one of the following schedules:

Hours	Breaks	Lunch
7:45 a.m. to 4:30 p.m.	None	45 minutes
7:45 a.m. to 4:30 p.m.	1 - 15 min.	30 minutes
7:30 a.m. to 4:30 p.m.	1 - 15 min.	45 minutes

On March 10, 1986, the Organization filed a Claim that the elimination of the breaks was a violation of the Agreement and requesting that all 21 Agreement-covered employees be "reimbursed the monetary loss" from February 3, 1986, until restoration of the paid breaks. The Claim remained unresolved on the property until eventually it was appealed to this Board.

The Organization contends that the Claim never was properly or timely denied on the property, but the record evidence does not persuade us to that view. At the oral argument before the Board, the Association's advocate moved for dismissal of the case for lack of jurisdiction, on grounds that the Association was not a "carrier" subject to the coverage of the Railway Labor Act. That argument never was raised by the Association on the property or in its Submission to the Board. Even if we assume, arguendo, that this is a jurisdictional objection which might properly be raised at the last minute, we do not find the motion for dismissal supported by any evidence in this record.

Turning to the merits of the case, we find a clash between the plain words of Rule 25(a) and a contrary practice under which the Association paid Agreement-covered employees compensation for eight (8) consecutive hours of work exclusive of their meal period, but employees worked only seven and one-half hours each day. After ten or twelve years of enjoying this practice, employees understandably considered that the gratuity had ripened into an entitlement. In the absence of contrary contract language, a long-standing, uniform and unequivocal practice might well be viewed as persuasive evidence of an implied mutual agreement upon a term or condition of employment. When the language is clear and unambiguous, however, even a long-standing contrary practice ordinarily must yield when a party to the Agreement insists upon enforcement of the language. In that connection, we find authoritative precedent in Third Division Award 20643, as follows:

"Under well established principles, unambiguous provisions of the Agreement generally must prevail over conflicting practice. This record does not indicate a waiver of Carrier's right to enforce the Agreement in this respect nor can we find herein support for an estoppel in pais. In light of all the foregoing we have no alternative but to deny the claims."

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of August 1989.