Award No. 5005
Docket No. CL-4981

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY

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

STATEMENT OF CLAIM: Claim of Committee on behalf of all scheduled clerical forces employed in the Pittsburgh Terminal, Pittsburgh Terminal Annex and House Buildings, Pittsburgh, Pennsylvania, on September 1, 1949 and thereafter, for thirty minutes at the overtime rate for every work day on which each employe is required to work in excess of 7½ hours but not in excess of 8 hours.

CARRIER'S STATEMENT OF FACTS: The carrier hereby submits the following statement of such facts as are material to the determination of this dispute.

History

For a long period of years prior to September 10, 1928, office hours for certain general office clerks employed by the Pittsburgh and Lake Erie Railroad Co. in its Pittsburgh Terminal and Pittsburgh Terminal Annex Buildings were on a basis of eight hours per day, Monday through Friday, and four hours on Saturday, for a total of 44 hours per week. On September 5, 1928, by independent determination of management, office hours for clerical personnel employed in these facilities were reduced, effective September 10, 1928, from 8 to 7½ hours per day, Monday through Friday, and from four hours to 3½ hours on Saturday, making a total of 41 hours per week. A copy of the bulletin containing advice of this action is attached as Carrier's Exhibit "A." This reduction in hours was instituted by the company without any request by, or negotiations with, the Clerks' organization. No agreement with that organization was entered into with respect to the matter, and the applicable rules in the governing agreement, as hereinafter pointed out, remained unchanged and continued to specify that 8 hours would constitute a day's work.

The reduction in hours was not general throughout the properties of this carrier but was, as indicated, confined to certain general office employes working at the particular facilities listed above, located in the City of Pittsburgh. Only about 363 clerks were affected. Percentagewise to the total number of employes represented by this organization on this property, only about 36% of the craft was involved. The balance of 649, or 64%, of the clerks on this railroad continued to work 8 hours per day and at least 44 hours per week, mostly 48 hours a week. These included all office employes at points other than Pittsburgh, and all yard clerks, station and freight house employes wherever located. Total clerks 1012.

Significantly, there was no agreement or undertaking by management as to the length of time such reduced hours would remain in effect. It was con-

the note immediately preceding Paragraph A of Article II, Section 1, captioned Paragraph A "General" and further specifically perpetuated existing basic days of less than eight (8) hours as they did in Article II, Section 3 (j). It is therefore not at all significant that the basic day rule (Rule 24) was continued without any questions being raised, the Chicago Agreement directing that it be so continued.

That nothing was done in the negotiations culminating in Memorandum Agreement signed July 18, 1949, to modify the basic days of the general office workers here involved, is evidenced by bulletins issued subsequent to July 18, 1949, none of which indicate any change in hours on and after September 1, 1949, and for the information of your Honorable Board we attach as Employes' Exhibits (R) to (V) inclusive, copies of some of such bulletins. It will be observed that the last two dated August 24, 1949, were issued immediately before instruction issued by Mr. Yohe on August 22, were received by the Terminal Agent.

The Carrier having violated our Agreement as shown, in that it arbitrarily changed the basic day of seven and one-half (7½) hours enjoyed by general office employes for twenty-one years, we respectfully request that our claim be sustained.

(Exhibits Not Reproduced.)

OPINION OF BOARD: This claim is brought by the Carrier and reads as follows:

> "Claim of Committee on behalf of all scheduled clerical forces employed in Pittsburgh Terminal, Pittsburgh Terminal Annex and House Buildings, Pittsburgh, Pennsylvania, on September 1, 1949 and thereafter, for thirty minutes at the overtime rate for every work day on which each employe is required to work in excess of 7½ hours but not in excess of 8 hours."

The Organization describes the claim as handled by them on the property as follows:

> "Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that Carrier violated the Clerks' Agreement.
>
> (1) When effective September 1, 1949, it changed the number of hours constituting the basic day of clerical employes at the Pittsburgh Terminal, Pittsburgh Terminal Annex and House Building, Pittsburgh, Pa., from seven and one-half (7½) to eight (8) hours per day, and
>
> (2) That all employes affected by such violation be compensated for thirty (30) minutes at overtime rate each and every day required to work in excess of seven and one-half (7½) hours, retroactive to September 1, 1949, and continuing until the violation is corrected."

The facts are, in general, admitted by both parties. The submissions show that prior to September 10, 1928, office hours for certain of the clerks in the Carrier's Pittsburgh Terminal and Pittsburgh Terminal Annex Building were on a basis of eight hours per day, Monday through Friday, and four hours on Saturday, for a total of 44 hours per week. On September 5, 1928, by independent determination of management, office hours for clerical personnel employed in these buildings were reduced, effective September 10, 1928, from eight to seven and one-half hours per day, Monday through Friday, and from four hours to three and one-half hours on Saturday, making a total of 41 hours per week worked. This reduction in hours was instituted by the Carrier without any request by, or negotiations with the Clerks' Organization. The rules as to working eight hours per day remained unchanged and continued to specify

that eight hours would constitute a day's pay. This reduction in hours was not general on the property, but only referred to the offices specified in the Bulletin of September 5, 1928, which reads as follows:

"Pittsburgh, Pa., September 5, 1928.

Messrs. F. G. Minnick
J. B. Nessle
J. H. James
W. M. Doulin
J. C. Grooms
A. P. Bixler
W. S. Shaw

Effective Monday, September 10, 1928, office hours on the Pittsburgh Terminal Building and the Pittsburgh Annex Building* will be as follows:

WEEK DAYS

From 7:30 A.M. to 11:00 A.M.
From 12:00 Noon to 4:00 P.M.
(Eastern Standard Time)

SATURDAYS

From 7:30 A.M. to 11:00 A.M.
(Eastern Standard Time)

Effective Monday, October 1, 1928, office hours in the Pittsburgh Terminal Building and the Pittsburgh Annex Building* will be as follows:

WEEK DAYS

From 8:30 A.M. to 12:00 Noon
From 1:00 P.M. to 5:00 P.M.
(Eastern Standard Time)

SATURDAYS

From 8:30 A.M. to 12:00 Noon
(Eastern Standard Time)

Beginning October 1, 1928, it will be permissible for any employe to be served with breakfast in the dining room or at the lunch counter after 8:30 A.M., provided that proper arrangements are made with the head of department or Chief Clerk.

Please acknowledge receipt.

J. B. Yohe

* and House Building"

This reduction in hours only affected 363 clerks, about 36% of the force. This arrangement has remained in effect through the 1923 Agreement for 18 years and through the 1946 Agreement for three years and was not changed until September 1, 1949, under instructions of Vice President Yohe's letter of August 22, 1949, reading as follows:

"Effective with the inauguration of the forty-hour week, on Thursday, September 1, 1949, the office hours in the Pittsburgh Terminal, Pittsburgh Terminal Annex and House Buildings, will be as follows:

7:20 A.M. to 11:00 A.M.
11:40 A.M. to 4:00 P.M.
(Eastern Standard Time)

From the foregoing you will note that employes in the above offices will be required to work five (5) eight (8) hour days, or forty (40) hours per week."

The Employes claim that the seven and one-half hour day, for which they were paid for eight hours, for the involved employes became an agreed upon or accepted practice, willingly acquiesced in by the parties for a period of 21 years; that the understanding and practice was in effect when the September 1, 1946, Agreement was made and became a part thereof and was continued thereunder for three years without change.

If there had been no Memorandum of Agreement entered into on September 1, 1949, to comply with the National Forty Hour Week Agreement, and this claim was made before us, it would have to be sustained in favor of the Employes as this Board has spoken on the matter of past practices on numerous occasions and particularly with claims on all fours with this claim. Award 3338 states:

"In the claim before us the practice of working these employes 7¼ hours had been in effect for over twenty-five years and the Carrier recognized this practice after the effective date, March 1, 1939, of the current agreement, for nearly seven years. In th record are bulletins running back through 1942 attesting the fact that the Carrier recognized this practice. Under these circumstances, the Carrier is now barred from changing this practice at the places in question without the consent of the other party to the agreement. That practice having been in effect through the agreements of 1936 and 1939, as well as for many years before and since, is just as much a part of the agreement as though it were written therein."

This was a case where the practice of working 7¼ hours per day had been in effect for 25 years, yet the Agreement contained a Rule which read:

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

In the Award 2436, the referee states:

"It is first necessary to determine if the matters sought to be avoided are in fact practices. While it is true that the carrier refers to them as illegal, unauthorized and unapproved practices, its argument is to the effect that they are nothing more than gratuities existing at the sufferance of the carrier. It is agreed that no written agreements are in existence which bind the parties with reference to them. The carrier contends that there never was a recognized understanding concerning the alleged practices. The Clerks' Organization contends that they were the result of negotiations which necessarily implies a meeting of the minds with respect thereto. The evidence in the record as to a definite oral agreement is fragmentary to say the least. The fact remains, however, that all have been in force from 35 to 40 years at the two points mentioned in the statement of claim. the claim of the carrier that these practices originated as mere gratuities is not a controlling fact. We do not doubt that many recognized practices were first considered as favors or gratuities and by long continued usage became such an integral part of railroad transportation as to deserve the name of 'practice.' A continuous recognition of them for 25 to 40 years, whether or not they had their beginnings as favors or gratuities, or as the result of oral understandings leads us to the conclusion that they are at the present time

practices in the sense in which that term is used in the railroad industry.

It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties. It seems to us, therefore, that the only question remaining is whether these specified practices have been abrogated by the various collective agreements made by the parties to this dispute.

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* * * But the failure of the parties to deal directly with these practices in subsequent agreements and their recognition by the parties for more than fifteen years after the negotiation of the last collective agreement furnishes convincing proof that their abrogation was never intended. See Award 1435. The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made.

We conclude therefore that the specified practices are not superseded by subsequent agreements and that they remain in force until such time as they may be eliminated by negotiation, a field entirely foreign to the powers of this Board."

In the claim in Award 2436, new Agreements were entered into during the period of the practices and the practices were not spcifically abrogated. The practices were allowed to stand as if they had been written into the Agreement.

We will now deal with this claim in view of the Memorandum Agreement of September 1, 1949. A National Agreement was entered into with this Organization regarding the forty-hour week. This Carrier in this claim entered into an Agreement with this Organization on the 18th day of July 1949, effective September 1, 1949. Rule 24 (a) was not changed; it reads as follows:

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

Rule 24½ was added to the Agreement and reads as follows:

"(a) General—Subject to the exceptions contained in this rule, the work week shall be 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements; so far as practicable, the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provision of this agreement which follow . . ."

Item 16 of the Memorandum Agreement of July 18, 1949, reads:

"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."

We have held that the September 1, 1946 Agreement did not change the practice of working the seven and one-half hour day for eight hours' pay for the involved employes. The basic eight hour day rule was not changed by the Amendment. Rule 24½ states that employes shall work 40 hours per week, eight hours per day, five days each week. The assignment of the involved employes called for 40 hours per week, eight hours per day, but by the practice of allowing these employes to work seven and one-half hours per day, they would now be paid for 40 hours for 37½ hours' work. This is due to the 21

year practice in the offices involved and the failure of the parties to deal directly with this practice in the Memorandum Agreement effective September 1, 1949. The recognition of the parties for more than 21 years during two collective Agreements and the Amendment to the 1946 Agreement furnishes convincing proof that this abrogation of the practice was never intended.

Under Item 16, the parties state that "Except as expressly modified by the provisions of this Agreement (September 1, 1949), the said Agreement effective September 1, 1946, as heretofore amended, shall remain in full force and effect." Rule 24 was not expressly modified by Rule 24½ as to the practice or working seven and one-half hours per day.

This claim must be sustained because this specified practice is not superseded by the Amended Agreement of September 1, 1949, and must remain in full force and effect.

The Carrier is ordered to pay to the involved employes one-half hour at the pro rata rate for each day starting September 1, 1949, to the date this Award is put into effect. The reason for the pro rata rate is that these employes have not actually worked more than eight hours and that is the number of hours of work required before time and one-half must be paid. Rule 27.

In other words, the practice here involved in no manner effects the hours of service provisions of either the collective Agreement of September 1, 1946 or the Forty Hour Week Agreement of 1949. The Carrier may properly require that the employes here involved shall work eight hours each day and five days each week. The practice affects only the rate of pay of the position. Because of it, they receive eight hours' pay for the first seven and one-half hours' work and the pro rata rate for the remaining thirty minutes of the assignment. The overall result is that these employes are entitled to be paid for eight and one-half hours for performing their regular assignment of eight hours.

This result is further supported by the fact that the National Agreement provided for the elimination of all rules and practices relating to relief of employes on Saturday afternoons. Nothing is said about the elimination of other practices and it appears, therefore, that the elimination of other practices was not contemplated. Neither was an elimination of practices other than those mentioned placed in the collective Agreement with this Carrier when the National Agreement was integrated into it by the inclusion of Rule 24½. This evidences an intent that other existing practices were not in any manner affected by the negotiation of the National Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

The Carrier violated the terms of the Agreement to the extent indicated in the Opinion.

AWARD

Claim sustained to extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of August, 1950.

DISSENT TO AWARD 5005, DOCKET CL-4981

We regard the Opinion, Findings and Award as unwarranted in fact and unsound in principle. The claim should have been denied.

The parties mutually made, effective September 1, 1949, a new contract, radically different from any theretofore known among railroads, which included Rule 24½ (a) providing:

> "* * * the work week shall be 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven . . ."

They also agreed to many other revisions of their last preceding contract, which had been in effect ever since September 1, 1946.

The last provision of the new Agreement provided:

> "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."

Thre could be no better evidence of how the 1946 Agreement was expressly modified by the provisions of the 1949 contract than the provisions of Rule 24½ (a). For more than twenty years the Carrier's employes had worked a minimum 6-day week and under Rule 24 providing that eight hours shall constitute a day's work. But a practice had existed whereby about 36% of the whole number worked not 48 hours in such 6-day week, but 41 hours, consisting of 3½ hours on Saturday and 7½ hours on the other days, having 1½ days off in each seven (Sunday and half of Saturday).

The Award errs in holding that the fome 7½ hour practice which was just as much a part of the 1946 Agreement as though written therein, was not expressly modified by the provisions of the 1949 contract. This is erroneous because the 1949 contract reduced the work week of all employes to 40 hours, consisting of 5 days of 8 hours each. Thus the worrk week of the claimants was reduced from 5½ days and other clerical employes from six days, both to 5 days; their days off per week were increased from 1½ days in one case, and one day in the other case, both to 2 days.

The Award bases its erroneous conclusions upon the supposition that the parties failed to deal directly with prior practice in the Agreement effective September 1, 1949. This is contrary to the evidence. The new Agreement effective September 1, 1949, particularly Rule 24½ (a) offers positive evidence that the parties did deal with past practice and established under the new Agreement a work week of 40 hours, consisting of 5 days of 8 hours each in lieu of the work week of 6 days with 41 hours for the claimants and 48 hours for the others.

At no time since the September 1, 1949 Agreement became effective has the 7½ hour day practice been rcognized. That is, there is no evidence of any conduct showing departure from the provisions of the September 1, 1949 Agreement.

Segardless of the facts that:

(1) there has never existed an Agreement or practice to work employes 37½ hours per week,

(2) the parties negotiated a work week of 40 hours,

(3) this Board has no authority to make rules for the parties,

the Division has in effect written a new basic day rule applicable only to a minor portion of the employes covered by the Agreement.

Before this Division would be justified in granting an affirmative Award it must be able to say that some rule of the September 1, 1949 Agreement precluded the Carrier's action.. That Agreement is plain and unambiguous and furnishes a new basis of measurement, i.e., a work week specifically defined as 40 hours, consisting of 5 days of 8 hours each with 2 consecutive days off in each seven. The measurements applied by the Carrier were in strict accord therewith. There is no provision in the current Agreement precluding the Carrier's action but, on the contrary, the Carrier may not lawfully be compelled to ignore the provisions of the new Agreement.

/s/ R. H. Allison

/s/ C. P. Dugan

/s/ A. H. Jones

/s/ J. E. Kemp

/s/ C. C. Cook