Award Number 5082

Docket No. CL-5162

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement:

1. When without conference or agreement with the Clerks' Committee, it ordered employes of the Car Record Office, Chief Engineer's office, Bethlehem, Pa., and Chief of Personnel's office, Vice President and General Manager's office and Manager of Transportation's office at New York, N. Y., to perform service on Lincoln's Birthday (February 12, 1949) and Columbus Day (October 12, 1949), thereby eliminating a practice in effect over twenty-five (25) years.

2. That the Carrier shall be required to restore the established practice of allowing employes time off on Lincoln's Birthday and Columbus Day without deduction in pay and reimburse employes affected the difference between straight time and time and one-half rate, February 12. 1949, and October 12, 1949.

EMPLOYES' STATEMENT OF FACTS: Thirty-six (36) employes in the Car Record Bureau, and seven (7) employes in the Chief Engineer's office at Bethlehem are involved. Their present hours of service are 8 A.M. to 5 P.M. (One hour for lunch), Monday through Friday, with Saturday and Sunday as assigned rest days. Ten (10) employes are located in the office at No. 143 Liberty Street, New York and employed in the offices of the Chief of Personnel, Vice President and General Manager and the Manager of Transportation. Their hours of service are 8 A.M. to 5 P.M. (One hour for lunch) Monday through Friday, Saturdays and Sundays assigned rest days. Prior to September 1, 1949 they worked five and one-half days per week.

Prior to June, 1946, all the offices involved here were located in the General Office Building, Bethlehem, Pa. and employes are carried on the Bethlehem Operating and Maintenance roster. On or about June 10, 1946, certain employes of the General Manager's staff, Superintendent of Transportation, Chief Engineer and Chief of Personnel offices were transferred to No. 143 Liberty Street, New York. The Chief Engineer's forces were transferred back to Bethlehem in 1948.

On February 11, 1949 employes were notified to work one-half day on February 12, 1949 (Saturday). The practice of allowing employes one-half day off on Saturdays was continued and they were allowed a full day's pay at straight time. Copy of protest filed with District Chairman Nolan of the Brotherhood, dated February 19, 1949, indicating the practice has been in effect 25 years or over and as far back as the memory of the employes goes.

coln's Birthday and Columbus Day, and also insofar as any compensation at time and one-half rate is concerned for these claimants who were required to work these dates during 1949. The Employes, in submitting this claim, are endeavoring to have this Division write a new rule for them, for if the claim were sustained, that would be the result. The Carrier submits the writing of a new rule is not a function of this Division to perform, but its responsibility rests solely with the interpretation of existing rules of the agreement. The existing rules of the agreement in effect do not include Lincoln's Birthday or Columbus Day as holidays for clerks, nor require the payment of compensation at time and one-half rate if clerks in these offices are required to work on those dates and, for these reasons, this claim should be wholly denied.

OPINION OF BOARD: The claim in this case is that employes in three offices, representing only a part of the whole number covered by the Agreement, are entitled to release from service with pay on two holidays, Lincoln's Birthday and Columbus Day, and further that the employes who were required to work on February 12, 1949, and October 12, 1949, be reimbursed for the difference between straight time and the time and one-half rate provided by agreement for holiday work.

The Employes' claim is based on an alleged verbal understanding and practice in effect over 25 years. The Carrier takes issue with the claimed practice and alleged verbal agreement and this frames the issue to be decided.

The Agreement and the rules cited in the record are from the Schedule Agreement effective March 1, 1939 and the Memorandum of Agreement effective September 1, 1949 which latter Agreement was executed to conform with the Agreement nationally negotiated effective the same date, which substituted the 40-hour week for the former prevailing 48-hour week. There was no material change in the holiday rule of the March 1, 1939 Agreement made by the September 1, 1949 Agreement. Both recognize the same seven holidays, of which neither Columbus Day or Lincoln's Birthday is one.

The undisputed evidence of the practice shows that for 25 years, excepting for the war years 1942, 1943, 1944, Lincoln's Birthday has been observed as a holiday on the property. In 1942 the entire force worked only one-half day, but in 1943 and 1944 the full force worked all day. In 1942 a few clerks worked on Columbus Day but were given another day off in lieu thereof. It thus becomes clear that there has been no break in the continuity of recognizing Columbus Day as a holiday. To hold that the recognition has been non-continuous in the case of Lincoln's Birthday is to ignore the well known fact that, because of manpower shortages and the other exigencies of the war years, thousands of employes stayed on the jobs without protest and under conditions contrary to vested rights as their contribution to the war effort. Therefore, the Board sees no validity in the fact that these employes did not protest working on Lincoln's Birthday for the years in question and holds that there was, up to the year 1949, continuous recognition for 25 years, of Columbus Day and Lincoln's Birthday as holidays on the property.

Whether this is sufficient to constitute an established practice is another question. The Carrier says it amounts only to a gratuity. The Organization says it is pursuant to an oral agreement. With celerity we get on record that this Board does not concern itself, and neither do the parties, with the general rule of law that written agreements always take precedence over oral understandings. In disputes of this kind, if the alleged agreement by parol is not incompatible with the writing, it is given great weight in ascertaining the intent of the parties to be bound by practice. The basic question here is not whether the agreement expressly recognizes only seven holidays, but did the Carrier by special grant extend the holiday rule to include days other than those specifically named. We find from the record that it did.

While it appears the agreement for four additional holidays in the Philadelphia General Offices was reduced to writing and the three additional holidays granted the subject employes in lieu thereof rests by parol, there can be no greater efficacy of agreement than one backed up by 25 years' continuous recognition.

We find merit to the claims both in fact and in Board precedent. See Awards 2436, 3338. Award 2436 is authority for holding that concessions made and gratuities granted may, by long usage and custom, ripen into binding obligations and that continuous recognition of favors or gratuities, or oral understandings, become such an integral part of railroad transportation as to become an established practice. Award 3338 disposes of a claim originating on the same property. There, as here, the practice was at variance with but not opposed to the express terms of the wirtten agreement, and the claim was sustained.

Before reaching the foregoing conclusion, we considered the fact that in 1949 when the parties made their Agreement conform to the 40-Hour Week Agreement, they did not extend in writing the holiday rule to include the days in question. In connection therewith our attention has been called to Award 5013 and First Division Award 7498.

Award 7498 is at best only authority for the proposition that a new contract will not be written by the Division under the guise of an interpretation of the old. No fault is found with that view, but here we are not being called on to write a new agreement, only to uphold one which has been in effect for 25 years by mutual understanding and acceptance.

Award 5013 is authority for the sound doctrine that "where a new contract is negotiated and existing practices are abrogated or changed by its terms the practice falls as of the effective date of the contract." In the instant case there is no evidence of a mutual understanding having been reached by which it can be said that existing practices are abrogated or changed. It can't be found in the Agreement and the record does not show that such changes as were made had any other purpose than to make the earlier Agreement conform to the 40-hour week. It is not even shown that the holiday provisions were considered other than in relationship to the 40-hour week, or that the Organization was put on notice of intention to apply such provisions of the new Agreement any differently than they had been applied in the past by mutual understanding. It would be a violent presumption to say that such intent is evidenced by the new Agreement expressly naming the same holidays as were named in the old Agreement. In the absence of evidence to the contrary there is a valid inference that the Agreement would be applied as it had been in the past.

This Board is committed to the rule of long standing that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. See Awards 507, 1257, 1397.

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

That the Carrier violated the established and accepted practice; therefore, the Agreement.

AWARD

Claims (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1950.

DISSENT TO AWARD 5082, DOCKET CL-5162

This award errs in holding the Carrier was obligated by an alleged practice of earlier years to refrain from requiring the claimants to work on Lincoln's Birthday, February 12, and Columbus Day, October 12, 1949 and that by not granting the previous concession of allowing these clerks in the involved offices to be off on those dates was in violation of the Agreements respectively in effect on those dates.

Irrefutable evidence in the form of written agreement which granted certain employes other than those here involved these two additional holidays with pay is contained in the record. Further evidence that the past grants to the involved employes represented concessions, and not practices enforceable as part of existing agreements, is found in the record of withholding of the grants in former years at the Carrier's election without additional compensation to the clerks thus being required to work. To declare that under such facts there has been practice creating in effect on agreement is an unwarranted assumption of authority to impose an agreement where none exists.

More particularly is this apparent in the light of the Agreement of September 1, 1949 which included Rule 20 (b) offering positive evidence that the parties in their provision for holidays failed to include the two here involved whilst naming specifically those seven other holidays which only were as such made subject of provisions of this later Agreement of September 1, 1949.

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 without ambiguity in that respect; the Carrier's action was completely in accord with its exercised rights without violation of the Agreements in effect prior to September 1, 1949 and equally and more impressively so in respect to the later Agreement of September 1, 1949 which stipulated the only holidays, not including the two here involved, in respect to which the parties did revise and execute the rule relating thereto.

/s/ C. C. Cook

/s/ R. H. Allison

/s/ A. H. Jones

/s/ C. P. Dugan

/s/ J. E. Kemp

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 5082

Docket No. CL-5162

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Lehigh Valley Railroad Company.

Upon application of the representatives of the employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3 First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

Dispute exists on the property over application of that part of the award based on paragraph numbered 2 of the claim. The award sustains the claim as submitted. Now the Organization contends the claim is for "the difference between straight time and time and one-half rate", and, in addition thereto, for four additional days' pay at straight time due to employes not being allowed a day off in lieu of the holidays. That position is untenable.

Board Circular No. 1 requires Petitioner to clearly state the particular question upon which an award is desired. If the Organization's position was what is now claims, it would have been a simple matter to have said so in stating its claim. We are not privileged to amend the statement of claim by interpretation nor to permit it to be done by Petitioner at this late date.

Portions of Petitioner's ex parte submission quoted in connection with its application for interpretation indicate that in the initial handling on the property the Organization's position was then as now with respect to claimed compensation. However, in later handling on the property, as the dispute was progressed, and in its statement of position before the Board, the demand conforms to that stated in the claim which is the subject of award. Thus no grounds exist for the Organization's claimed interpretation of the award.

The Carrier complied with the award when payment was made allowing the "difference between straight time and time and one-half rate" to employes involved.

Referee A. Langley Coffey, who sat with the Division as a member when Award No. 5082 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of June, 1951.