Award No. 5278
Docket No. CL-5190

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee.

PARTIES TO DISPUTE:

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

FRUIT GROWERS EXPRESS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, (hereinafter referred to as the Brotherhood) that the Fruit Growers Express Company, (hereinafter referred to as the Express Company) violated the Clerks' Agreement:

1. When, effective September 1, 1949, it, by unilateral action, changed the number of hours constituting a day's work from seven and one-quarter (7¼) hours per day to eight (8) hours per day.

2. That all employes affected by the Express Company's unilateral action be additionally compensated for forty-five (45) minutes work at the overtime rate for each and every day required to work in excess of seven and one-quarter (7¼) hours as a day's work retroactive to September 1, 1949.

EMPLOYES' STATEMENT OF FACTS: A. On August 15, 1949, Mr. Shorter, Comptroller, posted bulletin as information to all employes in the Accounting Department to the effect that commencing September 1, 1949 the hours of service of employes in the Accounting Department embraced within the Scope Rule of our working conditions Agreement with the Express Company effective September 1, 1943, would be changed whereby they would be required to work eight (8) consecutive hours less lunch period as a day's work in lieu of seven and one-quarter (7¼) hours as a day's work. (Employes' Exhibit 1)

On August 15, 1949 Superintendent of Car Service, Mr. Atkinson, addressed a similar notice affecting employes in his department. (Employes' Exhibit 2)

August 18, 1949, and August 23, 1949, formal protest was filed with Mr. Shorter and Mr. Atkinson that the posting of bulletins were contrary to provisions of our Agreement that governs the working conditions of the affected employes. (Employes' Exhibits 3A and 3B)

On August 19 and 25, 1949, our protest was denied by Messrs. Shorter and Atkinson, as evidenced by Employes' Exhibits 4A and 4B.

Further effort was made to compose the grievance as evidenced by the following exchange of letters made a part of this submission:

OPINION OF BOARD: The first Agreement between these parties was made effective April 1, 1943 following certification on May 27, 1942 by the National Mediation Board of the Brotherhood as the authorized representative of the employes here involved.

As of August 31, 1949 the Company had in its employ 667 salaried employes subject to the Agreement all of whom were paid on a 48-hour week basis. Most of them worked 48 hours per week; a few worked 42 hours per week; and the Claimants, 123 in number, worked 7¼ hours Monday through Friday and either 7¼ hours or a half day on Saturday pursuant to Rule 66. Thus, the Claimants' work week in August 1949 was either 43½ hours, or 40 hours if they got Saturday afternoon off.

When the parties negotiated their first agreement in 1943, this class of employes had been working this 7¼-hour day since 1928. The Agreement did not establish a basic work day as such. The pertinent provisions of the 1943 Agreement were as follows:

"ARTICLE 3—HOURS OF SERVICE, OVERTIME, Etc.

RULE 23—DAY'S WORK

(a) Except as otherwise provided in this agreement eight (8) consecutive hours or less, exclusive of the meal period, shall be considered a day's work for which a day's pay shall be allowed."

"RULE 27—OVERTIME

(a) Except as otherwise provided in these rules, time in excess of assigned hours but not less than eight (8) hours, exclusive of the meal period on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

The Agreement stood, as originally adopted, without revision or amendment (except for some wage adjustments) until the advent of the 40-hour week in 1949. On July 25, 1949, effective September 1, 1949, the Agreement was amended in conformity with the Chicago Agreement and in particular by the addition of SECTION 23½ which so far as pertinent reads:

"(a) **General.** The Company will establish . . . a work week of forty (40) hours, consisting of five (5) days of eight (8) hours each . . ."

Section 27 was re-adopted without change.

Effective September 1, 1949 the Company put the Claimants on a work week of 40 hours consisting of 5 days of 8 hours each.

The Claim is for 45 minutes overtime at the rate of time and one-half for each day worked since September 1, 1949.

FIRST. Prior to the adoption of the 1943 Agreement, the daily hours of work were at the discretion of the Company. We find nothing in the Agreement which shows an intention to establish the hours of work at 8, at 7¼, or at any particular number of hours less than 8.

Agreements generally establish the number of hours in a day's work in order to determine when a day's pay is earned and when overtime starts. In making the 1943 Agreement, the parties knew that for many years some employes had been working 8 and some 7¼ hours per day. While it is plain that the parties did not intend to change these accustomed hours of work, it seems equally plain that they did not intend to put the accustomed hours of work beyond change except by negotiation for the duration of the Agreement.

If the parties had intended to freeze some employes at 8 and some at 7¼ hours, it would have been of the utmost simplicity to have said so. But this the parties did not do. Instead, they deliberately refrained from the normal course of establishing a basic work day as such. They agreed that a day's pay would be earned by any time worked up to 8 hours. And they also agreed that overtime would not start until after 8 hours had been worked.

The overtime rule fortifies the conclusion that no fixed work day of less than 8 hours was intended to be established and that the Carrier might therefore properly have required 8 hours work each day without payment of overtime, additional straight time or any compensation in excess of a day's pay.

SECOND. The lack of any established basic work day in the 1943 Agreement was supplied by the adoption of Section 23½ in 1949. And the basic work day which was established was an 8, not a 7¼, hour day. There is no conflict or inconsistency between Section 23 and Section 23½ or between these two Sections and Section 27. Notwithstanding the adoption of Section 23½, a day's pay is still earned by less than 8 hours' work but overtime is payable only for time in excess of 8 hours.

It is argued by the Brotherhood that Section 23½ is a mere general "declaration of principle" and that the 8-hour day is not a "crystal clear concept" but rather "any unit in which 8 hours pay is earned." Various Rules are cited which affect the basic content of the 8-hour day, such as the Rules dealing with starting time (Rule 24) and meal periods (Rule 35). And it is pointed out that the Chicago Agreement (Article II) showed an intention that rules such as these should not be affected or changed. The Chicago Agreement (Article II Section 3(j)) also provided: "Existing rules which provide for the number of hours constituting a basic day shall remain unchanged."

So far as existing rules were concerned, the 1949 amendment followed the Chicago Agreement and left the precise content of the workday where it was under the 1943 Agreement with the same exceptions or leeway for meal periods and the like as before. But with respect to the basic work day there was no "existing rule" until Section 23½ was adopted.

Declarations of principle or policy are usually identifiable as such and generally appear in preambles. Section 23½, on the other hand, is a Rule joined to Section 23; and it speaks in terms of explicit command. While there is some force in the thought that the concept of the 8-hour day may not be a rigid 480 minutes, we are unable to conclude that the establishment of a 40-hour basic work week consisting of 5 days of 8 hours each can, by any reasonable process of interpretation, be taken to mean a 36¼ hour work week consisting of 5 days of 7¼ hours each, with overtime payable after 7¼ hours in the teeth of Section 27.

THIRD. Under the 1943 Agreement and long before, it was the practice recognized by bulletins to work 7¼-hour days and to pay overtime after 7¼ hours. However, upon the adoption of the 1949 amendment, the Company established an 8-hour day in conformity with Section 23½. Section 27 was re-adopted without change.

The effect of practices is well settled by numerous awards of this Board.

When a new agreement is adopted, the parties may expressly agree to continue prior practices (see Award 2345 where it was agreed that "present hours of assignment will be continued in effect"; and see also the agreement involved in Decision 17 of the Forty-Hour Week Committee). Such an intention is also shown by the adoption of an agreement after the proposal and rejection of an amendment which provides for the abrogation of all prior practices (Awards 2436 and 3338).

We may assume, for the purposes of this decision, though we doubt it for the reasons above expressed, that the 1943 Agreement perpetuated a fixed 7¼ hour day.

An intention to change a prior practice becomes plain, when the parties deal directly with the subject of the practice and adopt an amendment which is contrary to, or incompatible with it. In such a case, no matter how long-standing the practice may be, it falls in the face of clear and unambiguous terms in the amendment (Awards 4513 (30 years), 3979 (30 years), 3890, 3603 (32 years), 2926 (45 years), 2812 (20 years), 1671, 1518 (15 years), 1492 (20 years), 1456 (10 years and more) and 422). We have considered Award 5005; and to the extent that it expresses contrary views, we are unable to follow it.

It is difficult to conceive of an example more conspicuous than Section 23½ provides of direct and incompatible dealing with the subject of a prior practice by way of amendment of an agreement. For the first time the establishment of a basic work-day was imported into the Agreement. And it came about by reason of an Emergency Board Report and Recommendation that was focused entirely upon hours of work.

FOURTH. It appears that in 1947 the Company changed the hours of work from 7¼ to 8 hours for a few days but revoked the order after protest by the Brotherhood.

The protest itself challenged both the necessity of lengthening the hours and also the right to do so under the Agreement. There was a meeting at which the subject was discussed, but what the discussion was does not appear, nor does the reason for the revocation of the order. From all of this it may be inferred, with equal reason, that the action was taken on the protest either because the contract was being violated or because all of the work could still be performed within 7¼ hours. It would take more than this to lead us to the conclusion that this episode constitutes an admission against interest by the Company. In any event, the Company now stands on Section 23½, not Section 23.

FIFTH. There is some disagreement over the question whether the Company was bound by the Chicago Agreement. It did not sign the Chicago Agreement; but we do not consider this to be of any particular significance because the parties had obviously set about to conform their Agreement to the Chicago Agreement. Moreover, the difficulty here does not arise by reason of any deviation from the terms of the Chicago Agreement, for Section 23½ conforms with Article II Section 1 (a) of the Chicago Agreement. Indeed it would have taken changes in the language of Article II Section 1 (a) to have set at rest beyond question the contentions which the Company now makes. The case is here for the precise reason that Section 23½ conforms with the Chicago Agreement and does not conform with the local practice on the property.

It is true that Decision 17 of the Forty-Hour Week Committee decided that the Chicago Agreement did not require any change in a rule which expressly established a basic work day of less than 8 hours for certain specified employes. We do not, however, understand the Decision as preventing the parties on the property from agreeing that 8 hours should thenceforth be the established basic work day, though some employes theretofore had worked less. And this is what we conclude the parties to this Agreement did by the adoption of Section 23½ and the failure to amend Section 27.

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 Company 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: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of March, 1951.