Award No. 6787
Docket No. CL-6515

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

(A) When without conference or agreement with the Clerks' Committee, it required V. R. Chapman, V. V. Pierce, R. W. Lipop, A. J. Johnson, T. A. Gersh and all other schedule employes on duty Monday, December 24, 1951, to perform eight (8) hours service on that date.

(B) That V. R. Chapman, V. V. Pierce, R. W. Lipop, A. J. Johnson, T. A. Gersh and all other schedule employes required to perform eight (8) hours work on Monday, December 24, 1951, shall be compensated an additional half days pay at proper rate of time and one-half.

EMPLOYES' STATEMENT OF FACTS: The employes covered by the instant claim are employed as Clerks in the office of Auditor of Freight Accounts, Atlanta, Georgia. Prior to 1928 the office was located in Washington, D. C. In 1928, the office was moved to Atlanta, Georgia. In 1932, the offices located in Cincinnati, Ohio, were consolidated with the offices in Atlanta, all positions located in Cincinnati being transferred to Atlanta.

There has been in Atlanta, Washington and Cincinnati for longer years than the oldest employe can remember, a consistent custom and practice of allowing employes to work on December 24 an approximate half day for a full day's pay. On December 24, 1951, this practice was the first time unilaterally discontinued, claimants being required to work a full eight (8) hours.

Correspondence in connection with the claim is reproduced below, indicating efforts on the part of employes' representatives to dispose of this dispute on the property:

dated at Chicago, Illinois March 19, 1949, and specifically changed rules of the effective clerical agreement, Rule 25 in particular.

(c) While carrier has, as an accommodation released employes from duty prior to the established quitting time on many occasions on December 24, such action did **not** establish a working condition or condition of employment. Furthermore, on many occasions certain employes worked and were not permitted to be off with the majority. In no case has any employe been allowed additional compensation for working his regularly assigned hours on December 24.

(d) The effective clerical agreement was **not** violated. The claim is nothing more than an effort by the Brotherhood to obtain a new rule or working condition by Board decision rather than through negotiations as provided by law.

(e) The penalty of two and one-half times straight time daily rates for four hours on December 24 constitutes claim for a penalty which is neither authorized by the effective clerical agreement nor supported by prior Board awards.

Claim not being valid should in all things be denied, and the Board is urged to so hold.

All relevant facts and arguments involved in this dispute have been made known to employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: In 1928 the Carrier moved its Freight Accounts office from Washington, D. C., to Atlanta, Georgia, and in 1932, consolidated its Cincinnati Freight Accounts office with the latter office.

The Organization contends that from 1921 to 1950 it was the consistent practice of the Company to release its employes in the above offices at noon on December 24, the day before Christmas, without any reduction in pay; that this practice amounted to a contractual obligation to that effect on the part of the Carrier; but that on Monday, December 24, 1951, the Carrier wrongfully required the employes to work the full eight-hour period, thereby entitling them to be compensated for four hours at the time and one-half rate.

The facts show that since 1921, with a few exceptions, it has been the practice of the Carrier to release the employes in the offices referred to above at approximately noon on the day before Christmas. From 1921 until 1940 the employes were released, in most instances, at 12:00 noon, but from 1940 to 1950 they were consistently released at 1:00 P. M. There was an instance or two when the employes worked eight hours on the day before Christmas but were subsequently released for a half day, in lieu thereof. What we have said has no reference to those occasions when the day before Christmas fell on Saturdays or Sundays and the employes were off for the full day without pay under other provisions of the Agreement. On Wednesday, December 24, 1952, the employes were again released at 1:00 P. M.

During the period covered by the alleged practices there were four negotiated revisions of the agreement between the Carrier and the Organization representing the Claimants, all antedating the 40-Hour-Week Agreement of 1949, to-wit: in 1921, 1924, 1926, and 1938. The 1938 Agreement provided that it did not, "unless rules are specifically changed, alter practices or working conditions established by or under former Agreements." That is to say, the Agreement in effect on December 24, 1951,

when the alleged violation occurred, did not preclude the recognition or establishment of binding practices, unless such were forbidden by the 40-Hour-Week Agreement of 1949. We shall pass, for the moment, the effect of the 40-Hour-Week Agreement and consider whether, aside from it, the facts justify the conclusion that a binding practice existed on December 24, 1951.

The Carrier's answer to the Claim is that the alleged practice relied on by the Organization amounted to nothing more than a mere gratuity on its part; and that since Rule 24 (a) of the 1938 Agreement and paragraph (a) of Rule 25 of the 40-Hour-Week Agreement are clear and unambiguous, there could be no practice contrary to their terms. We shall consider these points in order, and our answers to them are as follows:

(1) The long indulged practice of releasing the employes at noon on the day before Christmas was sufficient, in point of time, to evidence a common understanding that this had become and would continue as a working condition, and the variations, from 12:00 noon to 1:00 P. M., when the employes were released is not, in our judgment, such a departure as to substantially affect the continuity of the practice.

(2) The fact that the practice had its inception as a gratuity on the part of the Carrier is of no consequence under the holding of this Board in Award 2436, where is was said:

> "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."

(3) Rule 24(a) of the 1938 Agreement simply provides that eight consecutive hours, exclusive of meal period, shall constitute a day's work. We regard this Rule as merely prescribing the maximum length of a normal work day. There is nothing in the Rule that we can perceive that precludes the parties from establishing a shorter period for a work day or from precluding the Carrier from paying for eight hours when less than eight hours are worked. In other words, taking into account the evident purpose of Rule 24(a), we do not believe a mutually acceptable arrangement whereby the employes should be released at noon on the day before Christmas would do violence to the Rule.

(4) Neither do we think that the oft-expressed principle to the effect that the clear and unambiguous provisions of an express rule cannot be varied by past practices has any application here. The Organization is not contending that there has been any modification of the requirements of Rule 24(a), which prescribes that an employe may be required to work eight hours to constitute a work day. All the Organization is saying is that by reason of a long continued practice the Carrier has recognized that for one particular day, the day before Christmas, it will release these employes at noon and will pay them for eight hours notwithstanding.

(5) Much of what we have said about Rule 24(a) is equally applicable to paragraph (a) of Rule 25, which came in to the

Agreement as a consequence of the 40-Hour Week. The Carrier relies on the fact that Rule 25 provides that a work week consists of five days of eight hours each; and again, we observe that there is nothing in that formula that precludes a carrier from paying an employe for eight hours work although only four hours service is performed. Our conclusion in this regard is fortified by Decision No. 17 of the 40-Hour Week Committee which, although involving a different carrier, is highly persuasive. If the Carrier can voluntarily pay for eight hours service when only four hours work is performed, without violating the Agreement, as it apparently did for December 24, 1952, we can conceive of no reason why it cannot obligate itself to do so either by formal contract or by long continued practice. A provision of a contract resulting from long continued practice, if duly established and not forbidden, is as much a part of the Agreement as one in writing.

Award 5005 of this Board is in accord with our conclusions, but the Carrier says that it was, in effect, overruled by Awards 5278 and 6469. A reading of the two Awards last mentioned indicates that they are predicated on the proposition that past practices cannot modify the express terms of a written contract. With that principle we do not find it necessary to disagree, although there is respectable authority to the contrary. We go no further than to hold that notwithstanding the existence of contractual provisions relating to the forty-hour week and the eight-hour day as presently existing, parties could and did by long continued practice create an exception thereto with respect to the day before Christmas.

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 Agreement to the extent indicated in the Opinion.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 18th day of October, 1954.

DISSENT TO AWARD NO. 6787, DOCKET NO. CL-6515

This Opinion, in effect, holds there is no rule in the Agreement to prohibit the Carrier from granting to its employes the privilege of working less than eight hours and paying said employes for the full eight-hour assignment and, therefore, when such practice has continued over a period

of years (during which time new Agreements have been negotiated, or revised, with the practice continued in effect), it is as enforceable as the terms of the contract itself.

The Carrier emphatically denies it has been the universal practice to permit all clerical employes to have a half-holiday on each Christmas Eve that has fallen on a full assigned work day.

The Majority opinion relies for support on the sustaining of this case on Award 2436 by Referee Carter, adopted December 18, 1943. In that Award (2436) the Referee was dealing with special conditions, as stated by him:

> "* * * The evidence is that special conditions and circumstances existed at these two points, long recognized by the parties, that brought these practices about. * * *"

In the instant dispute the attention of the Referee was directed to Award 4428, by the same Referee (Carter), adopted June 30, 1949. In denying the claim of the Employes in Award 4428, from March 1, 1945, and sustaining it from and following October 9, 1947, Referee Carter stated:

> "* * * The provisions of the agreement supersede practices incompatible therewith. The acquiescence of the employes in the continuance of the practice after the contract became effective, has the effect of estopping the parties from the collection of retroactive penalties resulting therefrom. **It does not estop either party from enforcing the contract** and the collection of penalties accruing after demand for compliance has been made. See Awards 4281, 3979, 3503, 2137." (Emphasis added.)

Numerous other Awards of this and other Divisions with holdings similar to those in Award 4428 were called to the attention of the Referee, including the reference to certain court decisions set forth in Fourth Division Award 123.

A check of the various Agreements between the parties to this dispute, running back to September 1, 1926, and up to and including the current Agreement, shows the "Basic Day" rule provides that eight (8) consecutive hours, exclusive of meal period, shall constitute a day's work. This rule does **not** provide that eight (8) hours **or less** shall constitute a day's work, as do certain other agreements. The current Agreement provides for but seven holidays per year, as set forth in Rule 32, "Holiday Work," revised effective September 1, 1949.

In 1948 the Clerks' Organization, together with other non-operating organizations, started a movement for a rigid 40-hour work week, Monday through Friday, with punitive pay for Saturday and Sunday work, and with no reduction in wages. In other words, 40 hours' work for 48 hours' pay. The Emergency Board set up declined to accede to a rigid five-day, Monday through Friday, work week. It recommended the following 40-hour work week for 48 hours' pay:

> "The carriers will establish, effective September 1, 1949, for all employes, subject to the exceptions contained in this Article II, a work week of **40 hours,** consisting of five days of eight hours each, with two consecutive days off in each seven; * * * ."
>
> (Emphasis added.)

(See Rule 25 of current Agreement.)

Since the adoption of the 40-hour week we have had four disputes involving the application of the 40-Hour Work Week Agreement, three of

which involved a practice of carriers permitting certain employes, especially in general offices, to work less than eight hours per day, for which they were paid the full eight hours, and the fourth case involved a ten-minute coffee break in the forenoon and again in the afternoon. The first case was sustained by Award 5005; the other three were denied by Awards 5278, 5631, and 6469.

The Opinion in Award 6787 further holds:

> "* * * Our conclusion in this regard is fortified by Decision No. 17 of the 40-Hour Week Committee which, although involving a different carrier, is **highly persuasive.** * * *."
>
> (Emphasis added.)

The attention of the Referee was directed by proponents of the claim to Decision No. 17. That Decision had no application to this particular Carrier, first, because the Carrier involved in the instant dispute was not a party thereto, and, secondly, Decision No. 17 covered an individual case jointly submitted by the Carrier and Employes and involved a rule upon which the question turned.

There was also an agreed-to Understanding of the parties to Decision No. 17 which reads:

"Understanding No. 1, dated June 15, 1938

> It is understood that the existing agreed upon arrangements in the various offices covering working time, **may** be continued."
>
> (Emphasis added.)

No such rule or understanding is to be found in the Agreement controlling in the instant dispute.

Decision No. 17 of the 40-Hour Week Committee reads:

> "The Committee's decision is that the March 19, 1949 Agreement does not require any change in the text of Rule 4 nor in the text of Understanding No. 1, dated June 15, 1938."

For the above reasons, the undersigned vigorously dissent to this Award.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ J. E. Kemp

/s/ E. T. Horsley