Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 3479
Docket No. 3480

Referee James C. McBrearty

PARTIES TO DISPUTE: ~~Railroad~~ Yardmasters of America

Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Claim #1 Allow an 8 hour day at pro-rata rate to Yardmasters C. E. Henry and E. H. Ciereszewski, Huron, Ohio from July 10, 1975 for Mr. Henry; and July 12, 1975 for Mr. Ciereszewski until August 10, 1975 based on five days per week for each man because the Carrier arbitrarily abolished their Yardmaster positions at Huron, Ohio in violation of National Mediation Board Case A-9288 dated February 2, 1973, Paragraph 1.

Claim #2 Accept this as a continuing claim based on five days per week effective August 11, 1975 for an eight hour day each in favor of Relief Yardmaster C. E. Henry and Yardmaster E. H. Ciereszewski, Huron, Ohio. Carrier arbitrarily abolished their yardmaster positions on July 10, 1975 and July 12, 1975 in violation of National Mediation Agreement A-9288 dated February 2, 1973.

OPINION OF BOARD: The Mediation Agreement A-9288 dated February 2, 1973 provides in pertinent part:

> "In the event that a Carrier decides to abolish a yardmaster position covered by the rules of a collective agreement between Railroad Yardmasters of America and a Carrier party hereto, such Carrier shall notify the general chairman thereof by telephone (confirmed in writing) or telegram not less than ten calendar days prior to the effective date of abolishment. If requested by the General Chairman, the representative of the Carrier and the General Chairman or his representative shall meet for the purpose of discussing such abolishment. Nothing in this Agreement shall affect existing rights of either party in connection with abolishing yardmaster positions."

Carrier alleges that its Agent did notify the General Chairman of the abolishment of the position, and thus complied with the requirements of Mediation Agreement A-9288. However, it has not produced a copy of this letter. On the other hand, the Organization has flatly denied that it ever received such a letter. It is well established that mere allegations do not constitute evidence, and on that basis, we find that Carrier's allegation is not supported.

We are concerned here that the Organization lost a valuable right under the agreement - a right to meet with the Carrier for the purpose of discussing the abolishments. Such contractual rights cannot be lightly disregarded.

Contrarily, we are also concerned that the Organization could knowingly let a considerable time elapse, and then assert their contractual rights under the Mediation Agreement by filing time claims. This is contrary to the intent of the parties who in negotiating the Mediation Agreement, contemplated a prompt and orderly procedure for the parties to employ if the Organization desires to explore the abolishment.

In light of the foregoing, we think that the proper remedy in the instant case is to award the Claimants ten (10) days pay at their pro rata rate. (See Fourth Division Award 3211).

FINDINGS:

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

The carrier and the employe involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: Nancy J. Dever
Assistant Executive Secretary

Dated at Chicago, Illinois, this 8th day of June 1977

Fourth Division
Docket No. 3479
RYA vs. N&W

BRIEF FOR REFEREE J. C. McBREARTY:

The facts of record show that there was agreement made on June 28, 1957. Among other things this Agreement provided that (Carrier's Ex Parte Submission, page 3):

> "The 3rd trick position on Wednesdays (marked 'open' above) will not be assigned at this time to an extra man. Until December 31, 1957, yardmasters holding down the four positions described above will be allowed to work the 'Open' position on a turn-and-turn-about basis at overtime rates. ***."

The agreement was also a contract as are other agreements between the parties in all railroad-labor agreements. This contract gave certain incumbents of positions the opportunity to work an extra day (in their turn) at punative rate; but only "until December 31, 1957", at which time the Carrier had the option of performing under the contract in a different manner. The Carrier had a time limit stipulated in the contract on which to perform. December 31st came and went. The Carrier did not take action and, in fact, sat on their rights.

Starting on page 5 and continuing on page 6 of their Ex Parte Submission, Carrier states:

> "*** The 1957 agreement is clear with no question left open as to intent of the parties where it is stated 'the 3rd trick position on Wednesdays (marked open above) will not be assigned at this time to an extra man. Until December 31, 1957, yardmasters holding down the four positions described above will be allowed to work the open positions on a turn-and-turn-about basis at overtime rates', etc.

> "' Until December 31, 1957', the agreement does not state before December 31, 1957, nor does it state after December 31, 1957. Therefore, until December 31, 1957, the Carrier was obligated to allow the four regular incumbents to work the open day at punitive rate, but after this date, it became the Carrier's option whether or not to continue with that obligation. ***."

We do not agree. The Carrier has one correct sentence in that entire quote, it is "the agreement does not state before December 31, 1957, nor does it state after December 31, 1957." We agree with that. If Carrier's contention is sound, if it became their option to perform after the time limit of December 31st it must be equally sound that they could also take the same action before December 31st and admittedly they could not do so.

Where did it leave the parties after December 31, 1957? The employes did perform exactly as provided for in the contract and there is no dispute in that performance. Carrier, on the other hand, failed in their option to exercise their right under the time limits provided for in the contract. After that date went by the parties were in fact working with a newly created practice which did not have a time limit provision. The June 28, 1957 Agreement did not stipulate what rights either party would have should the conditions be extended beyond December 31st. So it can be fairly stated that the June 28, 1957 Agreement ceased to exist beyond December 31, 1957.

Thereafter both parties continued with the same conditions, applied in the same manner simply by doing it without objection from either side. It was indeed a practice in which both sides acquiesced. But as the record points out, it developed into an eighteen year practice which under

any measure must be considered "past practice". There is no argument that the practice has prevailed for all the years since 1958 to the instant dispute and it has been continued without change in that time span. Now, the Carrier is seeking through the medium of the Fourth Division of the National Railroad Adjustment Board the arbitrary cancellation of a practice that has developed and existed by mutual consent for eighteen years and has become in practical effect a part of the agreement. In First Division Award No. 4173 (Swacker) it is stated in the Findings that:

> "*** There are many practices as to which the schedules are silent, but which constitute just as much a part of the agreements as though they were incorporated, indeed it would require almost an encyclopedia to specify all such existing practices. Nevertheless, it is an elementary rule of the law of contracts that when parties make an agreement rested on a condition of affairs not even mentioned in the agreement, one party to such contract may not by unilateral action so alter these conditions as adversely to affect performance by the other parties.
>
> "We therefore hold that a practice of this sort may not be changed without agreement."

The above quoted statement from Award 4173 is directly applicable in this case. The "elementary rule of the law of contracts" applies with equal force to each party in the contract and the Carrier has no more right than the employes to alter practices under an agreement by unilateral action, which unilateral action Carrier is seeking through an award of the Fourth Division of the National Railroad Adjustment Board.

Carrier writes, in their Rebuttal Submission, page 2:

> "The Employees again, by their reference to the courts of law, have insinuated that the Carrier has acquiesced in the form of a Statute of Limitations by not abandoning the Agreement in 1957. At least, the Employees admit there was an agreement and that the agreement did have a terminating clause."

And it did. Not only a terminating clause, but a terminating date, which is why the case is here today.

There is one other paragraph, on page 5 of Carrier's Ex Parte Submission, that is worthy of comment. It states:

> "The Employees have cited only the Scope Rule and Rule 6 in support of their positions; however these rules or any other rule cannot overturn the agreement made June 28, 1957, and the Carrier rejects the fact that the employees even make such a frivilous attempt to overturn an agreement to which they were a party. On the other hand, the employees want to keep that part of the agreement with respect to the rates of pay. In other words, the Employees position gives the distinct appearance of their wanting only that which suits their immediate needs and that the Carrier can settle for whatever is left. ***."

That is quite a mouthfull and we only hope that Carrier has a real sincere feeling that goes along with what they are saying. What it really means is the employes only have a few rules available to quote in their unreasonable effort to avoid an agreement which they signed. And further, that these same employes are trying to take the best of everything, agreement or not, and leave the Carrier the left-overs.

If they have that feeling, and we hope they do, they can now understand how the employes feel every holiday what the Carrier takes their work from them, gives it to another craft, and causes the loss of the overtime.

R. F. O'Leary

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