File: YM-02-86 (Doohan)

Public Law Board No. 4195

Parties to Dispute

United Transportation Union - Yardmaster Department

vs

The Long Island Railroad Company

Case No. 1

Award No. 1

STATEMENT OF CLAIM

One day's pay, at overtime rate, is due Yardmaster R. J. Doohan for April 5, 1986 when a junior Yardmaster was improperly used to cover Ja-YM-3, a job to which Mr. Doohan was entitled.

FINDINGS

On April 5, 1986 a pay claim was filed by the Claimant on the grounds that a junior employee, and not he, was called on that date to fill position Ja-YM-3 at overtime rate. The claim was denied by the Carrier on April 11, 1986. In this denial the Carrier averred that the Claimant had been called at 9:10 AM on April 4, 1986 to "...cover (an) assignment on 4-5-86 and refused relief day work for this date". After further appeal of the claim without resolution on property it was docketed before this Public Law Board for final adjudication.

The Claimant is a regularly assigned Yardmaster who holds seniority at the Carrier's Jamaica Yard. According to information of record he is the senior Yardmaster at the terminal. April 5, 1986 was one of his regularly assigned rest days.

Two vacancies occured at Jamaica Yard on April 5, 1986. All extra Yardmasters had assignments. On April 4, 1986 the Claimant was called and was offered assignment Ya-YM-1 --- the first trick Yardmaster position on April 5, 1986. He was called at 9:10 AM. After both the Claimant and the next-in-line Yardmaster refused this assignment, it was offered to and accepted

by Yardmaster M. DiPresso, who was third in line. It was offered to the latter at 10:25 AM on April 4, 1986 according to the mark-up sheet. It is the position of the Carrier that the refusal by the Claimant and the second-in-line Yardmaster of the first trick assignment put them in a position whereby they "...lost all entitlement to overtime work on April 5, 1986". Thus the Claimant was not offered the April 5, 1986 Ja-YM-3, third trick assignment because he had refused to work the first assignment on that day. According to the Carrier to have offered the Claimant the third trick assignment after he had already refused the first trick assignment for the same day would "...produce an absurd result".

The Rule in question reads, in pertinent part, as follows:

Rule 29 - Work on Assigned Rest Days

(a) Two regular rest days each week, designated by the Carrier, shall be assigned to each position....
.....

(e) Relief Days .....

(1) The regular encumbent of the position will have preference to work the position on his rest day.
(2) If the regular encumbent does not desire to work, then the senior Yardmaster in the Yard who has indicated his desire to work will be used.

An additional argument against sustaining the claim is offered by the Carrier in its June 13, 1986 correspondence to the Organization. This argument is based on past practice and will be quoted here in full for the record:

> "...the Association's reliance on Rule 29(e) in this case is misplaced. In fact, the Agreement between the parties contains no provision which dictates that Carrier is obligated to continue to call a relief day Yardmaster for work on a day that the employees has already refused a job.
>
> The Manager of Manpower, J. T. Farrell, advises that the long-standing practice is that once a Yardmaster has refused relief day work the Yardmaster will not be offered any additional job which may become vacant for the balance of that day. Chief Clerk John Scully advised that Yardmasters were handled in exactly the fashion described by Mr. Farrell during the many years that he handled the Yardmaster's Board. A review of Carrier's records, back to 1957, finds that this handling has never been grieved and was and is the accepted practice".

There is additional information in the record, which is also referenced by the Carrier in its submission, on this topic of past practice which the Board

may not use, however, as evidence when framing an Award on the instant dispute. Such information with accompanying arguments was introduced into the record after this case was docketed for adjudication before this Board on October 14, 1986. It is well established by Circular No. 1, and articulated by many National Railroad Adjustment Board Awards, that a Board such as this may not consider material which was not submitted during the handling of a case on property (See Third Division 20841, 21394, 21463; Fourth Division 4132, 4136, 4137).

This is a contract interpretation dispute and the burden of proof lies with the Organization as moving party (Second Division 5526, 6054; Third Division 15670, 25575).

The argument by the Organization in this case is the language of the Rule at bar. According to the Organization the language is clear and unambiguous and the Carrier simply made a mistake in interpreting it the way it did.

The Carrier states, as noted above, that to interpret the Rule in the manner in which the Organization argues would produce an absurd result. Why? Because the crew caller would have to recall the same senior person for the same date for another assignment which might materialize if that same employee refused an earlier assignment for that day. Further, the Carrier argues that such had not been done in the past, and the Organization never grieved this in the past. Thus according to the Carrier, its position in this matter is supported by past practice.

The Board must underline, first of all, that past practice generally serves to clarify general contractual language which, for whatever reason, is not completely clear and unambiguous. Secondly, if it can be determined that the language in question is clearly understandable, as a matter of language construction, then the intent of the parties by means of such language clearly has priority over any prior practice. Thirdly, if practice related to language has not been grieved, if such language is clear and unambiguous, such in itself is no bar to arbitral conclusions when an interpretation is requested.

The focus of the instant case centers on a distinction made by the Carrier between assignment to a position, and assignment on a day. This is clear from the language used by the Carrier when denying the claim on property. To reiterate from the Carrier's June 13, 1986 correspondence to the Organization: "...the Agreement...contains no provision which dictates that Carrier is obligated to

continue to call a relief day Yardmaster for work on a day the employee has already refused a job". Does such interpretation of Rule 29(e) come from past practice, or from the language itself of that Rule? Clearly there was a past practice of interpreting Rule 29(e) in the manner the Carrier suggests. Was such practice in accord with the language itself of this provision? After close study of the language of the provision, the Board must conclude in the negative. Rule 29(e) (1) and (2) clearly emphasize the priority which the parties gave to "position" when framing the language of this provision. Rule (e)(1) states that the "...regular encumbent of the position will have preference to work the position on his rest day". This provision alone, did not give the Claimant right to the assignment on April 5, 1986 since he was the regular encumbent of the first trick, and the assignment was for the third trick. But Rule 29(e)(2) did give him right to the assignment if he wished as the language of that provision unambiguously makes clear. Rule 29(e)(2) states that "...(i)f the regular encumbent does not desire to work (the position), then the senior Yardmaster in the Yard who has indicated his desire to work will be used". Nowhere in the record does it state that the regular encumbent of the third trick was available or asked to work the assignment. What is important is that the Yardmaster who did cover the assignment did not "...normally (even) work in (the) terminal" according the Organization's correspondence dated April 21, 1986 to the Carrier. Nowhere is this disputed in the record. Nor is there doubt that when the parties framed Rule 29(e)(2) they implied that "to work" referenced other than a given position. There is simply no other reasonable manner in which to understand the language in question. What is clear is that the Claimant was the senior Yardmaster in the terminal and that April 5, 1986 was a rest day. Would it have produced an "...absurd result" for the crewcaller to have called him to work the third trick on April 5, 1986 when the Claimant had refused, on April 4, 1986, to have accepted the first trick? The Board is puzzled by such logic. Rule 29(e)(2) is clearly a provision which grants privileges because of seniority. And it is a Rule which clearly references positions, not days. The Claimant was asked if he wished to exercise his seniority for one position on April 5, 1986 and he declined. The language of this provision cannot reasonably support the conclusion that the Claimant, by so doing, forfeited his seniority privileges for any other position

on that same day. If past practice had suggested such this was a practice which the parties simply accepted in view of informal understandings and not in view of the formal language of contract. The Carrier cites Third Division 11329 in support of its position. The Board has closely studied that Award and it notes that the Carrier's primary argument in that case is that "...past practice is controlling only in cases involving ambiguous rules". Such argument supports, in the instant case, the position of the Claimant rather than that of the Carrier. In view of what this Board considers to be the unambiguous intent of Rule 29(e)(2) it must conclude that the doctrine of equitable estoppel does not apply here. Applicable here is the conclusion of First Division 21780 which states: "... when the wording of a rule is clear, precise and unambiguous no amount of past practice contrary to the clear language of a rule can serve to nullify the provision...".

Relief requested is for one day's pay at overtime rate. The Agreement between the parties states the following at Rule 32(h):

> Monetary claims based on the failure of the Carrier to use an employee to perform work shall be invalid unless the claimant was the employee contractually entitled to perform the work and was available and qualified to do so. A monetary award bsed on such a claim shallnot exceed the equivalent of the time actually required to perform the claimed work on a minute basis at the straight-time rate less amounts earned in any capacity in other railroad employment or outside employment.

In view of this the claim is sustained, but at straight-time rate

AWARD

Claim sustained in accordance with the Findings. All compensation due the Claimant shall be paid to him within thirty (30) days of the date of this Award.

Edward L. Suntrup, Neutral Member

Janet R. Thomas, Carrier Member

P. G. Tramontano, Employee Member

Date: March 15, 1988