Special Board of Adjustment No. 1186

Parties to the Dispute

SMART - TRANSPORTATION DIVISION,
LOCAL 722

vs.

THE LONG ISLAND RAILROAD COMPANY

Award No. 1

Organization's Statement of Claim

The Sheet Metal, Air, Rail, Transportation Union ("SMART" or "Organization") alleged on behalf of all SMART-represented employees impacted by the Carrier's refusal to grant a compensated half-day to non-essential employees on Christmas Eve and New year's Eve, that the Carrier's actions violated the SMART-LIRR agreement. On or about January 14, 2019, the Organization filed this claim, alleging the Carrier violated a long-standing established practice of providing a compensated four-hour early dismissal for non-essential employees on both Christmas Eve and New Year's Eve. By agreement, the matter was expedited and heard by the Director of Labor Relations (Administration) on February 13, 2019. By decision dated April 12,

2019 the claim was denied. A demand for arbitration was filed on or about May 29, 2019. This Board was duly convened to hear and decide the matter.

Background

For a period of approximately seventy years, employees in non-essential positions on Christmas Eve and New Year's Eve received a compensated half-day of pay of "Time paid not worked" ("TPNW"). By letter dated December 20, 2018, the Carrier notified employees that it would only permit early dismissal on Christmas Eve and New Year's Eve to be taken without pay. Carrier President Phillip Eng in his letter to all Carrier employees advised that if service permitted, non-essential employees could take Early Quit or Absence Known - both designations indicating unpaid absences - on those days, with supervisor approval. Employees were further advised that in such case no Absence Control Policy penalty points would be assessed. The practice on compensating non-essential employees for four hours on these two Eves was an open practice acknowledged by both parties. In point of fact, the Carrier acknowledged as much in the Director of Labor Relations' letter of April 12, 2019 that denied the Organization's claim. However, the Carrier maintained that it was not binding and a unilateral gratuity on the part of the Carrier. It contended that the past early dismissals were solely initiated by the Carrier without input of any kind from the Organization, and, moreover, had never been the subject of collective bargaining.

Opinion of the Board

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Organization and the Long Island Rail Road Company. After hearing upon the whole and all the evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon.

The Organization argued that the Carrier's actions in this instance were arbitrary and capricious. It asserted that the past practice of granting a half day compensation of TPNW on Christmas Eve and New Year's Eve to non-essential employees has been in place for decades. It is so embedded that the Carrier has established a KRONOS pay code with the notation "holiday time" for such time. While the Carrier contended such practice was non-binding, the Organization maintained that where the controlling agreement is silent, past practice prevails. The Organization cited to *National Railroad Adjustment Board, Third Division, Award No. 4493,* wherein the referee determined: "...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 provisions of the contract itself." Also supportive is the award in *National Railroad Adjustment Board, Third Division, Award No. 13229 (1965)* in iterating the principal that:

"Mutual acquiescence in a past practice over such a long period of time not only establishes binding conduct on both parties under the doctrine of equitable estoppel - it also leads logically to the conclusion that the practice reflects what the parties intended or had in mind when the Agreement was made..."

The Carrier cannot properly modify or abrogate the practice followed for many years by the parties...except by negotiation.

Furthermore, although the President for the Carrier indicated in his December 20, 2018 letter to employees that he didn't have the authority to grant the early paid release, the Organization asserted that nineteen past Carrier Presidents had apparently felt differently.

Finally, as to the Carrier's contention that it can't be a binding practice because the same employees do not receive it every year, it argued that such argument only serves to solidify that there is a practice.

Therefore, the Organization urged the Board to grant the claim and direct the Carrier to: 1) revert to the practice in effect prior to December 2018 and provide a compensated half-day of TPNW on Christmas Eve and New Year's Eve to non-essential employees; 2) Restore leave time to any employees who chose to use paid leave rather than take unpaid time on December 24 and/or 31, 2018; 3) pay any employees who took unpaid leave on December 24 and/or 31, 2018; and 4) provide four hours additional penalty pay per shift to any non-essential employees who worked a full-shift on December 24 and/or 31, 2018.

The Carrier disputed the Organization's assertions and argued that there is no violation. Initially, it argued that the decision to provide only non-paid time for Christmas or New Year's Eve was well within its managerial prerogative. It

posited it is a well-settled arbitral precedent that any rights not protected by or contracted away in the Controlling Agreement are retained by the employer., citing to *National Railroad Adjustment Board, Third Division, Award 2491.* Further, it asserted, no mention of paid early release time for Christmas Eve or New Year's Eve can be found in the Agreement. Consequently, it contended, the Carrier has the right and discretion to take appropriate action regarding the instant subject. In this regard, it explained that financial considerations to the tune of an anticipated $1 billion budgetary deficit for the MTA by 2020 as well as increased governmental oversight preclude the Carrier from being able to justify the loss of productivity resulting from the paid early release of non-essential employees on Christmas and New Year's Eves. As its overall need of service and operating environment have changed, it is necessary to alter the early dismissal of bygone years, the Carrier argued. Consequently, the decision was based on firm financial reasoning and the existing contract with the Organization. The Controlling Agreement in no way impinges on the Carrier's ability to exercise its right with respect to financial matters for which it bears sole responsibility.

Additionally, the Carrier argued, there is nothing in the agreement that addresses paid time off as the Organization contends. Rule 49 indicates the specific days for which employees are to be compensated and these two days in question are not among the listed holidays. Moreover, it maintained, the parties agreed to a forty-hour work week unless absent on negotiated time-off with pay. Again, the Agreement is silent on these days in question. In that regard, the Carrier asserted that it is a well settled principle that past practice can not supersede clear and unambiguous contract language.

Thirdly, the Carrier contended that the practice at issue is not binding. It posited that in order for an enforceable past practice to exist and become binding on the parties, the practice must be unequivocal, clearly articulated, and ascertainable over a period of time so that it can be identified as fixed and mutually accepted. *Public Law Board 6268, Award No. 20 (1917).* In this instance, it argued, the field of possible employees affected varies from year to year, depending upon the specific needs of the Carrier. Consequently, there is no fixed process. Further, who is deemed non-essential can change from department to department. Moreover, the Carrier contended, early release has always been determined on a year to year basis. There was never any guarantee and the paid time in question was always granted via a letter each year from a Carrier official, specifying the circumstances under which the early release was to be implemented. Consequently, it cannot be disputed that it varied and was never unequivocal.

Finally, the Carrier cited to arbitral precedent to support its contention that it had a managerial right to change the paid early release practice. It pointed to the decision in *National Railroad Adjustment Board, Third Division, Award 3119 (1936),* wherein the Board discussed the concept and indicated that "...all agreements of necessity leave management a considerable zone of operation within which management has a right and a duty to exercise judgment as to the best and most efficient way to run the business..." According to the Carrier, that was precisely what it was exercising when, based on operational considerations and budgetary concerns, it simply could not justify a continuation of the practice in question, citing to *SBA 3543, Award Nos. 25-27; PLB 6268, Award 20 (1998).*

Therefore, for all such reasons, the Carrier urged the Board to deny the claim.

The issue before the Board is quite simple ... did the Carrier violate the parties' Agreement by refusing to compensate a half day to non-essential employees on Christmas Eve and New Year's Eve in 2018. By way of background, the record evidence established that for approximately seventy years non-essential employees on Christmas Eve and New Year's Eve received a compensated half-day of pay identified as "Time paid not worked" or TPNW. This had its own pay code in the KRONOS with the notation "holiday time". The practice came to an end on December 20, 2018 when a letter was issued to all Carrier employees advising that non-essential employees with supervisor permission could take an Early Quit (EQ) or Absence Known (AK) only for both Christmas Eve or New Year's Eve; in other words, discontinuing the past practice of compensating such employees. That is what generated this claim.

The Board has heard and considered all of the arguments set forth by both parties and has carefully reviewed the record evidence. Having done so, the Board must grant the claim. We arrive at such conclusion based on the following considerations.

At the outset, both parties agreed that there was a past practice. This was abundantly clear from the record evidence. However, the Carrier argued that it was not binding for the reasons that do not hold muster and must be rejected by this Board. First of all, the Controlling Agreement is silent on this practice. The sections cited by the Carrier bear little resemblance to the issue at hand and in

no way preclude the recognition of a binding past practice. Moreover, management rights must yield when there is a well-established past practice just as they must with provisions written in a contract that spell out limitations on management's rights. Moreover, while the Board is sympathetic to the economic plight the Carrier is facing, there is nothing in the record to suggest its obligations pursuant to the contract have been suspended or abrogated in any way.

What the Board finds evident is that past practice has existed for decades and decades. The Carrier is mistaken to place import on the fact that who is deemed non-essential may vary. The lack of universal application is of no consequence. The real significant point is that apparently over the course of decades who was or was not essential was not problematic. It is not the "who" but rather the practice that has been followed. Widely recognized in arbitral circles is that long standing past practices become woven into and become a part of the fabric of a collective bargaining agreement. A unilateral change of a long standing past practice is to violate the compact under which the parties are bound to operate. Should a party wish to alter such practice, the bargaining table is the venue of recourse.

Therefore, the Board must grant the instant claim.

Award

The claim is granted. The Carrier is directed to revert to the practice in effect prior to December 2018 and provide a compensated half-day of TPNW on Christmas Eve and New Year's Eve to non-essential employees. Additionally, the Carrier is directed to restore leave time to any non-essential employees who

chose to use paid leave rather than take unpaid leave on Christmas 24 and/or 31, 2018. Thirdly, the Carrier is directed to pay any non-essential employees who took unpaid leave on December 24 and/or 31, 2018.

Coyle A. Gavin

Chair & Neutral Member

Anthony Simon, Employee Member

Marilyn Kustoff, Carrier Member

Dated