

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

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

**SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA
(TEXAS AND NEW ORLEANS RAILROAD COMPANY)**

STATEMENT OF CLAIM: Claim of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Texas and New Orleans Railroad Company, that Frank Bell, Yard Clerk, Dallas Yard Office, be compensated for wage losses sustained while performing relief duty as Auto Industry Clerk because of Carrier's error in computing his earnings for the performance of such service in the period from January 1, 1938, to November 1, 1939.

EMPLOYES' STATEMENT OF FACTS: The position of Auto Industry Clerk, Dallas Yard Office, was last bulletined as a vacancy November 22, 1937, the bulletin reading:

"Ennis, Nov. 22nd, 1937.

Yard Clerks:

Applications will be received up to and including November 27th, 1937, for position as Auto Industry Clerk, Dallas and Miller Yards, as follows:

Rate of pay—\$165.20 per month
Hours of Service—7:00 A. M. to 3:00 P. M.—Six days
per week.

Successful applicant must be a thoroughly qualified yard clerk and must own an automobile.

/s/ T. M. SPENCE,
Superintendent."

It will be noted from the bulletin that the job was assigned to work "six days per week," which, of course, excluded both dates inclusive. Bell worked 8 of the 10 work days in the period cited and Rogers worked 2. Bell was paid 8 days at \$5.33 per day, or \$42.63. Rogers was paid 4 days at \$5.33 per day or \$21.32. The \$5.33 rate paid both men represents 1/31st of the \$165.20 monthly salary. Bell was paid \$42.63 for the actual performance of 8 full and complete days of service, or at the rate of \$5.33 per day. In the same period, and on the same job, Rogers was paid \$21.32 for the actual performance of only two days of service, or at the rate of \$10.66 per day.

Rogers and Bell were paid for their combined services on the 26 work days in the month of December, 1938, as follows:

OPINION OF BOARD: The claimant was used as a relief man for Clerk W. S. Rogers who was Auto Industry Clerk at the Dallas Yard Office. Rogers was paid on a monthly basis, and was on an assignment of six days a week. The Carrier paid the claimant for the days which he worked, the per diem being figured by dividing the monthly salary by the number of calendar days in the month. It is contended that this was an erroneous method of calculation, and that the per diem rate should have been figured by dividing the monthly salary by the number of working days in the month.

We think that there is much to be said for the claimant's contention. But the following facts appear from the record: that the method adopted by the Carrier had been in vogue for a long time, that up to December, 1938, no protest had been made, that the monthly salary had been apportioned between the two men on the basis established by the Carrier; that the claim was first presented January 26, 1939, and covered eight days during the month of December, 1938; that the claim was declined and no appeal was taken; that nothing further was done until September 24, 1941, during which time the parties had had many conferences about other matters and in fact had negotiated a new agreement effective November 1, 1939, in which this particular position was put on a daily basis; that when that agreement was executed a joint statement was signed by the parties which contained the following: "All questions concerning the rates of pay have been satisfied and there are not at this time any pending disputes of this character between us."

The present claim was not filed until September 24, 1941, and covers not only the month of December, 1938, but the period back to January 1, 1938, and down to November 1, 1939, the effective date of the new agreement.

We think that this claimant has slept on his rights and is barred both by laches and estoppel. The Carrier had every right to assume by the acceptance of the pay by the claimant without protest that the amount was satisfactory. Settlement was then made with the regular incumbent on the same basis. It is true that repeated violations do not change the rule; but repeated violations acquiesced in may bring into operation the doctrine of estoppel and render it inequitable that the Carrier should be called to account. It is as if two people were sharing a fund,—in this instance a month's pay. If these parties agree on the proportions which belong to each of them, and the holder of the fund who is the debtor pays on that basis he should not afterwards be called on by either of them for a larger share.

The Committee claims that the joint statement relative to no pending disputes over rates of pay does not refer to such a case as this but applies only to general rates of pay and not to their application to particular cases. This interpretation may be correct, but just the same it does not seem reasonable that nothing would be said about the pending dispute when that statement was signed, if there was an intention to press this particular claim. The final claim, which takes the form of an appeal from the denial of the original claim, covered violations which were then almost three years old, which had not before that time been brought to the attention of the Carrier.

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 employee involved in this dispute are respectively carrier and employee 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 claim is now barred by laches and estoppel.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.