

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS  
THE DELAWARE, LACKAWANNA AND WESTERN  
RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware, Lackawanna and Western Railroad Company that D. W. Rothery, or any others who occupied the position of Ticket Agent at Watsessing Avenue, New Jersey—a one-shift office—between July 2, 1941, and October 17, 1943, inclusive, be paid one hour at pro rata rate for each working day served in the position during the period named account not being accorded a meal hour in accordance with Rule 6 of the Telegraphers' Agreement.

**EMPLOYEES' STATEMENT OF FACTS:** There is in effect and in evidence an agreement, bearing effective date of May 1, 1940, between The Order of Railroad Telegraphers and The Delaware, Lackawanna and Western Railroad Company (hereinafter referred to, respectively, as the Organization and the Carrier); copies of which are on file with the National Railroad Adjustment Board.

At Page 14 of the above mentioned agreement there is listed:

Location	Position	Rate of Pay
Watsessing Avenue	Ticket Agent	.69 per hour

The present rate is 88c an hour, pursuant to the national wage agreements of 1941 and 1943.

Watsessing Avenue is a one-shift office.

**POSITION OF EMPLOYEES:** Rule 6 of the Telegraphers' Agreement reads:

"(a) Where but one shift is worked employes will be allowed sixty (60) consecutive minutes for meals between four (4) hours and thirty (30) minutes and six (6) hours and thirty (30) minutes after starting work.

"(b) If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the pro rata rate and thirty (30) minutes, with pay, in which to eat shall be afforded at the first opportunity."

On August 24, 1943, the Organization's local representative, who works a regular position and who does not have too much time to police hours of assignment, learned the week-day assignment at Watsessing Avenue, a one-shift office, was 5:30 A. M. to 2:00 P. M., one-half hour for lunch; this in spite of the provisions of Rule 6 of the Telegraphers' Agreement. The local representative immediately, or on August 24, 1943, called the attention of his Superintendent to the improper assignment, or at least to the improper payments made for the meal hour worked. The last paragraph of the letter to the Superintendent reads:

"In view of the assignment, a sixty (60) consecutive minute meal period has not been and is not being afforded this position, therefore, this is a formal protest and claim in behalf of Mr. Donald W. Rothery and/or

See Award 9039—First Division—Citing Third Division Cases,

**Award 2542, Third Division.**

"Employees should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulation of pay."

**Award 2137—Third Division**

The best test of what the parties intended by their agreement is by an—

"appraisal of their practical construction of the working agreement **by conduct.**"

**Skidmore vs. Swift**

U. S. Supreme Court, 322 US 723

Here two Local Chairmen, who worked the job themselves, concurred in the "practical construction of the working agreement **by conduct**" for over three years. This estops the Organization.

"The Organization stands in no higher position with respect to the claim than does the person on whose behalf it is filed."

**Award 2281—Third Division**

There can be no doubt in view of the foregoing principle that the employees concurred in the Carrier's construction of the agreement.

**(2) Even Were Rule 6 Violated The Claim Should Be Denied:**

No argument is necessary on this point.

This Board has spoken so conclusively on the subject that we need only repeat its language. In Award 2593 it said:

"Nor do we think a penalty should be imposed on the Carrier by reason of assigning a claimant a lunch hour contrary to the provisions of Rule 40. **That lunch hour had been assigned to the claimant long prior to the effecting date of the controlling agreement.** And through inadvertence on the part of the Carrier and acquiescence on the part of the claimant was continued in effect until this controversy arose. As soon as the violation was called to the Carrier's attention claimant was assigned a lunch hour in accordance with the provisions of Rule 40. Under the circumstances we decline to invoke a penalty against the Carrier."

**Award 2593—**

Since there was no violation of the agreement, and even if there was the acquiescence of the claimant precludes an affirmative award, the claim should be denied.

**OPINION OF BOARD:** This claim is for pay, at pro rata rate, for one hour each day that the Ticket Agent at Watsessing Avenue, New Jersey, was not allowed a meal period (sixty consecutive minutes) between four (4) hours and thirty (30) minutes and six (6) hours and thirty (30) minutes after starting work, in accordance with the provisions of Rule 6 (a).

Based on the facts and circumstances of this case, the claim should be sustained for the period August 24, 1943, to October 18, 1943.

**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 employees involved in this dispute are respectively carrier and employees 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 will be sustained for the period August 24, 1943, to October 18, 1943, in accordance with the Opinion.

#### AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson,  
Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1945,