Award No. 3038

Docket No. MW-3052

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

John G. Akerstrom	J. W. MacCormack
Fred L. Bryant	B. C. Maddox
Charles Cannon	Charles C. Moore
M. C. Cripps	J. H. Patten
Charles G. Dedo	Carl Schmidt
Ralph E. Dennison	Paul Smith
M. O. Griffith	George E. Thompson
Julius Johnson	W. E. Vincent
C. P. Jones	Charles Walburn
Howard J. Kelley	Leo B. White

Union Station Maintainers, shall be paid at the rate of time and one-half for all time worked on their regular assigned day of rest retroactive to May 24, 1941, the effective date of the governing agreement.

EMPLOYES' STATEMENT OF FACTS: Under the terms of Agreement between the Kansas City Terminal Railway Company and the Brotherhood of Maintenance of Way Employes governing hours of service and working conditions of employes in the Union Station Maintenance Department, the claimants, Union Station maintainers, were regularly assigned to eight hours per day, six days per week, with one rest day in seven. Such rest day may be either on Sunday or on a week-day. Where a week-day is assigned as the employe's rest day that day is equivalent to Sunday as far as the individual employe is concerned. When the employe is called or required to work on his regularly assigned rest day, he is entitled to pay therefor in conformity with the provisions of the Agreement Rules.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: As stated in the Employes' Statement of Facts, the Union Station maintainers, claimants here involved, were and are regularly assigned eight hours per day, six days per week, with one day of rest in seven or in the week. For that assigned service they are paid a monthly salary based on 204 hours per month. When called upon and required to work on their regularly assigned day of rest, be such day of rest on a Sunday or on a week-day, the employe is entitled to payment for such service on his day of rest under the application of the Call Rule, No. 33, which reads:

contract supersedes an existing practice and when the practice is continued after an agreement is made, the agreement may be enforced at any time even though the parties may have estopped themselves from any retroactive benefits by their acquiescence in the continuance of the practice." (Underscoring added.)

To show the parallel of cases, in the instant case the Organization had full knowledge of the fact that Maintainers were being paid pro rata for seventh days worked and made no objection thereto until presenting the claims adjudicated in Awards Nos. 2557, 2558, 2559 and 2560, the earliest of which was for December 15, 1942. From the date of the Agreement, May 24, 1941, the Organization acquiesced in the Carrier's continuation of past practice with respect to the payment of pro rata for work performed on seventh days. The Carrier holds that several recent Awards of this Board have ruled against the proposition of allowing claims for dates prior to the date they were filed. See Awards Nos. 2784, 2785, 2829, 2841 and 2849.

OPINION OF BOARD: A brief resume of the factual background is necessary for a proper understanding of this claim.

The Petitioner is the System Committee of the Brotherhood of Maintenance of Way Employes. The claim is asserted on behalf of twenty named employes in the Carrier's Union Station Maintenance Department at Kansas City. Two of these employes are deceased and are here represented by virtue of authorizations signed by their widows. Prior to May 24, 1941, the Claimants had no collective bargaining representation, but on that date the current Agreement became effective.

About February 15, 1943, a controversy arose between the Petitioner and the Carrier as to the proper interpretation and application of certain Rules contained in said Agreement. That controversy had particular reference to whether occupants of regularly assigned six day a week positions were entitled to pro rata or time and a half pay for work performed on their rest days. Failing to reconcile the dispute on the property, the Petitioner filed four ex-parte submissions with this Board. These claims were duly progressed and ultimately resulted in Awards sustaining the Petitioner's contentions as to the meaning of the Rules and ordering that the Claimants be compensated at the punitive rate or the work involved, with which awards and orders the Carrier promptly and fully complied. The pertinent data as to those proceedings is disclosed by the following tabulation:

Award	Claimant	Dates of Services Involved	Claim Filed	Date of Award
2557	M. C. Cripps	Jan. 4 and 11, 1943	Nov. 5, 1943	May 11, 1944
2558	Carl Schmidt	Jan. 11 and 25, and Feb. 8, 1943	Nov. 5, 1943	May 11, 1944
2559	Paul Smith	Feb. 17 and 24, and March 3 and 17, 1943	Nov. 5, 1943	May 11, 1944
2560	J. W. McCormack	Dec. 15, 22 and 29, 1942 Jan. 5, 12, 19, & 26, 1943 Feb. 2, 9 and 23, 1943 April 6 and 13, 1943 March 2, 9, 16, 23 & 30, 1943	Nov. 5, 1943	May 11, 1944

By the present claim, filed April 23, 1945, the Petitioner seeks to have each of the Claimants compensated at time and a half rate for all work performed by them on their regular assigned days of rest from the date of Awards 2557, 2558, 2559, and 2560, retroactively, back to May 24, 1941, the effective date of the Agreement. It is significant to note, in this connection, that among the present Claimants are the four individuals on whose behalf the previous Awards were sought and obtained. As to them, the purpose of this proceeding appears to be to carry their former recoveries back to the time the Petitioner became their bargaining representative.

The Carrier does not dispute the facts upon which the Petitioner relies, but stands upon the proposition that the Claimants are not entitled to prosecute their complaints before this Board. The theory of the defense is, in substance,

that further consideration of the subject matter of the present controversy is barred.

There are three recognized grounds upon which a Claimant may be denied the privilege of urging the merits of his complaint. These are: (a) Statutes of limitation, (b) contractual prohibitions, referred to in agreements of the character of that here before us as "cut-off" rules, and (c) the doctrines of estoppel and laches. The legislative history of the Railway Labor Act indicates, and the Supreme Court of the United States has expressly declared, that, "There is no Federal statute of limitations applicable to unadjusted claims which the Adjustment Board may consider." Order of Railroad Telegraphers v. Railway Express Agency, (1944) 321 U.S. 342. It is conceded that the applicable Agreement contains no "cut-off" rule.

The facts summarized above, therefore, call for a consideration of the doctrines of estoppel and laches insofar as these are applicable to proceedings before this Board. Estoppel is a common law defense and has been defined as that which precludes a person from denying the truth of a fact that has been settled in contemplation of law. Laches pertains to equity jurisprudence and is such delay in asserting a right as works a disadvantage to another. On account of their differences in origin, laches, that is, delay in the enforcement of a right, is to be more flexibly applied than estoppel. We have gone somewhat in detail as to the above matters because of their peculiar application to the subject before us.

In approaching the issues here presented, the Claimants must necessarily be divided into two groups, namely, Claimants Cripps, Schmidt, Smith and MacCormack; and the remaining sixteen Claimants. As to the members of the first group, it must be remembered that they have already been before this Board; that their original demands related to work performed subsequent to December 15, 1942 (see MacCormack's claim, Award No. 2560); that these demands were duly recognized by awards of this Board and met by the Carrier; and that said Claimants now seek to recover upon prior claims growing out of the same continuing violation of the Agreement from its effective date to the accrual of the demands heretofore adjusted. Significantly, also, the other sixteen Claimants now seek recovery for all demands that they might have asserted between the effective date of the Agreement and the time the Carrier discontinued its improper practices and made redress for all claims therefore presented to it.

Applying the principles heretofore stated to the facts, in the light of the precedents heretofore established by this Board, we reach the following conclusions:

1. The Claimants Cripps, Schmidt, Smith, and MacCormack are not entitled to press the merits of their present claim. Having, on February 15, 1943, asserted various claims for back pay, the most remote being on behalf of MacCormack for December 15, 1942, and having obtained favorable awards and accepted the benefits thereof, they have, by their conduct, placed the Carrier in such a position as entitled it to rely upon the assumption that all claims based upon that violation of the Agreement had, as to them, been fully and finally settled. To allow these Claimants to reopen the issues at this late hour would also constitute a flagrant example of permitting a splitting of a cause of action, and would violate well-established and generally recognized principles.

2. The sixteen Claimants, other than those enumerated in the preceding paragraph, are entitled to the difference between the time and one-half rate and what they were actually paid for overtime work performed on their rest days from December 15, 1942, the earliest date involved, when the Carrier's violation of the Rules was first called to its attention, until it commenced complying with the Rules by virtue of Awards 2557, 2558, 2559, and 2560. We reach this result by reason of the fact that from the time the violation was called to the Carrier's notice it was as much obligated to pay the Claimants what they were entitled to receive as it was the duty of the Claimants to take steps to enforce payment. Neither estoppel nor laches can have any proper application to such a situation.

While we cannot point to any particular award as constituting a precedent for our disposition of this claim, we do not believe that our conclusion does any violence to the previous action of this Board.

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 employes involved in this dispute are respectively carrier and employes 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 Claimants Cripps, MacCormack, Schmidt, and Smith are barred; and that the Claimants, other than those above named, are entitled to be compensated according to the terms of the Agreement, as the same has heretofore been interpreted, from December 15, 1942, to the time the Carrier properly applied the Rules, with credit for all wages heretofore paid for work performed during that period.

AWARD

Claim denied as to Claimants Cripps, MacCormack, Schmidt, and Smith; sustained as to the others, 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 20th day of December, 1945.