Award No. 3518
Docket No. CL-3466

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, 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 General Committee of the Brotherhood that John H. Reagan, Yard Clerk, Hearne, be paid the difference between straight time paid and time and one-half payment for time worked in excess of eight hours August 28th, 1942, September 12th, 1942, November 26th, 27th and 28th, 1942, December 3rd, 4th, 7th, 8th 14th and 29th, 1942, and January 3rd, 1943, as required by Rule 36.

EMPLOYES' STATEMENT OF FACTS: In the period involved here John H. Reagan did not hold a regular assignment but held himself available for use and was used, in the performance of service as an extra clerk in the Hearne Yard Office. He doubled, that is, worked two tours of duty, 16 hours, on the dates shown below:

8-28-42—Jobs	2	&	11—	3:59PM	to	11:59PM—	11:59PM	to	7:59AM
9-12-42—Jobs	16	&	11—	7:59AM	to	3:59PM—	11:59PM	to	7:59AM
11-26-42—Jobs	16	&	2—	7:59AM	to	3:59PM—	3:59PM	to	11:59PM
11-27-42—Jobs	16	&	11—	7:59AM	to	3:59PM—	11:59PM	to	7:59AM
11-28-42—Jobs	2	&	11—	3:59PM	to	11:59PM—	11:59PM	to	7:59AM
12- 3-42—Jobs	2	&	12—	3:59PM	to	11:59PM—	11:59PM	to	7:59AM
12- 4-42—Jobs	2	&	12—	3:59PM	to	11:59PM—	11:59PM	to	7:59AM
12- 7-42—Jobs	16	&	2—	7:59AM	to	3:59PM—	3:59PM	to	11:59AM
12- 8-42—Jobs	2	&	11—	3:59PM	to	11:59PM—	11:59PM	to	7:59AM
12-14-42—Jobs	10	&	11—	3:59PM	to	11:59PM—	11:59PM	to	7:59AM
12-29-42—Jobs	10	&	11—	3:59PM	to	11:59PM—	11:59PM	to	7:59AM
1- 3-43—Jobs	16	&	2—	7:59AM	to	3:59PM—	3:59PM	to	11:59PM

The time worked by Reagan an each second tour of duty on each of the dates named was time in excess of 8 hours within the meaning of Rule 36. Reagan was paid for both the first and second tours of duty (16 hours) on each of the dates named at the pro rata daily rate. Rule 36 makes no distinction between extra men and regular men in the matter of payment for services performed in excess of 8 hours in any calendar day. There are not now, nor have there ever been, any agreements or mutual understandings to the contrary. Representatives of the Carrier and representatives of the Employes are agreed as to all of the foregoing facts.

The Carrier has declined Reagan's claim for payment at the time and one-half rate for time worked in excess of 8 hours on each of the dates named as shown. The last conference was held May 31st, 1946.

than two years after the service was performed and that John H. Reagan was paid pro rata rates exactly as he claimed the time and just as all furloughed and extra Clerks were paid for working two positions within the sonal reasons or otherwise. It is further shown that furloughed and extra same twenty four hour period relieving regular Clerks laying off for per-Clerks were given the privilege of performing work in this manner to increase their earnings and work more days, and at the same time providing convenience for the regular Clerks permitting him to lay off as they wished and that this practice which had been in effect for more than twenty years and under the current and preceding agreement and known to all employes affected and representatives of the Organization, was stopped because of the prosecution of the R. L. May case which was settled by agreement on January 29, 1943 and that at that time there were no other such claims of record before the Management for settlement. The time worked by Reagan included in the instant claim had been performed prior to the settlement of the May case and the submission of the Reagan claim for collection by the Organization was not initiated until more than two years after the work was performed and that John H. Reagan and the Organization in his behalf are now barred by limitations under the doctrine of laches and stale demands from successful prosecution of the claim here asserted.

Wherefore, premises considered, the Carrier respectfully requests that the claims and contentions of the Organization be, in all things, denied.

OPINION OF BOARD: On twelve specified dates between August 28, 1942, and January 3, 1943, Claimant Reagan worked two eight-hour shifts within a twenty-four hour period from the beginning of the first shift for which he was paid at the straight time rate. He now claims that he should have been paid the overtime rate for the second eight hours on these dates.

Claimant was an extra Yard Clerk at Hearne, Texas. The record shows that it was the practice prior to January 1943 to permit extra clerks to work more than eight hours a day and to compensate them at the straight time rate. Many instances are cited where extra clerks at Hearne worked two eight-hour shifts in one day for which they were paid at the straight time rate in accordance with the time cards they themselves filed. There is a letter in the record in which a Yark Clerk at Hearne says that from 1929 to 1937 it was the understanding and practice for extra yard clerks to receive the pro rata rate for working two eight-hour shifts in a twenty-four hour period.

The Carrier always contended this to be the rule until January 1943. It is true that the General Chairman from time to time contended these employes were entitled to the time and one-half rate for the second eight hours under the overtime rule. But in each instance, the General Chairman acquiesced with the Carrier by accepting a lesser amount or withdrawing the claim. No appeal was ever taken to this Division to ascertain the correctness of the Carrier's interpretation of the rule. However, in January 1943, the Carrier, on the basis of interpretations of similar rules on other carriers issued by this Division, concluded that the position of the Organization was the correct one. During the pendency of the negotiations in January 1943, relative to three claims for overtime pay in similar cases, Carrier's representative asked the General Chairman if he had any more claims listed on the docket. As stated in Award 2145, we think this was an inducement to the adjustment and allowance of the pending awards by leaving an inference that no other claims were to be made. While the statement was in all respects truthful, it was intended to encourage the settlement of the pending claims. All the claims then pending were paid at the overtime rate and instructions issued not to permit employes to work a second eight-hour shift except at the overtime rate. We think these circumstances bring the claim within the holdings of several awards of this Divsion requiring a denial of the claim.

Repeated violations of an agreement will not have the effect of changing the rule involved. This has been held many times by this Division. But repeated violations acquiesced in by employes may bring the doctrine of

estoppel into operation. Not only has the Organization acquiesced in the interpretation given the overtime rule by the Carrier, but the General Chairman left the impression with the Carrier it would not be called upon to pay claims other than those pending. In addition to this, Claimant claimed only straight time pay and received it. It was not until after the settlement of the claims in January 1943, and the concurrent agreement of the Carrier to accept the Organization's interpretation of the overtime rule, that Claimant undertook to make a claim. Without this occurrence, it is not likely that a claim would ever have been filed. The language of Award 2576 is particularly pertinent:

> "Where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in and, as a consequence, he acts on that belief over a long period of time, this Board will treat the matter as closed, insofar as it relates to past transactions. But repeated violations of an express rule by one party or acquiescence on the part of the other will not affect the interpretation or application of a rule with respect to its future operation."
> See also Awards 1806 and 2137.

The Carrier has agreed to interpret the overtime rule in accordance with the views of the Organization and has paid pending claims in compliance therewith, and although the agreed upon interpretation has been at all times the correct one, employes will not be permitted under such circumstances to enter a claim for additional pay for similar work completed and paid for long before the settlement and agreed upon interpretation was made. Award 2261. To permit otherwise would not only be unfair, but it would be a practical bar to the amicable adjustment and settlement of this type of labor dispute.

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 no basis for an affrmative award exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 11th day of April, 1947.