

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Grady Lewis, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim (a) That all signal maintainers employed on first trick at Tower A-4, July 16, 1945 to February 19, 1946, both dates inclusive, shall be paid straight time for the hours 12:00 noon to 1:00 P. M., and the difference in the amount paid for the hour 3:00 P. M. to 4:00 P. M. and rate and one-half that should have been paid during this period.

Claim (b) That all signal maintainers employed on second trick, Tower A-4, July 16, 1945 to February 19, 1946, both dates inclusive, shall be paid straight time for the hour 3:00 P. M. to 4:00 P. M. and the difference in the amount paid for the hour 11:00 P. M. to 12:00 midnight and rate and one-half that should have been paid during this period.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the Brotherhood of Railroad Signalmen of America and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company governing rates of pay, hours of service, and working conditions of employees in the Signal Department. The agreement was revised effective April 16, 1946; however, the previous agreement, effective November 1, 1938, governs in this dispute.

For a number of years prior to July 15, 1945, the Carrier employed one signal maintainer at Interlocking Tower A-4, Chicago Terminal, with assigned hours from 7:00 A. M. to 12 noon and from 1:00 P. M. to 4:00 P. M. Effective July 16, 1945, a second shift was added with assigned hours from 4:00 P. M. to 12:00 midnight, with no change in assigned hours on the first shift.

At the request of the General Chairman, and in compliance with provisions of Rule 7 of the agreement governing, and effective February 20, 1946, the assigned hours for the first trick were changed to 7:00 A. M. to 3:00 P. M., with twenty minutes for lunch without loss of time, and the second trick was changed to 3:00 P. M. to 11:00 P. M., with twenty minutes for lunch without loss of time.

Rules of the agreement in force during the period of this dispute and relevant thereto read as follows:

"Rule 7. Where two (2) or three (3) shifts are worked, the spread of each shift shall be eight (8) hours including an allowance of twenty (20) minutes for lunch without loss of time. Except by mutual agreement between the Management and the General Chairman, the second shift shall immediately follow the first shift or may

So long as the first shift ended at 4:00 P. M. and the second shift was assigned eight consecutive hours beginning at 4:00 P. M., there was no violation of of Rule 7. In other words as the first shift ended at 4:00 P. M. and the second shift started at 4:00 P. M. and covered a spread of eight (8) hours, including an allowance of twenty (20) minutes for lunch without loss of time, the manner in which the second shift was assigned did not constitute a violation of the rule.

The Board members will please understand that at no time during the period July 16, 1945, to February 19, 1946, did the individuals employed on these positions of signal maintainers claim any additional time other than that actually worked. In other words, the employes on the first shift assigned 7:00 A. M. to 4:00 P. M. with one hour for meal only claimed eight hours and the same is true with the employes on the second shift who were assigned 4:00 P. M. to 12 midnight. While technically the first shift assignment was not proper because the employee assigned thereto should have been assigned eight consecutive hours at the time the second shift was established, nevertheless it is the responsibility of the individual employes and the Organization to police the agreement and see that the same is complied with as much as it is the responsibility of the Carrier, and had the Carrier's attention been called to the assignment not being proper, or had the employes on the first shift claimed nine hours for the spread of time 7:00 A. M. to 4:00 P. M. currently, the hours of the assignment would have been corrected without delay.

So far as the employes on the second shift are concerned, there cannot possibly be any merit in their claim because they were assigned eight consecutive hours, i.e. 4:00 P. M. to 12 midnight, and while later on their hours were changed to 3:00 P. M. to 11:00 P. M., nevertheless during the period of time the first trick assignment terminated at 4:00 P. M. and the second trick assignment commenced at 4:00 P. M. and was assigned eight consecutive hours, there cannot possibly be any merit in the claim of the employes on the second trick.

So far as the employes on the first trick would be concerned, the Carrier is firmly of the opinion that where there was no objection taken to the assignment nor claims filed by the individuals for additional payment during the period July 16, 1945, to February 19, 1946, the employes should not be entitled to the penalty payment they are asking, and in that connection your Board has in different awards so held. Particular reference is made to Award No. 2635 in which the Board held:

"The continuing violation of a rule will not change or diminish its binding effect, though acquiescence in respect to such conduct may estop the claimant from recovering for the period prior to the time when said violation was called to the attention of the Carrier."

also Award No. 2934, the opinion of the Board in that award reading in part:

"While the Organization's claim dates from April 1, 1941, the first notice of it to the Carrier is dated January 17, 1942. In view of the existence of such practice for a long period without protest the Organization may not recover a penalty for the period prior to the time the violation was called to the attention of the Carrier."

OPINION OF BOARD: The facts are not in dispute nor are the applicable provisions of the Agreement.

The Carrier very frankly denies any attempt to defend the assigned hours of the first shift here involved between the dates complained of. Explanation for such assignment is attributed to a simple oversight on the part of the Signal Supervisor. Such explanation, however sincerely urged, is not a valid defense here. The Agreement is the fruit of collective bargaining, arrived at in across the table negotiations between the parties, dealing at arm's length. No equities are contemplated or provided for therein. This Board may not supply that deficiency.

Delay, for some seven months, in the presentation of the claim is urged as a waiver of the applicability of the affected rule. Since there is no rule of the Agreement that limits the time within which claims may be submitted, if the claim is barred, it must be so by conduct of the Claimants. In support of this argument, Carrier cites Awards 2635 and 2934. Examination of Award 2635 discloses that no claim for any exaction was made. The only request was for a classification of a position. While Award 2934 does limit recovery to the period covered after the violation was called to the attention of Carrier, the violation there was by a system wide basis of disseminating telephonic information and ample opportunity was given the General Committee to become acquainted with the fact of the violation. See Award 1720. Knowledge of a rule violation by two signal maintainers for the length of time complained of, is not sufficient to operate as an estoppel to recovery of the exaction. Moreover, responsibility for policing the Agreement is, primarily, that of Carrier.

It follows that Claim (a) is valid. Since to have complied with the rules, with respect to the proper spread of the first shift, it was incumbent upon Carrier to have spread the second shift from 3:00 P. M. to 11:00 P. M., time worked from 11:00 P. M. to 12:00 midnight is overtime. Claim (b) is likewise valid.

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 parties waived oral hearing thereon;

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 Agreement was violated as complained of.

AWARD

Claim (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of June, 1947.