Award No. 3886
Docket No. CL-3740

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee.

PARTIES TO DISPUTE:

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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

(1) The regular four (4) hour Sunday assignment of the two Express Clerk positions at Belen, New Mexico, is violative of the provisions and intent of the current agreement between the parties; and,

(2) J. B. Woodall, Leo Sais and/or other occupants of the two Express Clerk positions shall be paid for eight (8) hours at the rate of time and one-half on all of the Sundays occurring since October 1, 1942.

EMPLOYES' STATEMENT OF FACTS: Prior to October 1, 1942 the Express Cashier at Belen, Position No. 955, was assigned 5:00 A. M. to 2:00 P. M., with one hour out for lunch, on week days, and from 5:00 A. M. to 9:00 A. M. on Sundays. The Night Express Clerk, Position No. 956, was assigned from 1:45 P. M. to 10:45 P. M., with one hour out for lunch, on week days, and from 6:45 P. M. to 10:45 P. M. on Sundays, the Sunday tours of duty on each position being paid for at straight time rate under provisions of the December 1, 1929 agreement. The current agreement became effective on October 1, 1942 and the above assignments were continued until November 27, 1942 when Bulletin No. 139 was posted which changed the hours of assignment of both positions and eliminated the short hour Sunday assignment insofar as the Night Express Clerk, Position No. 956, was concerned. Bulletin No. 139 read as follows:

BULLETIN NO. 139

"Clovis, November 27, 1942.

All Clerical Employes,
Pecos Division.

Due to change in schedule of Train No. 24 Nov. 29th and necessary to change hours of assignment, bids will be received in this office until 12 Noon December 3rd on the following:

Position 955—Express-Cashier, Belen, assigned hours 8:00 A. M. to 5:00 P. M., 1 Hr. meal period, week days, Sunday assignment 8:00 A. M. to 12 Noon, rate $5.57 per day.

stant claim was not filed until January 20, 1945. There is mention made that an earlier claim was filed on behalf of Claimant Benson in February, 1943 but no appeal was taken from the Carrier's denial of it. Petitioner contends the earlier claim, although not pursued after Carrier's denial, was notice of protest to the Carrier, and the present claim should be allowed retroactive to its date. We cannot agree. The failure to pursue that claim indicated apparent acquiescence in the Carrier's denial, and satisfaction with the asserted long established practice which Carrier alleges was followed by the parties. Although concurrence in a practice does not change unambiguous provisions of a contract it does, under certain circumstances affect the right to claim retroactively benefits which have been waived by positive conduct. Such is the situation here."

The attention of the Board is also directed to its established practice of refusing to sustain penalties prior to the date a claim was first presented to the Carrier. See Third Division Awards Nos. 491, 693, 696, 788, 851, 932, 1273, 1274, 1284, 2700 and others.

In conclusion, the Carrier reiterates that it is apparent that the employes have resurrected the instant claim, after permitting it to lie dormant for approximately three years, solely as an afterthought following rendition of Award 3054. Under no circumstances could the handling there rightfully be considered as expeditious; to the contrary, it could only be interpreted as an abandonment of the claim. The Employes now come forward and ask the Board to assist them in their efforts to collect penalties on a claim which the Employes of their own accord failed to pursue to a final conclusion, bringing into operation the doctrine of estoppel. It is unreasonable for the Employes to assume that this Board will permit them to deliberately retard the progression of a cumulating claim for approximately three years, by failure to appeal a decision given them by the Carrier's General Manager on July 30, 1943, until July 18, 1946, and then expect to collect the accrued penalties.

The instant claim is wholly without merit or schedule support and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim by the occupants of two Express Clerk positions at Belen, New Mexico, for pay for eight hours at the rate of time and one-half for each Sunday worked since October 1, 1942, the effective date of the current agreement.

The claimants were regularly assigned eight hours each day except Sunday and were assigned for shorter periods on Sundays. One of the positions was regularly assigned eight hours work on Sundays beginning December 1, 1942, and the other on January 9, 1947.

The Carrier states that "The parties are in agreement that these two positions are necessary to continuous operation and are now properly assigned," and insists that the only question for decision here is whether the Carrier is subject to retroactive penalties since October 1, 1942.

Since there is no intimation that there has been any change in the duties of the two positions since October 1, 1942, we must assume that since that date the positions have been necessary to the continuous operation of the Carrier. It follows that since October 1, 1942, the Carrier violated the agreement on each Sunday on which it permitted the occupants of these two positions to work only a portion of the guaranteed eight hours. This was clearly decided by this Division in Award 3054 as to positions which were necessary to the continuous operation of the Carrier.

The Carrier here contends, however, that the Employes have not been diligent in progressing these claims and that prior to January 9, 1947, the Employes made no contention that these two positions were necessary to the continuous operation of the Carrier.

The Employes presented this claim to the Carrier's Superintendent at Clovis, New Mexico, November 9, 1942, in a letter by John Byrne, Division Chairman. After the claim was denied by the Division Superintendent it was appealed to the Carrier's General Manager July 7, 1943, who denied the claim on July 30, 1943. On March 13, 1944, the Employes advised the General Manager that his decision was not satisfactory and would be appealed. The claim, more formally stated, was next presented in a letter to the Assistant to the Vice President of the Carrier dated January 18, 1946. Throughout all this time the Employes had relied primarily on Article VII, Section 1, which provides that:

> "Except as otherwise provided in these rules, eight (8) consecutive hours work, exclusive of the meal period shall constitute a day's work."

And on Article VI, Section 6-a, which provides for a fixed starting time for regular assignments.

If the above facts presented the entire story the Carrier would have a strong case of such dilatory handling of the claim as to justify the refusal of this Division to permit the collection of penalties back to October 1, 1942.

During the time this case was apparently lying dormant, however, another case involving the same agreement, the same parties, and the same question was being progressed. That was the case of the Wellington Ticket Clerks, Docket No. CL-3092, Award 3054.

The General Chairman in a letter concerning this case to the Assistant to the Vice President of the Carrier dated February 4, 1947, stated:

> "Likewise, it was well known by all concerned that the Wellington Ticket Clerk case was being progressed to the N.R.A.B., Third Division, as a test case involving the short hour Sunday assignment principle on which the parties were in dispute."

The Employes also state in their original submission that after conference between the representatives of the Brotherhood and the Carrier on January 21, 1943, and again on January 26-29, 1943, that on the question of calls and short hour Sunday and holiday assignments under the October 1, 1942, Agreement "it developed that the parties were in hopeless disagreement and employes' committee advised that test case would be selected and ultimately presented to the N.R.A.B., Third Division, for the purpose of securing, by Award, an interpretation of the rules".

At no place in this record is there a denial by the Carrier of the above statements. The same representatives of the Brotherhood and of the Carrier were handling the Wellington Clerks' case and this case. A party is not guilty of laches for holding in abeyance the prosecution of cases where all parties realize that a similar case is being prosecuted as a test case.

The Carrier also insists that prior to January 9, 1947, the Brotherhood failed to mention Article VIII of the current agreement and failed to point out that these positions were necessary to continuous operation.

In his letter of October 26, 1942, John Byrne, then Division Chairman, objected that claimants were not being paid under the provisions of Article VIII. In his letter of July 30, 1943, denying this claim the Carrier's General Manager contended that Article VIII provided an exception to Section 1 of Article VI. The parties did have some discussion of Article VIII then during their early discussions of this case.

In Award 3054 the Brotherhood relied on the same Rules as in the instant case. Docket CL-3092, on which Award 3054 was rendered, also fails to disclose that in the presentation of those claims there was any mention of the positions being necessary to the continuous operation of the Carrier or any mention of Article VIII prior to the appeal of those claims to this Division.

In view of the above we must conclude that the Carrier violated the Agreement as claimed and that the claimants should be paid at time and one-half rate for eight hours work for each Sunday since October 1, 1942, they were worked only a portion of the eight hour period, less such amounts as they have heretofore been paid for such Sunday work.

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

The Carrier violated the Agreement as claimed.

AWARD

Claims sustained as indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of April, 1948.