Award No. 4039
Docket No. CL-4073

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the Clerks' Agreement:

(1) When it assigned Red Caps, Mr. A. E. Fox and Mr. Andrew Fitzgibbons, to perform service as Gatemen on Sundays and paid them at pro rata time.

(2) That Red Cap A. E. Fox be paid the difference between pro rata and punitive time for all Sundays worked as a gateman from April 21, 1946 to August 31, 1947 and subsequent Sundays worked in that capacity.

(3) That Red Cap Andrew Fitzgibbons be paid the difference between pro rata and punitive time for all Sundays worked as a gateman from May 25, 1947 to August 24, 1947 and subsequent Sundays worked in that capacity.

EMPLOYES' STATEMENT OF FACTS: Mr. A. E. Fox and Mr. Andrew Fitzgibbons, regularly assigned Red Caps, were instructed by the Carrier to leave their regular Red Cap assignments and work as Gatemen on various Sundays during the periods mentioned in the Statement of claim.

These claims were filed separately and the Carrier has seen fit to combine the two claims because of their similarity and therefore, we are filing as one submission.

Under date of September 4, 1947, Local Chairman H. A. Ferguson filed claims with the Stationmaster and copies of these claims are attached as Employes' Exhibits "A" and "B."

Replies from Stationmaster, R. F. O'Neill, dated September 9, 1947, are attached as Employes' Exhibits "C" and "D."

Copies of appeals from the decision of the Stationmaster to Superintendent Henry Miller, Jr., dated September 17, 1947, are attached as Employes' Exhibits "E" and "F."

Copies of Mr. Miller's reply dated September 20, 1947 are attached as Employes' Exhibits "G" and "H." Copies of letters dated September 30, 1947 to Superintendent Miller are attached as Employes' Exhibits "I' and "J."

Copies of Mr. Miller's reply dated October 4, 1947 are attached as Employes' Exhibits "K" and "L." Copies of Appeal to Director of Personnel, John A. Wicks, dated October 30, 1947 are attached as Employes' Exhibits "M" and "N."

Copies of Mr. Wicks' reply dated November 3, 1947, is attached as Employes' Exhibit "O."

agreement. The circumstances were similar in both claims involved and, for that reason, we have combined them into one case.

The effective agreement was consummated by the Employes and the Carrier jointly and it is the responsibility of both parties to see that its provisions are carried out. The effect of the arrangements made to have the claimants relieve gatemen, placed the former in the category of extra gatemen, and as such they should have been paid at punitive rate for any Sunday work. This feature was overlooked and they were compensated at straight time rate but no complaint was ever made by the claimants and none by the organization for a long period of time. When protest was made we immediately took corrective action.

The Carrier's property is divided up into many departments and districts, each of which is in charge of a supervisor, one of whose duties is to apply the provisions of the agreement in his territory. Likewise, the Employes have representatives in these different districts and departments for the express purpose of protecting their constituents' rights under the agreement. When the present agreement was being negotiated, the Employes requested that a sentence reading, "Copies of all bulletins and assignments will be mailed to the General Chairman," be added to the bulletin rule and that an entirely new rule be added providing the General Chairman be furnished a copy of any rulings made by the Management affecting the interpretation of any rules in order that the representatives of the Employes could better police the agreement. Their request was granted as will be noted in Rules 11 and 64 of the present agreement. Notwithstanding this acknowledgment of their responsibility in enforcing the agreement, the Employes are now trying to force payment of claims for a long period of time in which they took no action whatever to correct a misinterpretation of the agreement. It is the joint responsibility of the Carrier and the Employes to see that the Agreement is properly applied and the Employes cannot sit idly by accepting the remuneration paid by the Carrier for work performed for long periods of time and then secure retroactive adjustment.

The principle that claims for dates prior to the time presented to the Carrier are not valid has been repeatedly upheld not only by the Third but other Divisions of the National Railroad Adjustment Board as well. See First Division Awards 7205, 7239, 7893, 7926, 7932, 9038; Second Division Award 626, and Third Division Awards 2784, 2856, 3038, 3136, 3430, 3503 and 3518.

In the General Chairman's letter of October 30, 1947, quoted in our Statement of Facts, he refers to the Third Division Award 594 as supporting their position. It will be noted that the agreement concerned in that Award was effective as of May, 1923, and the condition complained of by the Employes existed since that time but no protest or claim was presented to the Carrier until in September, 1936 and the first date considered by the Board in making the Award was September 6, 1936. Rather than giving any support to the Employes' contention, the Award very definitely affirms our position that claims for dates prior to presentation to the Carrier are not valid.

Conditions and circumstances are not the same in all departments and districts of the Carrier and the agreement must be interpreted as to how the provisions apply in each particular territory. The laxity on the part of the Employes in making protest in this case, thereby depriving the Carrier of the opportunity to correct a misinterpretation of the agreement and avoid unnecessary expense, precludes any favorable consideration of claims for retroactive adjustment and they should be denied.

(Exhibits not Reproduced.)

OPINION OF BOARD: The claims have been set forth in the respective submissions and need not be restated. It is frankly conceded by the Carrier that each of the two claimants therein named performed Sunday service as stated on the dates alleged and that due to oversight both were paid at the pro rata or straight time rate in violation of Rule 44 of the applicable work-

ing Agreement providing that work of the character performed by them on Sundays should be paid at the punitive rate of time and one-half.

This the sole issue in this case is whether, under the Agreement, the Carrier is obligated to pay claimants the difference between pro rata time as paid and time and one-half for all work performed by them or is only required to compensate them in that manner for work they performed subsequent to the date of the hearing of their claim.

It will be noted the claim of Red Cap Fox commences with April 2, 1946, and that of Red Cap Fitzgibbons on May 25, 1947. From the record it appears no question was raised as to under payments in rates of pay until September 4, 1947, the date on which these claims were presented. Indeed the reasonable inference to be drawn therefrom is that claimants did not know they were entitled to the penalty rate until on or about that time. On the other hand, it appears the Carrier did have actual knowledge as early as March 26, 1945, of what the contract required and that under its terms all extra men used in the place of regular men on continuous service were to be paid for Sunday work at the penalty rate. This fact is evidenced by a letter of instruction to that effect written on such date by the Carrier's Director of Personnel to the heads of all its departments in St. Louis. It is likewise conceded the Carrier acknowledged its error as soon as the claims were presented and thereafter commenced to pay for such work in conformity with the Agreement. It refused, however, to compensate claimants for past services.

The Carrier contends that under the foregoing facts the delay of more than a year on the part of Fox and the delay of several months on the part of Fitzgibbons in presenting their respective claims should and does bar consideration of anything therein involved based on events occurring prior to September 4, 1947, the date on which they were presented for payment. We do not agree. This, in our opinion, is definitely a case where, by the express terms of the contract, the Carrier agreed to pay the rate claimed by claimants and now refuses to do so. No provision of such Agreement limits the time in which claims can be made thereunder. It also presents a situation where the Carrier unquestionably owes the amount claimed and must be assumed to have operated in contemplation of their payment. Moreover the record discloses no conduct on the part of claimants giving room for application of the equitable doctrine of estoppel or laches. In fact, except for mere oversight which is not enough grounds for the interposing of equity, if they exist, rest with the claimants. Under such circumstances we think claimants are clearly entitled to an affirmative award and have no hesitancy in holding the Carrier's contention, retroactive compensation is barred for the reasons it asserts, cannot be upheld.

It is true, as Carrier suggests, Awards of this and other Divisions of this Board can be found holding that lapse of time will bar a claim for compensation of such character. We believe that when such Awards are examined and carefully analyzed it will appear they are based upon long continued lapse of time and inaction coupled with knowledge of conditions or circumstances authorizing the equitable relief to which we have heretofore referred. In any event, we are cited to no Awards of this Division and we find none which go so far as to hold that under the facts and circumstances prevailing in this case there should be a denial of retroactive compensation.

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 Carrier violated the Agreement and the claimants should be paid for work performed at time and one-half as required by its terms.

AWARD

Claims 1, 2 and 3 sustained as stated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of August, 1948.