# Award No. 4129
# Docket No. CL-4034

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Francis J. Robertson, Referee

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## PARTIES TO DISPUTE:

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

## THE WESTERN PACIFIC RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of System Committee that J. J. Susoeff, Relief Clerk at San Francisco Freight Office be paid at his regular rate of pay for his regular assignment for days upon which he was not permitted to work the same since September 11, 1942.

**EMPLOYES' STATEMENT OF FACTS:** Through Clerks' Circular No. 132 of September 21, 1942 J. J. Susoeff was assigned to position of Relief Clerk, performing relief on position necessary to continuous operation of the Railroad at San Francisco Freight office and yard offices.

On many occasions since September 11, 1942 Susoeff has been required to suspend work on his own assignment and work an assignment other than his own.

Under date of April 23, 1945 the Local Protective Committee of this Brotherhood filed claim with Agent R. E. Barrett on behalf of J. J. Susoeff, requesting that Susoeff be paid at his regular rate of pay for his regular assignment for days upon which he was not permitted to work the same since July 1, 1942. This date was subsequently corrected to September 11, 1942.

Under date of June 2, 1945 Agent Barrett notified the Local Protective Committee that the claim was declined.

**POSITION OF EMPLOYES:** The following rules are cited from agreement between the parties bearing effective date of December 16, 1943.

> Rule 20. Except where changing assignments in the exercise of seniority rights, or where furloughed employes are used on more than one shift, time in excess of 8 hours, exclusive of the meal period, in any 24-hour period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half.
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> Employes shall not be required to suspend work during regular hours to absorb overtime.
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> In working overtime before or after assigned hours, employes regularly assigned to class of work for which overtime is necessary shall be given preference. In working overtime on Sundays and holidays, the same principle shall apply.
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> Rule 21. Employes notified or called to perform work not continuous with, before or after the regular work period or on Sun-

position at all times had been in accord with the procedure and it had not been protested by any representative of the organization, although there was an authorized representative at all times in the agent's force. Promptly after having the matter called to our attention, the situation was corrected. During the period the procedure complained of was followed, no employe was injured financially, and as stated above, prior to the presentation of this claim, all persons involved were in accord with the desirability of the method.

Carrier fails to see any justification for the retroactive penalty demanded by you, and claim is declined.

Yours truly,

/s/ E. W. Mason-HRF
Vice President and General Manager."

The position of relief clerk, here involved, has been in existence since 1922 during which period the following Clerks' Agreements have been in effect:

United States Railroad Administrations' National Agreement, Effective January 1, 1920.

Clerks' Agreement, Effective June 1, 1923.

Clerks' Agreement, Effective October 1, 1930.

Current Clerks' Agreement, Effective December 16, 1943.

**POSITION OF CARRIER:** As set forth in Carrier's Statement of Facts, this position has been in existence since 1922 and was handled no differently during Susoeff's tenure of office than at any other time. He bid for the position of his own volition and with the full knowledge of the conditions under which the positions of relief clerk were to work. Furthermore, there has always been at least one representative of the Clerks' Organization in the Agent's Office who was familiar with the fact that the clerk assigned to this position was required to work variable hours and no protest was made prior to April 23, 1945.

Carrier promptly took cognizance of the protest and without undue delay (considering that the method had been in effect for more than 20 years) took steps to correct the assignment. The circumstances in case decided by Award No. 2884 were different than those in existence in this dispute. In that case Carrier took an employe off a regular job with the specified assigned hours and used him on a position with entirely different hours. In this case the advertisement of the vacancy positively showed that the incumbent of the position was required to work various hours which were not set forth in the bulletin.

Throughout the years Carrier's agent acted in good faith and had every reason to believe that the employes and their representatives were in accord with this method of handling. Under these circumstances, claim for retroactive penalty over a period of more than 2½ years is without merit and certainly is unfair.

**OPINION OF BOARD:** Claimant, one J. J. Susoeff, was assigned to position of Relief Clerk at San Francisco Freight Office of Carrier, performing relief on a position necessary to the continuous operation of the railroad. He was appointed to this position under a Clerks' Circular advertising vacancies in clerical positions dated September 11, 1942, in which Circular this position of Relief Clerk was indicated as having various hours and at various rates. On April 23, 1945, claim was made by the Clerks on behalf of Susoeff requesting reimbursement of wage loss suffered subsequent to September 11, 1942, on the basis of eight hours straight time for his regular assignment and eight hours straight time for all work performed while held off regular assignment, plus time and one-half for working his day of rest. On June 2, 1945, the claim was denied by Carrier's Agent. At a later date, June 12,

1945, a Clerks' Circular was issued by the Carrier announcing, among other things, that bids would be received for Relief Clerk, San Francisco, six-day assignment with definite hours and definite rates for each work day set forth therein, and Susoeff was appointed to the position.

Employes rely chiefly upon Rule 20 of the December 16, 1943, Agreement and Rule 20 of the October 1, 1930, Agreement similarly worded. Rule 20 of the December 16, 1943, Agreement reads as follows:

> "Rule 20. Except where changing assignments in the exercise of seniority rights, or where furloughed employes are used on more than one shift, time in excess of 8 hours, exclusive of the meal period, in any 24-hour period, shall be considered overtime and paid on the actual minute basis at the rate of time and one-half.
>
> Employes shall not be required to suspend work during regular hours to absorb overtime.
>
> In working overtime before or after assigned hours, employes regularly assigned to class of work for which overtime is necessary shall be given preference. In working overtime on Sundays and holidays, the same principle shall apply."

The record reveals that there is little doubt that the position in question has been in existence since 1922 and was handled no differently during Susoeff's tenure of office than at any other time prior to June 16, 1945. In effect, it would appear that is conceded that the Carrier's treatment of this position prior to June 16, 1945, was in violation of the applicable provisions of the December 16, 1943, Agreement and the October 1, 1930, Agreement.

The Carrier, in resisting claim for retroactive pay, points to many decisions of this Board wherein claims for retroactive payment were denied on the basis of long periods of acquiescence by employes in Carrier's actions sometimes clearly in contravention of the terms of an agreement and sometimes occasioned because of uncertainty as to the interpretation of a rule. This defense has been variously termed as estoppel, waiver, sleeping on one's rights, and laches. A careful consideration of the many awards cited by both Carrier and Employes representatives on this subject reveals that there are some more or less irreconcilable precedents with respect to this principle. There is no doubt, however, that these awards consistently hold that a contract supersedes any existing practices and when a practice is continued after an agreement is made, the agreement may be enforced at any time, even though in some instances this Board may have held that the parties have estopped themselves from reaping any retroactive benefits by acquiescence in the continuance of such practice.

We subscribe to the belief that the dignity and the enforcibility of collective bargaining agreements cannot be maintained if, in individual instances, private agreements between the employer and an individual employe at variance with the terms of the collective agreement can be sustained. However, where there has been such a long history of acquiescence by the Employes and where there was a representative of the Brotherhood in the San Francisco Freight Office, as appears from the record in this case, it would not be unwarranted to presume that the Clerks, through their representative, had knowledge of the situation. Therefore, we believe that under these circumstances the Employes' failure to act to correct this violation constituted in effect not a change in the collective bargaining agreement but a continuing waiver of the requirements of Rule 20 thereof. This waiver, of course, was subject to being revoked at any time and it is our view that the revocation took place by notification to the Carrier of the claim on April 23, 1945. Accordingly, we hold that Claimant should be paid at his regular rate of pay for regular assignments on days upon which he was not permitted to work the same, beginning with the 23rd day of April, 1945.

There is one further element in this case which requires comment, and that is the claim of the Employes that this is a time claim and that the Carrier has violated Rule 26 for the reason that the employe was not notified

within ten days in writing as to the reason for the non-allowance of his claim made on the date of April 23, 1945. We question the applicability of Rule 26 with respect to a situation of this kind, but in any event the rule carries no penalty. Whether or not we would invoke a penalty under such rule in a proper case is a question which does not require an answer for the purposes of this opinion.

**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.

AWARD

Claim sustained beginning with the 23rd day of April, 1945.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 12th day of October, 1948.