

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE NEW YORK CENTRAL RAILROAD COMPANY
BUFFALO AND EAST**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Buffalo and East, that:

(a) The Carrier violated the rules of the Telegraphers' Agreement when and because it permitted or required section foremen, or operators of motor cars to handle train orders at Clark Mills, New York, outside the assigned hours of the agent-telegrapher, and

(b) In consequence thereof the Carrier shall now be required to pay "call" service (Rule 5 of the Telegraphers' Agreement) to the incumbent of the agent-telegrapher position at Clark Mills on each of the days listed in the Employes' Statement of Facts.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties, herein known as the Telegraphers' Agreement, bearing effective date of January 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Clark Mills is a one-man station employing one agent-telegrapher 8:00 A. M. to 5:00 P. M. (one hour out for meal) daily, except Sundays.

April 17, 1942, to and including November 3, 1947, Carrier required or permitted a section foreman, or motor car operator to copy train orders, at Clark Mills, outside of the assigned hours of the agent-telegrapher on the following dates:

April, 1942—17th, 18th, 20th, 22nd, 23rd, 24th, 25th, 26th, 27th, 30th.

May, 1942—3rd, 4th, 6th, 8th, 9th, 11th, 14th, 15th, 17th, 19th, 20th, 22nd, 24th, 25th, 27th, 28th, 29th.

June, 1942—2nd, 3rd, 5th, 7th, 8th, 9th, 10th, 12th, 13th, 16th, 17th, 19th, 20th, 22nd, 24th, 27th, 29th.

July, 1942—1st, 3rd, 6th, 8th, 9th, 10th, 12th, 14th, 17th, 18th, 20th, 21st, 23rd, 26th, 27th, 28th, 29th.

August, 1942—3rd, 4th, 7th, 8th, 9th, 11th, 13th, 15th, 17th, 19th, 20th, 24th, 27th, 29th, 31st.

In its opinion, the Board brought out the fact that "this dispute was handled on the property only for the period subsequent to February 1, 1936", and sustained the claims effective from that date.

Award 500. Claim of certain employees in the Mail and Baggage Department of St. Paul Union Depot for a minimum of eight hours' pay each day short shifts were worked, **retroactive to June 12, 1934.**

In its findings, the Board decided, "That the claim of the employees * * * shall be sustained but limited in its retroactive application * * * to February 1, 1936."

Award 540. Claim of a signal maintainer on the Toledo Division of the New York Central Railroad for payment at time and one-half rate for all service performed on Sundays from February 1, 1932 to January 16, 1933 and subsequent to July 1, 1934; also similar claim for another signal maintainer for the period May 20, 1934 to April 30, 1936.

The opinion of the Board reads in part, "In the opinion of the Board the pro rata payment * * * **since September 3, 1935 the date when claims were presented in their behalf** is in violation of the provisions of Rule 16." (Emphasis added.)

Many other awards could be cited in which your Board has followed the principle of recognizing claims only from the date first presented to the Carrier.

CONCLUSION

The evidence herein presented conclusively proves that the claim of the Employees prior to October 31, 1947, the date it was first brought to the attention of the Carrier, has no proper standing and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: From April 17, 1942, to and including November 3, 1947, Carrier required or permitted a section foreman or motor car operator to copy train orders at Clark Mills outside the assigned hours of the Agent-Telegrapher on certain specified dates set forth in the claim. The Carrier urges that the orders copied were not train orders for the reason that they referred to a track motor car and not a train. The distinction here made is not to be accepted. The fact that a track motor car may be involved does not change the classification of a train order if it is in fact such an order.

The Carrier asserts that the interpretation given the rule was in accordance with an unsigned agreement dated February 5, 1941, which had been mutually adopted by the parties. There is some evidence in the record that use of this unsigned agreement was attempted, but there is no evidence that it was ever mutually applied. For an unsigned agreement to be effective, there must have been a meeting of the minds with reference thereto, usually followed by a reliance upon the agreement by the parties. The evidence will not sustain a finding that the unsigned agreement in the present case ever became a binding agreement upon the parties to this dispute.

That the Carrier misapplied the agreement is proved by the record. The Carrier asserts, however, that the violation was not called to their attention until October 31, 1947, and that it was corrected on November 4, 1947. It is contended that under such circumstances it should not be required to make retroactive reparations and that the claim for penalty payments, if any are allowed, should commence as of October 31, 1947; the date that claim was first made.

The evidence shows that Carrier has paid claims for similar violations. The Carrier, therefore, knew the proper application of the rule. The record shows, however, that the violation at Clark Mills was not called to its attention until the claim was filed on October 31, 1947. The Organization states that "Claimant Farley filed his claims for 'call' payments with the Organiza-

tion for the dates shown in the Employees' Statement of Facts. He kept a daily record and turned the claim over to the General Chairman of the Organization to handle in his behalf". The Organization specifies 790 days between April 17, 1942 and November 3, 1947, on which violations occurred. It is clear that the Claimant knew of the violations as they occurred. He made no complaint. Apparently he was willing that these violations should accumulate into a sizable number before he voiced any protest. Not until the violations totaled the number recited did he voice a protest and file a claim.

We cannot sustain any such claim. By failing to protest to the Carrier the numerous violations which afforded him the basis for claim, he deprived the Carrier of an opportunity to correct the violation in order that he might receive a large sum of money in retroactive penalties. Such claims are contrary to the intent and meaning of the Railway Labor Act. Penalties are prescribed as a means of securing the enforcement of agreement provisions; not as a technical basis for the collection of unreasonable and excessive claims. When such facts are shown by the record, the claim will be sustained from the date the claim was first made.

But in any event, we think the case is one in which retroactive payments prior to the date that protest was made, are not properly allowable. The record shows that as claims were filed on specific violations, correction was immediately made. The record shows also that the Organization may have misled the Carrier as to the Organization's attitude in the matter. The unsigned agreement of February 5, 1941, authorized the acts here complained of. There is evidence that the Carrier assumed that it represented the attitude of the Organization due to the fact that the Organization made some use of it in pressing prior claims. The Carrier evidenced a desire to correct violations and did so when specific instances were called to its attention. This affords a basis for applying the rule announced in Awards 1289, 2137, 3430 and 3503.

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 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.

AWARD

Claim (a) sustained.

Claim (b) sustained from and after October 31, 1947.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of January, 1949.