

Award No. 6102
Docket No. MW-5987

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul G. Jasper, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

GULF, MOBILE AND OHIO RAILROAD COMPANY

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

(1) The Carrier violated the provisions of the effective agreement from September 12, 1949, to June 25, 1951, when they assigned the relief Crossing Watchman at Jefferson Street, Mexico, Missouri, to regularly perform service for four hours daily on seven days per week;

(2) Crossing Watchman J. O. Johnston and all other occupants of the relief Crossing Watchman's position at Jefferson Street, Mexico, Missouri, subsequent to September 12, 1949, be allowed an additional four hours each, at their respective rates of pay, for each day on which they were required to perform only four hours of service, because of the violation referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Carrier's rail transportation equipment operates over track facilities that intersect at grade with Jefferson Street Highway at Mexico, Missouri. It is required that twenty hours daily protection be afforded at this crossing, with this Carrier being responsible for providing one half of the required amount of protection, and the remaining half assigned to the Wabash Railroad Company.

With the 40 hour week becoming effective on September 1, 1949, numerous changes in existing assignments were being contemplated by the Carrier in order to conform with the agreement as it would be, effective September 1, 1949.

Included in such changes of assignments was the position of Crossing Flagman at Jefferson Street, Mexico, Missouri. The Carrier therefore agreed with officials of the Wabash Railroad Company, that it would provide protection for 12 hours daily on five days per week, and four (4) hours daily for two days a week, and that the Wabash Railroad would provide the remaining necessary protection.

OPINION OF BOARD: With the advent of the 40-hour week, one of the Claimants was called back to work on September 12, 1949, and was assigned as a relief Crossing Watchman at Jefferson Street, Mexico, Missouri. His assignment was four hours per day, seven days per week. The assignment was carried out until June 25, 1951.

On April 3, 1951, the Claimant was replaced by a senior employe.

Claim is made for four additional hours for each day from September 12, 1949, to June 25, 1951, contending a violation of Article 13 of the Agreement, which provides:

"Article 13—Hours of Service. Eight consecutive hours, exclusive of the meal period, shall constitute a day's work, except when due to inclement weather interruptions occur to regularly established working periods preventing eight hours' work. Only actual hours worked or held on duty will be paid for, except as provided by Article No. 19. Employes required to walk or patrol tracks on rest days or holidays will be paid according to the provisions of call rule, Article No. 16."

This claim was filed with the Carrier on April 23, 1951. The violation was corrected June 25, 1951.

Effective September 1, 1949, the Carrier issued a bulletin rearranging the crossing assignment. Copies of the bulletin were furnished the General Chairman and the Assistant Chairman of the Organization. Bulletins were also furnished the Crossing Watchman, and posted in each cabin.

The Carrier contends that its action was in good faith and that the Claimant acquiesced in the violation for approximately one year, seven months, and twenty-two days, and therefore the Carrier should not be held liable for the violation until the date the claim was filed with the Carrier.

The Agreement does not provide for a statute of limitations, which would bar the claim here involved.

Laches cannot be asserted to the facts as here found, since laches may operate as a defense only where there has been inexcusable delay in asserting a right which has resulted in prejudice to the adverse party. Lapse of time alone is not sufficient. The defense of the Carrier must have been prejudiced. This last fact is not shown.

Do the facts reveal that the Claimant acquiesced in the violation for an undue length of time?

It is a Carrier's duty to properly apply an Agreement. In this instance it did not do so. Although the Organization and the employe received a copy of the bulletin, and a copy was posted in the crossing cabin, this in and of itself cannot be interpreted as putting the parties on notice that the Agreement was being violated so that the Carrier could be relieved of the violation until the claim was filed. The responsibility for violations is that of the Carrier as long as the employe does not cause the doctrine of laches or estoppel to come into being. The Organization and the employes do have a duty to police the Agreement, but acquiescence in a violation cannot commence until the parties know of the violation.

From the record, we cannot say that either party was cognizant of the violation until the claim was presented. Therefore, the lapse of approximately one year, seven months, and twenty-two days was not an acquiescence in the violation.

The Carrier has called our attention to numerous Awards. Most of these show a past practice for a number of years, and are not in point with the facts as here presented.

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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of February, 1953.

DISSENT TO AWARD 6102, DOCKET MW-5987

The majority's conclusion herein is in error in holding that the Carrier's posting of a bulletin and furnishing copies thereof to the Organization and the employee "cannot be interpreted as putting the parties on notice that the Agreement was being violated." Such a conclusion is repugnant to the majority's recognition that "The Organization and the employees do have a duty to police the Agreement * * *."

Therefore we dissent.

/s/ C. P. Dugan

/s/ E. T. Horsley

/s/ W. H. Castle

/s/ R. M. Butler

/s/ J. E. Kemp