Award No. 6427

Docket No. CL-6125

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT & TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement at the Crawford Street station when it assigned positions to begin work outside of the hours specified in Rule 42 (a). Also

(b) Claim that all employes who have occupied such positions be paid additionally at the rate of time and one-half for all time required to report for duty in advance of the hours specified in Rule 42 (a), retroactive to date violation began.

EMPLOYES' STATEMENT OF FACTS: At the Crawford Street station work is performed covering the twenty-four hour period of the day.

At the time this claim arose, there were, among others, the following positions with hours assigned as indicated below:

Position	New No.	Old No.	Assigned Hours
Asst. Order Clerk	183	53-A	7:30 AM- 4:30 PM
Expense Bill Clerk	136	33	8:00 AM- 5:00 PM
Rate & Bill Clerk	153	41	3:30 PM-12:00 MN.
Messenger	259	98	4:00 PM- 7:30 AM
Claim Register Clerk	112	69-A	11:00 PM- 7:30 AM
Porter	278	57	12:00 MN- 8:00 AM
Messenger	260	99	12:00 MN- 8:00 AM.

One or more employes are on duty at all times, with work being performed during the entire twenty-four hours of the day.

ments as provided in Rule 42 (a) and (b). Certainly all the information that has been furnished the Employes' Representatives, such as bulletins, the statement in 1947 **(Exhibit No. 2)**, statement furnished at time of consolidation **(Exhibit No. 1)**, and no exceptions taken, would indicate very clearly that the assignments were made with the full knowledge and consent of the Organization, and that there is no basis for the claim, and it should be denied.

As indicated in paragraph (b) of Employes' Statement of Claim, this claim as presented reads "retroactive to date violation began". In this connection attention is directed to second paragraph of the Carrier's Statement of Facts where it is shown that claim was first presented to the Carrier in the General Chairman's letter of January 9, 1952. In many awards rendered in the past ten or twelve years your Board has established the principle of refusing to recognize and allow penalty claims of employes retroactive prior to date the claim or protest was submitted to the Carrier. In this respect, therefore, attention of the Board is directed to its findings in Awards 1125, 1289, 2137, 3136, 3430, 3503, 4129, 4312; also Awards 213, 2436, 3603, 4086, 4208 and 4383.

In the above awards the claims were either denied outright or limited to the date protest or claim was first submitted to the Carrier because of the Organization's long acquiescence in the practice or situation upon which a protest or claim was subsequently based and presented to Carrier. The above cited awards would limit the Organization's claims, if it has any, to January 9, 1952, the date it was first filed with the Carrier.

However, under circumstances here existing, we question whether the Organization has a bona fide claim. In support of this belief we respectfully direct attention of the Board to Awards 193 and 1325, in each of which awards a similar contention of the Clerks' Organization was denied.

The matters contained herein have been the subject of correspondence and/or conference between the parties.

(Exhibits not reproduced).

OPINION OF BOARD: The Organization contends Carrier has violated the provisions of Rule 42 of the current Agreement between the parties, by assignment of positions scheduled to begin work outside the hours as specified in the rule. For such violation the Organization contends all employes who have occupied such positions be paid at time and one-half rate for all time required to report for duty in advance of the hours specified in Rule 42 (a), retroactive to the date the violation began.

Carrier takes the position that it did not violate the Agreement, as alleged, and further that the parties did not contemplate the application of this rule to the facts before us, since the adoption of the Agreement of 1940 made no change in the practice of Carrier to make such assignments, and it became the custom and practice of Carrier to make such assignments without any complaint from the Organization, up to the time the current Agreement was negotiated and became effective July 1, 1950.

Rule 42 provides:

> "(a) All assignments will have a fixed starting time. Where work is performed covering the twenty-four (24) hour period, the starting time of each shift will be between the hours of six (6) and eight (8) A. M., two (2) and four (4) P. M. and ten (10) P. M., and midnight.
>
> "(b) In no event may the starting or ending time of any assignment be between the hours of twelve (12) midnight and six (6) A. M."

The rule is not ambiguous. It sets out specifically and clearly the periods in which assignments will have a fixed starting time, during a twenty-four (24) hour period. It also states specifically, that in no event may the starting or ending time of any assignment be between midnight and six (6) A. M.

From a review of the record, it is evident that on many occasions Carrier has had employes on duty during all periods around the clock. It is also evident the starting and ending time for assignments by Carrier were effective during the prohibitive hours as provided in Rule 42 (a). The rule expressly prohibits the starting or ending time between certain specified hours. Carrier has violated the Agreement, as alleged, and claimants are entitled to pay at the penalty rate of time and one-half, for such time as required to report for duty in advance of the hours as provided in the rule. See Awards 685, 1591, 1819. As we held in Award 6095, the appropriate penalty is to require payment to the incumbent from the proper starting time, until work actually commenced at pro rata rate, that being the proper penalty where no work was performed.

The Organization is contending that the claims be retroactive to date the violation began. This may include violations as far back as 1932. The employes have given this Board no explanation why claims have not been filed heretofore under prior agreements. The claims before us were not progressed to this Board until March 26, 1952. Nor where the claims presented to Carrier until January 9, 1952. It is the Opinion of this Board that no claims, prior to January 9, 1952, may be considered, for the reason the employes acquiesced in the action by Carrier, and made no prior claims until the filing of the matter before us. Such claims made from and after January 9, 1952, and subsequent thereto should be sustained for reasons as above stated. All claims arising prior to such date should be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 Carrier has violated the Agreement. All claims prior to date of filing with Carrier should be denied; all subsequent claims should be sustained.

AWARD

All claims prior to January 9, 1952, denied. All subsequent claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1953.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD 6427

DOCKET NO. CL-6125

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Houston Belt & Terminal Railway Company.

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3 First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The Award as made in this case has the effect of sustaining the allegations of the Organization, as more clearly set out in the Opinion, Findings and Award.

The Organization now requests an Interpretation of said Award, and urges such request, based upon facts, not included in the record before the Board at the time said Award was made.

The Board has no authority to change the meaning or intent of its Awards, either by express or implied provisions, as set out in the Railway Labor Act, or its amendments. Nor has the Board authority to consider new factual evidence, after an Award has been made and adopted. The matter was most thoroughly presented on the record before the Board.

The record clearly discloses, definitely and specifically, the positions affected by the alleged violations of the Carrier, and shows no supplementary list of positions not included in the claim as filed.

This Board has no authority to consider a factual controversy regarding the compliance or noncompliance of the terms of the Award by the Carrier. The Board has no duty to perform in policing the enforcement of its Awards.

It must not be construed, that any employe of the Carrier, will be prejudiced or denied the right to progress a claim before the Board, under the rules and Agreement between the parties with reference to the subject matter in this cause, and as prescribed by law and in accordance therewith.

Referee Donald F. McMahon, who sat with the Division as a Member when Award 6427 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 30th day of April, 1954.