

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Western Pacific Railroad Company:

(a) That the Carrier violated the terms of the Agreement between the parties, when, beginning July 28, 1949, and continuing to April 2, 1952, both inclusive, it assigned the Agent-Telegrapher M. F. Lawson, Sacramento, California, a one-shift office, to work eight (8) consecutive hours 8:00 A. M. to 4:00 P. M., with no meal period, and without pay for the meal period not allowed.

(b) That the Carrier shall be required to compensate, M. F. Lawson, at Sacramento, California, occupant of the agent-telegrapher position at this one-shift office, in accordance with the rules of the Agreement, the difference between what it has paid him and the amount agreed to be paid him for the one hour each day he worked his meal period at straight time, plus thirty (30) minutes with pay because he was not afforded time to eat.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties to this dispute bearing effective date of June 16, 1940, copies of which are presumed to be on file with your Board. This Agreement was in effect during the period involved in this dispute.

Prior to July 28, 1949, the following positions were maintained, and listed under the Telegraphers' Agreement at Sacramento:

"Sacramento Psgr. Sta. 'RA'"	Agent-Telegrapher
Sacramento Psgr. Sta. 'RA'"	Telegrapher-Clerk"

On July 28, 1949, one shift (the Telegrapher Clerk position) at the Sacramento Ticket Office was abolished. This reduction brought the remaining position under Rule 6 of our agreement. However the Carrier did not re-assign the hours, but continued to require M. F. Lawson, Agent-Telegrapher, to work from 8:00 A. M. to 4:00 P. M. without providing a meal period, and without paying Claimant Lawson the amount due him under the Agreement.

During this period in question (July 28, 1949 to April 2, 1952) there was work for the Agent-Telegrapher due to the arrival of the California

In Award No. 2849 (Docket No. TE-2665), which involved a claim similar and a rule almost identical to those of the present claim, Referee Mitchell stated as follows:

"This Division, as this Referee sees it, has been quite consistent in holding that retroactive pay will only be allowed from the date the claim or protest was made to the Carrier."

In Award No. 4129 (Docket No. CL-4034), Referee Francis J. Robertson had the following to say on the matter of retroactive pay claims:

"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 records 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."

See also Award No. 2856, Docket No. CL-2780.

Further, there can be no basis for that part of the instant claim for thirty minutes per day account not afforded time to eat lunch. Carrier asserts that, during the whole period of this claim, claimant was never denied an opportunity to eat lunch and he regularly took his lunch period with pay.

In conclusion, Carrier asserts that the claim for retroactive pay should be denied in accordance with the policy of the Third Division on this issue as stated by Referee Mitchell in Award No. 2849 (supra) and further that there is positively no merit to that part of the claim which demands thirty minutes pay per day, inasmuch as claimant was never denied an opportunity to eat his lunch.

All of the above has been presented to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: On July 28, 1949 the Carrier abolished one of two telegraphers' positions which brought Rule 6 into play:

"Rule 6. **Meal Period:** (a) Where but one shift is worked, employes will be allowed sixty (60) consecutive minutes between eleven-thirty (11:30) and one-thirty (1:30) o'clock, day or night, for meal.

(b) If the meal period is not afforded within the allowed or agreed time-limit and is worked, the meal period shall be paid for at the pro-rata rate and thirty (30) minutes, with pay, in which to eat shall be afforded at the first opportunity."

The Carrier did not then, however, reassign the hours of the remaining position in order to allow the meal period.

On February 7, 1952 Claimant filed a claim for payment, retroactive to July 28, 1949, of one hour at straight time for each day he worked his meal period plus 30 minutes at straight time account not afforded time to eat at the first opportunity.

On April 3, 1952 the Carrier changed Claimant's assigned hours to conform with the rules and indicated a willingness to pay one hour at pro rata rate because of non-allowance of meal period, but only from the date of claim on February 7, 1952. The Carrier made no offer to pay anything

on the 30 minute claim asserting that "during the whole period of this claim, claimant was never denied an opportunity to eat lunch and he regularly took his lunch period with pay." The record contains no refutation of this assertion from the Organization. This portion of the claim must, therefore, be denied. Thus the sole question before us is whether the remaining portion of the claim is good from the date of claim or from the date of initial violation, a difference of 2 years, 5 months, 10 days.

The record fails to disclose any particular reason why the assigned hours were not changed, or why this claim was not presented immediately on the heels of the institution of the single shift. By reason of the arrival of two important trains in Sacramento between 11:30 and 1:30 it was impossible, and it still is impossible, to afford the meal period within the agreed time-limit. But there is nothing in the record to indicate affirmatively that either party was aware of any violation of the Agreement by reason of continuation of the old assignment until the claim was filed.

First. The Railway Labor Act contains no time limitation on claims; and neither does this Agreement, although many do. There is, therefore, no basis for denial of this claim unless the conduct of the Claimant or of the Organization makes it inequitable, under established Board decisions, to sustain the claim.

Second. There are numerous awards partially denying claims upon the ground of waiver, estoppel, laches or unreasonable delay. But they all involve situations in which the evidence showed actual acquiescence in a mutually known deviation from the terms of the Agreement over a long period of time, such as specific understandings with employees or local chairmen (Awards 2849, 2576, 2593, 4122, 4428 and 5098) or unreasonable delay in prosecuting denied claims (Awards 2550, 4463, 4941, 5190, 6229 and 6656).

Lapse of time alone is not sufficient. There is no showing here that the Carrier has been actively misled by its adversaries to the belief that no claim would ever be presented or that the Carrier has been prejudiced in the presentation of any meritorious defense that it might have to the claim.

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 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

The Carrier violated the Agreement as claimed except for the 30 minutes not afforded time to eat and except for any payment made on account of the violation.

AWARD

Claim sustained in accordance with the foregoing Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of June, 1955.