

Award No. 7106
Docket No. TE-6953

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atlantic Coast Line Railroad, that:

(1) Carrier violated the terms of the Agreement, between the parties hereto, when commencing on October 7, 1945, and on various dates thereafter, it provided rest day relief, for D. G. Borom, Jr., Agent-telegrapher, Branford, Florida, by using an employe not having seniority on the Telegraphers' roster for such district;

(2) Carrier further violated the terms of the Agreement, when commencing October 4, 1945, and on various dates thereafter, it provided rest day relief, for Mrs. Ruth C. James, Clerk-telegrapher, Branford, Florida, by using an employe not having seniority on the Telegraphers' roster for such district;

(3) Carrier violated the terms of the Agreement, when commencing on October 28, 1945, and on various dates thereafter, it provided rest day relief, for E. R. Bush, Agent-telegrapher, Fort White, Florida, by using an employe not having seniority on the Telegraphers' roster for such district;

(4) Carrier violated the terms of the Agreement, when commencing on July 21, 1946, and on various dates thereafter, it provided rest day relief for J. C. Christopher, Agent-telegrapher, Fort White, Florida, by using an employe not having seniority on the Telegraphers' roster for such district;

(5) Carrier shall compensate D. G. Borom, Jr., Mrs. Ruth C. James, E. R. Bush and J. C. Christopher, at the rate of time and one-half, for each and every day (as shown by Carrier's records) they and each of them were deprived of employment on their rest day, by the use of an employe of Carrier not having seniority on their seniority district.

EMPLOYEES' STATEMENT OF FACTS: There is in full force and effect an Agreement between the Atlantic Coast Line Railroad Company, hereinafter referred to as Company or Carrier, and The Order of Railroad Telegraphers, hereinafter referred to as Employees or Telegraphers, governing rates of pay, wages, hours of service and other conditions of employment, for employes of Carrier covered by said Agreement. The Agreement was effec-

Waycross on each trip and while it may simply be a coincidence, the fact remains that Mr. Jenkins has not had occasion to call on the Chief Dispatcher at Waycross since the affidavit in question was prepared.

We were able for the last several years to protect rest-day relief service with employes returning from military service who held seniority on the old Waycross side of that District, although in a few instances it was necessary for the occupant of a seven-day position to work on the seventh day of the week at punitive rate of pay. In order to avoid penalty payments as above stated, the Carrier, as early as practicable, changed all of these seven-day positions involved in this claim to six-day assignments, thus eliminating the need for relief-day service. It also found it possible to abolish the position of Clerk-Telegrapher at Branford.

Here for a period of many years the Employes acquiesced in the practice outlined above without complaint. During this time the agreement between the parties was revised on several occasions and still no complaint or protest was filed. Even if there were a rule violation, which the carrier does not admit, certainly acquiescence on the part of the employes over a long period of time without complaint should bring into operation a doctrine of estoppel.

The Board on many occasions has stated that where one party, with the actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in, and as a consequence, he acts on that belief over a long period of time, the Adjustment Board will treat the matter as closed insofar as it relates to past transactions. There is no question but what the employes failed to take exception at any time to the arrangement mentioned and by their own action indicated approval of the practice of using unassigned employes interchangeably as between the two seniority districts on the Waycross District. Carrier contends there is no merit in the instant claim and requests the Board to deny it.

Data in support of the Carrier's position have been presented to the Employes' representative.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute arose from the Carrier's practice of using relief or extra men from adjoining seniority districts. The practice was acquiesced in for several years; but a few months after the adoption of Mediation Agreement A-2070 October 1, 1945, protest was entered.

In 1933 Carrier's Savannah District was merged with and became a part of the Waycross District. On January 1, 1934, the two seniority districts were combined. Since this arrangement did not prove satisfactory, at the request of the employes the two original seniority districts were restored January 1, 1936. Thereafter they became known as the "Waycross Side" and the "Savannah Side" of the Waycross District.

According to Carrier's statement, which has not been denied, it was common practice to assign relief men from one of these seniority districts to the other, throughout the period from 1936 to 1945. During World War II, when there was a shortage of men on the Waycross side, it was common practice to transfer men from the Savannah side, and vice versa. Nobody raised objection to this practice. It was mutually accepted.

However, on October 1, 1945, Mediation Agreement A-2070 became effective. Thereafter the Carrier was obligated to allow each employe one rest day each week. If no relief man was available, the regular employe might be continued at the time and one-half rate. Carrier continued to draw from one seniority district to fill in on the other. But, following the establishment of the rest day rule, this crossing from one seniority district to another often resulted in Carrier being able to cover an employe's rest day at pro rata rate where, by strict observance of the seniority groupings, it

might have had to pay the penalty rate. The employees did not object to the practice while everyone was paid pro rata rate; but when it became evident that employees were being brought in from the adjoining district to perform work at pro rata rate which, under the new rule, would be subject to the time and one-half rate if performed by those within the proper seniority unit, objection was raised. Carrier stopped the practice.

Thus, it is admitted that for a period following the adoption of the new rule, Carrier violated it. This claim is for retroactive pay for those employees within each unit who were relieved on their rest days by employees from the adjoining seniority district, after the effective date of the new rule.

Carrier contends that, since this use of men from one seniority district to help out in the other was long acquiesced in, and since the practice was terminated as soon after the new rule went into effect as requested by the employees, the matter should have ended with Carrier's agreement to comply. In short, Carrier claims that the Organization is estopped to claim reparations where a mutually accepted practice contrary to the rules was discontinued upon notice of objections being received.

The record indicates that there was discussion and correspondence between the parties relative to the practice of using Savannah Side and Waycross Side extra telegraphers interchangeably from August 5, 1946 to March 22, 1948. Employees' Exhibit 21, as well as other correspondence in the record, indicates that the Organization acquiesced in the practice for several months following the October 1945 Agreement. In view of these facts, we can only conclude that Carrier acted in good faith. After the Organization made clear its objection to the practice of using extra men interchangeably between the two seniority districts, that practice was ended.

The dates mentioned by the Organization as those when violations occurred are all dates prior to the filing of the Claim, as admitted at p. 9 in Employees' Ex Parte Submission. Since there was acquiescence at the time of these occurrences, we must hold that the Organization is estopped from pressing monetary claims for violations prior to the time it made known its objection to the practice. Awards 6263, 5526, 2576, and 4312.

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

1. That Carrier continued the practice of drawing extra men from the adjoining seniority districts for a period of time following the adoption of Mediation Agreement A-2070, October 1, 1945, as it had done prior to this agreement.

2. That for some months after October 1, 1945, there was apparent acquiescence in this practice.

3. That finally an objection was made and the Carrier discontinued the practice.

4. That the specific claims in this case are for infractions prior to the Employees' objections and for a period when there was apparent acquiescence.

5. That Employees are estopped from pressing claims for loss of earnings during such a period of acquiescence.

AWARD

The claim is denied for reasons stated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 5th day of August, 1955.