Award No. 8162
Docket No. CLX-7725

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

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

(a) The Agreement governing hours of service and working conditions between Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated at the Charlotte, North Carolina Agency November 24, 1951 when Employe Ralph W. Hunsinger was given a run-around on call; and

(b) He shall now be compensated for eight (8) hours pay at the rate of time and one-half times the straight time hourly rate of $301.81 basic per month for each Saturday work was performed in the On Hand Department beginning November 24, 1951 to and including Saturday March 21, 1953, except Saturdays April 19 and 26 and May 3, 10, 17, 24 and 31, 1952.

EMPLOYES' STATEMENT OF FACTS: Ralph W. Hunsinger, with a seniority date of October 4, 1926 is the regular occupant of position titled On Hand Clerk, Position 17, Group 1, hours of assignment 8:30 A. M. to 5:30 P. M., Monday to Friday inclusive with Saturday and Sunday as days of rest, salary $301.81 basic per month. The duties and responsibilities of this position, as set out in Bulletin 149, dated August 11, 1950, the latest covering this position are:

"Must have thorough knowledge of duties pertaining to duties of On Hand Department; handling all O. H. traffic, placing same on hand; mailing notices to shippers and consignees, make Sales Reports; render balance sheets and other duties pertaining to On Hand Department." (Exhibit "A")

Prior to Saturday November 24, 1951, the On Hand Department was closed on Saturdays and Sundays and no deliveries were made. Beginning Saturday November 24, 1951 and all subsequent Saturdays delivery of express shipments were made by the Terminal Agent and/or General Foreman assisted by a regularly assigned Clerk in a separate payroll classification not assigned to relieve the On Hand Clerk position on Saturdays.

which requires that in such circumstances the regular incumbent of the position be called on his day of rest.

Employes have failed to support their contention that the work of the On Hand Clerk was performed on the Saturdays beginning February 2, 1952 through March 21, 1953, or that the system in effect during that period of making deliveries from the On Hand room on occasion by classified employes violated the rules of the Agreement effective September 1, 1949. The claim should be denied in its entirety.

It will be observed that the claim in the instant case is for pay at punitive rate for work not performed. This Division has held in numerous Awards that the right to perform work is not the equivalent of its performance. The claim, therefore, for punitive pay is improper, even assuming there was a violation, which Carrier denies. See Award 6004.

All evidence and data set forth have been considered by the parties in correspondence and in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: At the time this dispute arose Claimant Hunsinger was the occupant of an "On Hand Clerk" position at Charlotte, North Carolina with assigned hours 8:30 A. M. to 5:30 P. M., Monday through Friday, with Saturday and Sunday off. The claim is that beginning November 24, 1951 to and including March 21, 1953, except for certain interim specified dates, Carrier violated the Agreement by failing to call in the Claimant on Saturdays to perform work accruing to his position and instead assigning such work to others. The bulletin description of On Hand Clerk duties at this location states: "Must have thorough knowledge of duties pertaining to duties of On Hand Department, handling all O. H. traffic, placing same on hand; mailing notices to shippers and consignees; make Sales Reports under Balance Sheets and other duties pertaining to On Hand Department."

The On Hand Department was closed on Saturdays following establishment of the forty hour week in September 1949. Management states that prior to November 24, 1951 deliveries were made from the On Hand room on Saturday by one of the classified employes on duty, under the supervision of an excepted supervisor, when consignees called for shipments. The Organization denies any Saturday deliveries were made from the On Hand Department during this period. In any event, it is clear that from November 24, 1951 to March 21, 1953 consignee requests for delivery from the On Hand room were complied with. The Terminal Agent or other excepted supervisor would unlock the door and assign a classified employe to make the necessary delivery. The number of such deliveries per Saturday varied, but appear to have averaged about 20. On March 23, 1953 the Carrier established a Relief Clerk position, the incumbent of which was to make deliveries in the On Hand Department from Saturday 8:00 A. M. to 4:30 P. M., among other duties. The Organization contends this action is proof that the work of an On Hand Clerk was required on Saturdays. Carrier denies this, stating the Relief Clerk was assigned to relieve a Receiving Clerk who regularly assists the On Hand Clerk, Monday through Friday, in making deliveries from the On Hand room. It is further stated the Relief Clerk makes deliveries from the On Hand Department in the same manner the Receiving Clerk does Monday through Friday.

Our first impression of this claim is the Petitioner's delay in progressing same. Although the protested practice is asserted to have begun in November 1951, the Claimant did not file a protest until August 1952. It cannot be said there was no prior knowledge of the practice. The claim was then progressed and was denied on May 12, 1953 by Carrier's highest officer designated to consider same. It was not until July 6, 1955—over two years later—that Petitioner gave notice of intention to submit the dispute to the Board. There was some further discussion between the parties until December 3, 1953 but the Carrier refused to alter its position. Petitioner's notice

to this Board was sent nineteen months thereafter. Nothing in the record indicates the Organization advised the Carrier at any time prior to July 6, 1955 concerning its intention to make further appeal.

It is argued that consideration of this claim on its merits is barred by virtue of Petitioner's unreasonable delay. We agree with this contention under the confronting facts. One of the stated purposes of the Railway Labor Act is "(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." In Award 4941 we stated:

> ". . . While it is true that a time limit in which an appeal must be taken to this Board from an adverse determination by a Carrier is not stated in the Act, or in the agreement before us it is contemplated that disputes arising under it shall be handled expeditiously. The parties are entitled to a reasonable time to appeal in the light of all the circumstances."

In the present instance we think the Petitioner allowed an unreasonable period to elapse before appealing its claim to the Board. With 26 months having passed since denial by Carrier's highest appropriate officer, and 19 months after the termination of further discussions initiated by the Organization, we think Management was entitled to conclude the Employes had accepted its adverse decision. There are no extenuating circumstances involved. The appeal must be dismissed.

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 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 the claim is barred by lapse of time.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of November, 1957.