

Award No. 2137

Docket No. CL-2141

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that all positions of Computer in the Zone Revision Bureau at Chicago be rated at \$5.00 per day as of the date the Zone was established, and to this sum shall be added any increases applicable subsequent thereto, and that all employes affected be compensated for all wage loss sustained by reason of the improper rating and assigning of the said positions.

EMPLOYES' STATEMENT OF FACTS: Effective September 16, 1930, a Zone Revision Bureau was established at Chicago, Illinois and placed under the jurisdiction of Mr. L. L. Adams, Manager, the Bureau being a part of the Accounting Department.

Effective September 16, 1930, the Chicago Zone Revision Bureau took over the revision of inbound billing, both as to rates and computing previously performed in the Agent's office of the Transportation Department at Chicago.

Effective September 16, 1930, a position of Comptometer Operator, located in the Freight Office of the Transportation Department at Chicago under the jurisdiction of Mr. E. F. Clark, Agent, with rate of \$5.00 per day, was nominally abolished; the position and work previously performed in the Transportation Department in connection with inbound billing being transferred to the Zone Revision Bureau at Chicago. The employe holding the position was denied the right to follow the work. Concurrently with the nominal abolishment of this position, a position of Computer at a rate of \$3.99 per day having been advertised by Manager L. L. Adams by Bulletin No. 3 dated September 8, 1930 to be effective as of September 16, 1930, was established in the Zone Revision Bureau and took over the duties of the nominally abolished position, and was awarded to Miss W. Kornrumpf from the outside, who held no rights whatsoever with the Railway Company.

Effective October 1, 1932, the Zone Revision Bureau at Chicago took over the work of rating and revising all outbound billing.

Effective October 1, 1932, a second position of Computer with a rate of \$5.00 per day was nominally abolished, and concurrently therewith the work was transferred into the Zone Revision Bureau, the incumbent of the position being denied the right to follow the position.

Effective with the establishment of the Bureau at Chicago September 16, 1930, a position of Computer at a rate of \$4.27 per day was established without bulletin and assigned to an employe who held no rights on the Chicago District.

were required to file tariffs and do other routine clerical work. These rates of pay had never been protested by the employees and in establishing the Zone at Chicago one of the Computers, rate \$4.27, was transferred from Ashland, and, there not being a comparable position on the Chicago Division, the additional position of Computer was established at \$3.99 per day, which rate was in conformity with rates paid for straight computing work at other Zones, which rate, as stated above, had never been protested by the employees. As a matter of fact, the employees recognized, as shown in Carrier's Exhibit "F," that only where Computers were required to do other than Computing work was a rate higher than \$3.99 called for, but in no case did they claim a rate of \$5.00 per day as now claimed in the instant case.

The attention of your Board is directed to Award 1684 in which it was decided it had no authority to fix the rate of new positions where no positions of similar kind or class existed in the seniority district in which the position was created.

The employees refer to Awards 198, 199 and 751 of the Third Division, National Railroad Adjustment Board. Those awards, however, cover entirely different circumstances and involve entirely different agreement rules. Consequently, they could have no bearing on the instant case. The attention of your Board is directed to the fact that in the instant case the agreement rules definitely provided how Zone Revision Bureaus would be set up and how positions in such bureaus would be filled, and these rules, as set out herein, were strictly complied with.

It is the Carrier's position that the rates and positions in the Zone Revision Bureau at Chicago were established strictly in accordance with the Agreement. The C. & O. Railway Clerks' Association, which represented the employees until April 10, 1935, never protested the rates or the manner in which the positions were established in this Bureau and no protest was received from The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, which secured representation of the clerks on April 10, 1935, until December 1936. In other words, this Bureau had been in operation for a period of over six (6) years; two agreements had been negotiated and employee representation changed before the first protest as to rates of pay or assignment of position in that Bureau was ever presented to the Railway.

Under these circumstances, your Board could not properly do other than deny the claim of the employees.

OPINION OF BOARD: This claim concerns solely the rates of pay applicable to the positions of computers in the Zone Revision Bureau at Chicago which the Committee claims should be rated at \$5.00 per day as of the date the positions were established instead of a lesser rate as paid by the Carrier.

The Chicago Zone Revision Bureau was established September 16, 1930. Prior to that time there had been four Zone Revision Bureaus on the system. Each zone had rate clerks and comptometer operators. The employees claim that prior to the establishment of the Chicago bureau the work of rating outbound shipments as well as the work of revising inbound shipments was performed by the Agent's Rate Clerks and Comptometer Operators, the Comptometer Operators in the office of the Agent being paid \$5.00 per day. It is unnecessary to enumerate all the details of the changes which took place in the Chicago office which resulted, as the Committee says, in transferring work formerly done by higher rated employees to lower rated employees who it is now claimed should be paid the \$5.00 rate instead of \$3.99 per day which was the rate actually put into effect for Comptometer Operators in the office of the Zone Revision Bureau. It is, however, important to bear in mind that the initial act of the Carrier out of which the present contro-

versy arises occurred in 1930 when the Bureau was established and the rate fixed, and that the subsequent acts in expanding the work of the operators extended only over the next two years. We have before us a claim to recover for back pay running back to twelve years. The first protest was not filed until December 1, 1936. There is no reasonable explanation for the delay in filing the claim in the first instance, nor for the failure to press it since it was called to the attention of the Carrier.

It is suggested that the failure to act was due to the fact that the employees until 1935 had been represented by a company dominated union. But the representatives of this very union appear to have negotiated the agreement of June 1, 1928, the alleged violation of which is for the basis for the present claim. Furthermore this mere suggestion of company domination is not sufficient in itself to overcome the ordinary presumption that pay accepted over a long period of time without protest indicates acquiescence.

Beyond this there were opportunities afforded over this period for any error to have been brought to the attention of the Carrier. A new agreement became effective in 1931 and another in 1936 and there is no intimation by anyone that this particular matter was discussed at any of the negotiations which preceded the execution of either of these agreements. If this dispute was as bitter then as it now appears to be, is it possible that nothing would have been said about it at the many conferences which the parties must have had? Then, too, there were revisions of pay rates during this period of time.

It is true that repeated violations of a rule do not change it. But repeated violations acquiesced in by employees may bring into operation the doctrine of estoppel. This is particularly true where the controversy concerns simply rates of pay. Wages are not accepted over a long period of time without protest if an employee believes that he is not receiving what is due him. Employees should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay. Awards 1289, 1806, 1811.

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 these employees are barred from maintaining their claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.