Award No. 2602
Docket No. TE-2467

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware, Lackawanna and Western Railroad, that effective in April, 1942, the carrier violated and continues to violate Rules 6-(a) and 6-(b) of the Telegraphers' agreement by assigning the agent-operator at Whitney Point, N. Y., a one-man station, to work eight consecutive hours daily, 8:00 A. M. to 4:00 P. M., with no meal period and without pay for the meal period not allowed; and that the agent-operator at this station shall be compensated in accordance with Rule 6-(b) of said agreement for the meal period thus worked on each day retroactive to the date in April, 1942, since which the meal period has not been afforded.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties, bearing effective date of May 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

At page 28 of the Telegraphers' Agreement (wage scale), referred to in the preceding paragraph, there is listed,

WHITNEY POINT Agent-Operator $156.20 per month.

(Rate shown is that in effect May 1, 1940)

Prior to April, 1942, the agent-operator at Whitney Point was assigned 8:00 A. M. to 5:00 P. M., with one hour for meal, no Sunday assignment. Effective during April, 1942, exact date not known, the assignment was changed to 8:00 A. M. to 4:00 P. M., without an hour for meal and no Sunday assignment.

POSITION OF EMPLOYES: That Whitney Point is a one-man, one-shift office is not disputed by the Carrier. Rule 6 of the Telegraphers' Agreement reads:

> "(a) Where but one shift is worked employes will be allowed sixty (60) consecutive minutes for meals between four (4) hours and thirty (30) minutes and six (6) hours and thirty (30) minutes after starting work.
>
> "(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."

"It is also understood that if the incumbents of any of the positions thus reclassified are required to work outside of the hours of assignment, as of January 13, 1933, overtime rates as provided in the Rules and Rates of Pay of January 1, 1929, will govern."

Three passenger trains, daily, stop at Whitney Point within the period 8:00 A. M. to 4:00 P. M. There was no advantage to the Railroad in requiring the Agent to work a spread of nine hours nor any reason, from the standpoint of taking care of the necessary duties to the public or the Railroad, the request for change in hours could not be granted. Furthermore, if the Agent desired to revert to the former schedule, there was no reason why he could not have so indicated to his proper officer, and the request would have been granted without the Organization having forced the change and then attempted to penalize the Railroad to the extent of one hour per day for eight and one-half months, and on the Railroad declining to be "held up" burdening your Board with a case that had behind it only the desire to embarrass the Railroad.

The understanding that has been accepted as standard practice through the terms of office of three General Chairmen, and the life of seven Agreements since May, 1919, regarding the status of Agency positions restored to the Schedule, so far as working conditions are concerned, is now repudiated and we are being deluged with trivial claims that could and should be settled on the property.

In this case, the Agent was not required to work beyond the hours of assignment in effect when the position was reclassified and there has been no violation of the recognized agreement.

He had his opportunity to take his lunch according to the provisions of Rule 6 (a). If he chose not to do this, in order to complete his work by 4:00 P. M. instead of 5:00 P. M., there certainly can be no penalty because he was permitted to leave his assignment at 4:00 P. M. The advertised hours of assignment were then in effect and are still in effect.

The absurdity of the claim is shown by the fact that because the Carrier permitted the agent, at his own request, to reduce the number of hours of his assignment from nine, with a lunch period, to a straight eight hours, with thirty minutes to eat, thus giving him an additional hour to himself, the Carrier should be penalized to the extent of one hour's pay over and above the assigned rate of the job. Surely, an operator at a small one man station has no difficulty in finding thirty minutes in which to eat.

In Awards 1289, 1806, 1811 and 2137, your Board has taken the position that "repeated violations acquiesced in by employes may bring into operation the doctrine of estoppel." Or, as stated in Docket No. 1811, "After their initial protest, for a period of almost thirteen years they acquiesced in procedure adopted by the Carrier, and thereafter up to the time of filing of this complaint made but feeble protest. During all this time three new agreements were negotiated in which no settlement of this particular matter was sought. Under well recognized principles, they are now estopped to claim that the agreement has been violated."

The Carrier contends that the same principle, except as to the violation of any agreement, is presented here and that the claim should be denied.

OPINION OF BOARD: Prior to May 11, 1942, W. G. Ryan, Agent-Operator at Whitney Point, N. Y., held a regular assignment from 8:00 A. M. to 5:00 P. M., with one hour for lunch. Ryan asked that his hours be changed to 8:00 A. M. to 4:00 P. M., with no lunch period, on account of the condition of his health. The request was granted, effective May 11, and Ryan worked under this arrangement until he was relieved on July 11, 1942. The vacancy was thereafter bulletined as an 8:00 A. M. to 4:00 P. M. position, with no lunch period, and the bid of F. P. Halloran therefor accepted on October 13,

1942. On January 11, 1943, the Organization protested to the Carrier that the assignment violated Rules 6 and 11 of the effective Agreement of May 1, 1940. On January 17 the position was readvertised on an 8:00 A. M. to 5:00 P. M. basis, with one hour for lunch, and thereafter so assigned, effective January 25, 1943.

Rule 6 provides that where but one shift is worked 60 minutes will be allowed for meals, and that if the meal period is not afforded it shall be paid for at the overtime rate. Rule 11 says that employes shall not be laid off to absorb overtime. The claim involves the contract rights of Ryan and Halloran during the period from May 11, 1942 to January 25, 1943.

The Carrier concedes that Rule 6 does not permit a straight eight-hour assignment without a meal hour, where but one shift is worked. It insists, however, that it should not be penalized for the following reasons: that the arrangement was of no advantage to it, either financially or in hours of service, but was requested by and granted to Mr. Ryan as a personal accommodation, out of consideration for his health; that Mr. Ryan has disavowed any claim to additional compensation; that the improper assignment was corrected promptly after protest was received; and that no employe has been deprived of work to which he was entitled.

The Carrier's argument is highly persuasive and would appeal to the conscience of the referee, if he had any discretion in the matter. It appears, however, that no less an authority than the Supreme Court of the United States, has declared in the case of The Order of Railroad Telegraphers v. Railway Express Co. (No. 343, decided February 28, 1944) that where collective bargaining agreements exist their terms cannot be superseded or varied by special voluntary individual contracts, even though a relatively few employes are affected and these are specially and uniquely situated. The Court based its decision upon the fundamental proposition that if it were otherwise "statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually." The decision is precisely in point, clear, positive and unequivocal, and we have no other choice than to apply the law of the land, as declared by the nation's highest tribunal. The Carrier will have to find whatever solace it can in the thought that it was motivated by a generous humane impulse, for the benefit of an unfortunate employe.

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 carrier violated the Agreement from May 11, 1942 until January 25, 1943.

AWARD

Claim sustained as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of June, 1944.

Serial No. 52

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 2602
DOCKET TE-2467

NAME OF ORGANIZATION: The Order of Railroad Telegraphers

NAME OF CARRIER: The Delaware, Lackawanna & Western Railroad 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 claim for compensation was sustained for the period May 11, 1942 to January 25, 1943. The Award required the payment of money.

The Carrier should furnish the General Chairman with the names of the employes who occupied the position during the period involved.

Referee Curtis G. Shake, who sat with the Division as a member when Award No. 2602 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 8th day of February, 1945.