

Award No. 2603

Docket No. TE-2471

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 & Western Railroad, that the agent-operator at Cresco, Pennsylvania, shall be paid in accordance with the provisions of Call Rule No. 5 of the Telegraphers' Agreement for all time on each day required by the Carrier to work outside of the regular work period since April 24, 1941, to attend to the express transportation business at the Cresco station.

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

The Telegraphers' Agreement, referred to in the preceding paragraph, at Page 20 (wage scale) lists:

CRESCO: Agent-Operator	Rate 71¢ per hour
Clerk-Operator	Rate 70¢ per hour

Rates of pay subsequent to December 1, 1941, are 81¢ and 80¢ per hour, respectively.

Effective April 24, 1941, the agent-operator's assigned hours, on instructions from the Carrier, were 8:00 A. M. to 4:00 P. M.; at intervals between April 24, 1941, and now, the assignment was from 7:00 A. M. to 3:00 P. M. The clerk-operator's assignment was 11:30 A. M. to 7:30 P. M.

Passenger and Express Train No. 5 is now scheduled to depart from Cresco at 7:07 P. M. The departing time has varied at intervals, however, at no time as early as 4:00 P. M. Passenger and Express Train No. 6 is now scheduled to depart from Cresco at 4:24 P. M., the departing time has varied, however, at no time as early as 4:00 P. M.

The agent-operator received instructions dated April 22, 1941, that effective April 24, 1941, "it will be necessary for you to be around to attend to whatever express business there is for Nos. 5 and 6, as this is work for which you receive compensation outside of your salary as agent." Those instructions have not been cancelled.

The agent-operator at Cresco, as agent for the Railroad Company, as is the usual practice, also acts as agent for the Railway Express Agency and receives as a part of his wage certain express commission.

Hill Falls Inn., Etc., and during the summer vacation season does a large express business. For the month of June, 1943, the Agent was paid \$245.65 by the Express Company. July and August commissions will be much higher.

For many years, the Agent returned to the station to look after the express on two trains—viz.: 6:24 P. M. and 6:45 P. M. (these times of arrival change with changes in Summer and Winter Train Schedules).

The present agent held the position of clerk-operator at Cresco for many years prior to March 13, 1941. The former agent retired and the agency was advertised on March 1, 1941, by the Superintendent as follows:

"Applications will be received by the undersigned during the next ten days for position of Agent-Operator at Cresco, Pa., vice M. E. Weld, retired. Rate of pay 71¢ per hour. Hours of service 8:00 A. M. to 5:00 P. M. daily, with one hour for lunch."

On March 13, 1941, N. E. Hummel, former clerk-operator, and the present agent, was assigned to the position. Shortly afterwards the assignment was corrected to a straight eight hours without lunch period—viz.: 8:00 A. M. to 4:00 P. M.

Some time during 1942, the agent spoke to the Superintendent about overtime payment for returning to the station for Nos. 5 and 6, and in answer to the inquiry as to the necessity for his coming back to the station, as the clerk-operator was on duty, to cover these trains, replied that it was to look after express. He was informed that he was paid by the Express Company for that service and that the Railroad would not allow him overtime.

For many years, these hours of assignment have been in effect, and no request for overtime was made until the present agent came on the job. So far as the Railroad is concerned, the agent is not required after 4:00 P. M. and has not been instructed to work after that time.

Reference has been made by the Organization to Third Division Award 421—O. R. T. vs. A. T. & S. F. Ry. as justifying these claims. There is no similarity whatever between the two cases. In the opinion of the Board in Award 421 it is stated "It is shown that M. D. Stayton was required to perform water pumping service outside of assigned hours * * * that there was telegraphers' correspondence relating particularly to the question of an authorization for a call to pump on Sunday; that the result of this correspondence was a specific authorization by the Superintendent for employe Stayton to take the special call for pumping work on Sunday."

It is a recognized principle of long standing that voluntary work without proper authority is no basis for a claim.

The Carrier contends that there is no rule or practice to justify the claim for overtime or call payments for work not ordered by the Railroad and that the claim should be denied.

OPINION OF BOARD: This claim is predicated upon Rule 5 of the Agreement effective May 1, 1940, which reads:

"CALL RULE

"Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

April 22, effective April 24, 1941, the carrier directed its Agent-Operator at Cresco, Pennsylvania to attend to the Railway Express business incident to two trains due at 6:24 and 6:45 P. M., after working his regular 8:00 A. M. to 4:00 P. M. assignment. The Superintendent's letter of instructions stated

that "this is work for which you receive compensation outside of your salary as agent," referring to the commissions paid the employees by the Express Agency.

The Agent-Operator immediately asked for an increase in pay, which request was ignored, although on June 2 his regular hours of service were changed to 7:00 A. M.—3:00 P. M., without reference to the order of April 22, requiring him to attend said trains after his assigned hours. The employee continued to perform such service, and on November 14, 1942, his organization demanded that he be paid overtime retroactive to April 24, 1941. To this the carrier responded by letters dated November 28, 1942, December 3, 1942, and January 22, 1943, that this employee was not being required to work on **railroad business** outside of his regular hours of assignment. The order of April 22, 1942 was not discontinued until September 28, effective October 1, 1943. The period in controversy is, therefore, from April 24, 1941 to October 1, 1943.

It is apparent that the carrier assumed that it had the right to require the employee to perform service for the Express Agency after his regular hours, without incurring liability for overtime under Rule 5. In this it was in error. See Awards 211 and 421.

The carrier's position was promptly challenged by the employee and his organization. There was no acquiescence with respect to the carrier's conduct and the controversy involves more than a matter of wages. Under these circumstances the doctrine of estoppel has no application.

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 the carrier violated the Agreement from April 24, 1941 to October 1, 1943.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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