

Award No. 2611
Docket No. TE-2468

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 the carrier violated and continues to violate Rule 2 of the Telegraphers' Agreement by assigning the agent-operator and the clerk-operator at Plymouth, Pa., a two-shift office, to work a tour of duty of eight hours within a spread of nine hours daily, and that the agent-operator and the clerk-operator at this station shall be paid one hour at time and one-half rate of their respective positions in accordance with Rules 2 and 4 of said agreement for each day such improper assignments have been or are continued in effect.

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

At page 24 of the Telegraphers' Agreement, referred to in the preceding paragraph, there is listed:

PLYMOUTH: Agent-Operator	\$205.20 per month
Clerk-Operator	.73 per month

(Rates shown are those in effect May 1, 1940)

The Plymouth agent-operator position was negotiated into the Telegraphers' Agreement effective December 2, 1939.

Prior to on or about December 17, 1942, the agent-operator's week-day assignment was from 8:00 A. M. to 5:00 P. M., one hour for meal, no Sunday assignment. The clerk-operator's week-day assignment was from 10:00 A. M. to 7:00 P. M., with one hour for meal, no Sunday assignment.

On December 17, 1942, the carrier's superintendent, after attention was called to assignments contrary to Rule 2 of the Telegraphers' Agreement, advised the Organization that effective at once the agent-operator's assignment would be from 8:00 A. M. to 4:00 P. M., week-days, no Sunday duties, and the clerk-operator's week-day assignment would be from 11:00 A. M. to 7:00 P. M., no Sunday duties. On April 8, 1943, the carrier's Vice President stated to the Organization there would be no change in assignments.

POSITION OF EMPLOYES: Rule 2 of the Telegraphers' Agreement reads:

"Except as specified in Rule 3, eight (8) consecutive hours, exclusive of the meal hour, shall constitute a day's work, except that where two or more shifts are worked, eight (8) consecutive hours with no allowance for meals shall constitute a day's work."

The same principle, except that there was no violation of any agreement, is presented here.

The Carrier further contends (quoting from Third Division Award No. 1023) "That no grievance or claim was pending and unadjusted at the time that the Amended Railway Labor Act took effect on June 21, 1934, and, therefore, the Board is without jurisdiction to consider the claim * * *," and that the claim should be denied.

OPINION OF BOARD: Prior to December 2, 1939, Plymouth, Pa., was classified as a one-man station, the force consisting of a clerk-operator under the Agreement and an agent without the Agreement. Both of these employees worked eight hours within a spread of nine, with one hour for lunch. On the above date the agent was brought under the Agreement, with the title of agent-operator. The carrier failed to assign said employees to straight eight-hour shifts, as required by Rule 2 of the Agreement which became effective May 1, 1940. This error was called to the attention of the carrier by the organization on December 9, 1942, and on December 17, following, said employees were properly assigned. The petitioner claims that each of said employees is entitled to one hour's overtime each day from December 2, 1939 to December 17, 1942, under Rule 4 of the Agreement.

The carrier does not deny that said employees were assigned in violation of Rule 2. It says, however, (1) that it is entitled to the benefit of the doctrine of estoppel, because eight within nine hour assignments were in effect at this station for many years prior to the negotiation of the current agreement and for thirty-one months thereafter, with the knowledge of the organization and without protest on its part; (2) that when protest was made the carrier acted promptly to conform to Rule 2; (3) and that if a claim for compensation was contemplated it should have been included in the organization's protest.

We cannot sustain the carrier's contentions. There is no showing in the record as to the terms of any applicable rules in effect prior to May 1, 1940. What occurred prior thereto is, therefore, immaterial to the present inquiry. It was as much the duty of the carrier to conform to the current Agreement as it was that of the employee and his organization to protest a violation thereof, and it would be inequitable to permit the carrier to reap a benefit from its own wrong. As already pointed out, the organization protested the assignment on December 9, the carrier corrected its practice on December 17, and a claim for overtime was asserted on December 18, 1942. There was, therefore, no appreciable delay in making the money demand after the proper assignment was established. Award 684 presented an entirely different situation. There, the protest was made on May 10, 1934, but there was no money demand until December 27, 1937—a delay of more than three and a half years, during which period the carrier was led to believe that its practices were satisfactory to all concerned. Here, there was no acquiescence after the subject of the original dispute was put at rest and nothing intervened to prejudice the carrier's position.

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 rules 2 and 4 of the Agreement to December 17, 1942.

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.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 2611
DOCKET TE-2468**

NAME OF ORGANIZATION: The Order of Railroad Telegraphers

NAME OF CARRIER: The Delaware, Lackawanna & Western Railroad
Company

Upon application of the representatives of the Employees 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 on a violation of rules continuing to December 17, 1942. The Award required the payment of money for the period May 1, 1940 to December 17, 1942.

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

Referee Curtis G. Shake, who sat with the Division as a member when Award No. 2611 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.