Award No. 2811
Docket No. MW-2798

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL SYSTEM

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood on behalf of John D. Waggoner, Pumper, Kentucky Division:

(1) That the Carrier violated the provision of Rule 28 of agreement effective July 1, 1922, and Rule 36 of agreement effective September 1, 1934, in reducing claimant's weekly assignment to less than six days per week; and

(2) That claimant be paid the difference between what he received and what he was entitled to receive from April 16, 1933, until such time as the assignment at Narrows, Kentucky, shall have been restored to six days per week.

EMPLOYES' STATEMENT OF FACTS: John D. Waggoner was assigned as pumper at Barlow, Kentucky. On April 11, 1933 the Carrier issued the following instructions:

> "Effective April 16th pump station at Barlow will only be operated every other day due to decrease in business. Please arrange accordingly."

Waggoner continued to work the assignment at Barlow, Kentucky, until assigned to position of pumper at Narrows, Kentucky, on December 12, 1935.

The agreed rate of pay for pumper at Barlow was $65.92 in 1933. The agreed rate of pay for pumper at Narrows at the time Waggoner was assigned at that point was $65.92. Both of these rates were predicated on the basis of 8 hours per day calendar month. These rates were subsequently increased by Mediation Agreement, effective August 1, 1937, 5¢ per hour; by order issued by the Administrator, Wage and Hours Division, U. S. Department of Labor, effective March 1, 1941, establishing a minimum rate of 36¢ per hour; by Mediation Agreement, dated December 15, 1941, applying an increase of 9¢ per hour effective September 1, 1941, adding an additional 1 cent effective December 1, 1941, or a total increase of 10¢ per hour effective December 1, 1941; by Agreement between committee representing the Carriers and committee representing employes, dated January 17, 1944, providing for an increase of 10¢ per hour effective February 1, 1943, adding an additional 1 cent effective December 27, 1943, or a total increase of 11¢ per hour effective December 27, 1943.

During the period involved in this claim Pumper Waggoner was paid for every other day, or one-half of the stipulated monthly rate.

filed July 24, 1941, continuing from April 16, 1933, which claim was handled by the General Chairman of the organization in several letters and conferences with Carrier officials from date initially filed, with, however, (4) a lapse of over 16 months in the continuity of the handling by the organization between Carrier's letter of September 25, 1942, and Mr. Noakes' letter of February 5, 1944.

The several reasons why this claim is not consistent may be summarized as follows:

1. There is no violation of any rule of the current rules agreement, in fact, there is no rule stipulating rates of pay. Past practice prevails in such cases, as is set forth in Carrier's letter of June 2, 1944, in which were cited Third Division Awards Nos. 389, 974, 982, 1109, 1178, 1397, 2137 and 2436, First Division Awards Nos. 4234 and 7615, and Second Division Awards Nos. 974 and 1011.

2. Under the provisions of Rule 26 (a) claims are cut off ten days prior to the date Carrier is put on notice regarding violation of the agreement.

3. The doctrine of laches, as invoked by the various divisions of the National Railroad Adjustment Board, must apply in instances where the handling of a case by the employes was not begun for a period as extended as in this case and, where once begun, it was again delayed for a period of nearly 17 months. See Third Division Awards Nos. 1289, 1606, 1645, 1806, 1811, 1876, 2137, 2146, 2281 and 2576.

4. The circumstances in this case are specifically covered by and permitted under the provisions of Rule 32 of the current agreement.

OPINION OF BOARD: We deem a summarization of the facts essential to a proper understanding of the issue. Therefore, they will be related as briefly as possible.

John D. Waggoner was employed as Pumper at Barlow, Kentucky, on January 19, 1924, at a rate of $65.92 per month on a six-day assignment. On April 16, 1933, the Carrier, without agreement, changed his assignment from six days to three days per week with a fixed rate of $32.96 per month and thereafter the station operated only every other day. Waggoner continued in that position until January, 1937, when the station was closed. He then displaced on the position of Pumper at Narrows, Kentucky, at a monthly rate of $32.96, which amount had been the monthly rate paid there since September, 1929. The record does not disclose but we assume for our purposes a change in the rate at Narrows on that date from $65.92 to the rate last mentioned was made under the same circumstances as the one at Barlow. Claimant retired on January 13, 1943.

The claim is the provisions of Rule 36 of the current Agreement did not permit the change from six days to three days per week, and that claimant be paid the difference between what he actually received and what he should have been paid on a six-day assignment at both Barlow and Narrows. The submission of the Petitioner does not include a claim that the present position at Narrows should be restored to that of a six-day assignment.

At the outset it should be stated that since we feel compelled to hold on other grounds that the claim should be denied no necessity exists for a determination of the question of whether the Company's action in changing the assignment at either Barlow or Narrows was permitted by the terms of the contract. Therefore, we shall not hereafter refer to that subject in this opinion.

The Carrier first contends Rule 26 (a) is a cut off rule and because of it the Petitioner is barred from maintaining it. With that contention we

do not agree. Without laboring the question we hold that the provisions of such rule do not contemplate the barring or cutting off of claims of the character here involved.

It is next contended the claim is barred by laches and that because of the situation revealed by the record there is involved in the determination of that question the equitable doctrine of estoppel. We have concluded such contention presents the decisive factor in arriving at a decision as to the rights of the parties.

In reaching our decision we have carefully reviewed the facts. It cannot be denied the Pumper in question had actual notice more than eight years prior to making any complaint of the fact his assignment had been changed, if not by formal notice from the Company by actual notice from the circumstances his hours and monthly pay check had been reduced in half. Notwithstanding, without protest he accepted compensation and continued in his position. Still more important is the fact that more than three years prior to the making of any complaint and after his position at Barlow had been done away with, he exercised his seniority rights, which, as we understand it, was a voluntary act on the part of the employe, and displaced another Pumper at Narrows with knowledge that the hours and rate of pay there were the same as had been in effect at his former location, if in fact he did not know, as the record discloses, that had been the situation there for more than seven (7) years prior to the date he exercised his seniority rights. Nevertheless he continued to accept payment for his services there without protest until July, 1941, or shortly prior thereto. As for the Brotherhood, it too failed to protest or take any notice of the action until the date referred to and we note in passing that with the condition in existence it entered into a new agreement without any material change in the provisions of the rule. This, of course, does not necessarily mean that it acquiesced in the Company's interpretation thereof, but it does evidence delay and inaction. In view of the circumstances we believe that both employe and his representative should be regarded as having had constructive knowledge of the alleged violation.

Under circumstances such as we have related when the claim involves merely the right to compensation, we are certain the far greater number of our decisions and those which are sound in principle hold to the rule that the doctrine of estoppel is applicable and that claims similar in character to this one are barred because of inaction and delay on the part of the party making them and that their laches in failing to present them within a reasonable time, make it unjust and inequitable that they should be permitted to recover. In announcing the general principle this Division in a well considered decision, Award 2137, said:

> "It is true that repeated violations of a rule do not change it. But repeated violations acquiesced in by employes 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 employe believes that he is not receiving what is due him. Employes 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."

For a few of our other decisions to the same effect, see Awards 1640, 1644, 1645, 1806, 2146, 2281, 2576 and 2623.

When it is limited to claims for reparation where an employe has accepted and received benefits over an extended period of time, such as is here involved, we believe the proper application of the well established practice was well stated and summarized in Award 2576, where Referee Shake, speaking for this Division, said:

"From the awards of this Board in which this subject has been considered we think the following conclusions may be deduced. Where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in and, as a consequence, he acts on that belief over a long period of time, this Board will treat the matter as closed, insofar as it relates to past transactions. But repeated violations of an express rule by one party or acquiescence on the part of the other will not affect the interpretation or application of a rule with respect to its future operation."

From what has been said it must be apparent our view is that this case is clearly within the intent and meaning of the first portion of the statement just quoted and should be sustained if the practice established by our decisions, which we have concluded should be adhered to, is followed.

On behalf of the Petitioner it is pointed out that some of the awards to which we have referred do not deal with direct violations but with questions of practices. We are not impressed with the suggestion. After all questions pertaining to practices spring from violations of agreements, otherwise there would never be occasion for their presentation to an administrative agency such as ours. Moreover, examination of several of such decisions reveal the claims involved were specifically referred to as having been predicated upon violations of the terms of the contract involved.

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 here involved is barred by estoppel and laches.

AWARD

Claim dismissed as to Item (1); denied as to Item (2).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of February, 1945.