Award No. 2841
Docket No. TE-2832

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Luther W. Youngdahl, 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, Delaware, Lackawanna & Western Railroad Company, that the agent-operator at West Pittston, Pa., whose regular assigned week-day hours were 7:00 A. M. to 4:00 P. M., with one hour allowed for meals, who was required to work 8:00 A. M. to 11:00 A. M. on each Sunday, December 6, 1936, through March 19, 1944, and paid at the pro rata rate for three hours worked on these Sundays, shall be paid the difference between pro rata rate and the overtime rate of time and one-half for the time worked 8:00 A. M. to 10:00 A. M. on each of these Sundays to which he is entitled under the provisions of Rule 8-(c) of the telegraphers' agreement.

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.

Rule 8-(c) of the current telegraphers' Agreement corresponds with Rule 8-(c) of the agreement effective January 1, 1929.

At page 23 of the telegraphers' agreement, there is listed:

West Pittston: Agent-Operator 78¢ per hour.

That rate has subsequently been increased by agreement to 97¢ per hour (the national wage increases of 1941 and 1943).

The week-day assigned hours of this agent-operator position have been and are 7:00 A. M. to 4:00 P. M., with a lunch hour. Sunday assignments have been, until July 22, 1944, 8:00 A. M. to 11:00 A. M. For the latter service, each Sunday from December 6, 1936, through March 19, 1944, the carrier allowed three hours' pay at pro rata rate. March 16, 1944, the carrier instructed the agent at West Pittston as to the proper computation of time worked on Sundays (which is in accord with the organization's computation) and on July 22, 1944, said agent-operator was notified by the carrier to discontinue Sunday hours at West Pittston.

POSITION OF EMPLOYES: The Telegraphers' Agreement, hereinbefore mentioned, among other rules, contains the following designated as Rule 8-(c):

> "When notified or called to work on Sundays and the above specified holidays a less number of hours than constitute a day's work within the limits of the regular week-day assignment, employes shall be paid a minimum allowance of two (2) hours at overtime rate for

"The principles of estoppel apply to the law of contracts."

Williston on Contracts 98

"An estoppel like a conclusive presumption, is a rule of substantive law masquerading as a rule of evidence."

Williston on Contracts 1508

Where compensation has been accepted year after year and pay day after pay day without complaint such quiescence is in fact acquiescence.

This Board has held in Award 2137 Referee Thaxter—

"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 accumulation of pay."

While the claim is not made by the Employe but by the General Committee, the Organization stands in no better position than the employe.

In Award 2281 this Board said:

"True, the question is raised by the Brotherhood, **but the Organization stands in no higher position with reference to the claim than does the person in whose behalf it is filed.** Long and continuing violations of an agreement do not operate to change it, but acquiescence therein for long periods, as in this case, ordinarily sets up a bar to any claim therefor, **especially wage claims.** Numerous Awards so hold."

* * * * * *

"However, **we do not base our decision on any agreement between the carrier and the employe.** It is the employe's acceptance of his position and the salary paid him for the long period of thirteen years without complaint that on the ground of laches estops him from now asserting his claim and **what he can not do directly can not be done indirectly through his Brotherhood.** On this basis alone, if none other existed, the claim will be denied."

Award 2281—Third Division

Further, this Board has held in Award 1289, Referee Rudolph, that where there has been such an extended delay the Carrier is justified in believing that employes have concurred in an arrangement, the claim should be denied.

The Carrier contends this claim is without merit and should be denied.

OPINION OF BOARD: There is no dispute about the meaning or application of Rule 8 (c). The present controversy arises over the issue whether employe is entitled to retroactive pay under the facts disclosed by the record.

Employe asserts that he actually worked three hours on Sundays whereas he was only paid for a call (two hours). Carrier contends (1) that the record does not show employe worked more than a call, and (2) that his long acquiescence in amount of pay received precludes recovery at this late date.

It fairly appears from the record that employe worked on Sundays from December 6, 1936, through March 19, 1944, for at least a call and that on his time sheet he reported three hours time on Sundays. However, it was the practice of some agents to prepare time sheets to reflect actual number of hours worked on Sunday while others prepared time sheets to reflect actual hours to be paid for on account of Sunday work. In the instant case, the record is not clear whether employe was reflecting on the time sheet the actual hours worked or number of hours for which compensation was to be had.

Assuming, however, that the Board is justified in finding that employe actually worked three hours, there is, in our opinion, an insurmountable obstacle to employe's right of recovery. For about 34 years he prepared time reports so it may be reasonably inferred that he was familiar with them.

For almost eight years he prepared time sheets and accepted pay for two hours work on Sunday without protest. It must be assumed that he is a man of at least average intelligence. Otherwise he would not have been competent to discharge the important responsibilities of his position. It does not seem reasonable to us that during the entire period of eight years he was in ignorance as to what compensation was actually due him under Rule 8 (c) for the three hours he claims to have worked on Sunday. If he actually knew he had more money coming, it would seem that after eight years of silence, he should in all fairness be barred from now asserting the claim, especially as the record is silent as to any reason for failing to protest during this time.

Though repeated violations of the rule by Carrier do not change the rule and do not absolve Carrier in all cases where no protest has been made, violations acquiesced in by employe over a long period of time may, under certain circumstances provide no right of recovery. This is especially true where, as here, there is a dispute as to the actual number of hours worked and the record is not clear as to the real situation because of the varying methods of preparation of time sheets heretofore referred to. We are fully cognizant of the fact that there is no statute of limitations which can operate against a claim of this kind. The Order of Railroad Telegraphers vs. Railway Express Agency, Incorporated, (Supreme Court of the United States, No. 343, Decided February 28, 1944.) That does not mean that employe may not be barred in certain cases from presenting a claim. In Award No. 2137, this Board, speaking through Referee Sidney St. F. Thaxter, said:

> "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. Awards 1289, 1806, 1811."

See also Awards 2281, 2784. Although 2137 had to do with rates of pay we see no difference in principle between the situation there involved and that in the instant case. In both cases employe was claiming he had more wages coming; in 2137 by virtue of rates of pay, and in this case by virtue of number of hours worked on Sunday.

Because formal protest by Committee was made in this case on February 19, 1944, we feel employe should be granted additional compensation for one hour's work at pro rata rate from February 19 through March 19, 1944.

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 employe is barred from maintaining his claim prior to February 19, 1944, when formal protest was made and that claim is allowed from February 19 through March 19, 1944.

AWARD

Limited claim allowed in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD,
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

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