Award No. 2849
Docket No. TE-2665

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Richard F. Mitchell, 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 Company, that the carrier violated Rules 6-(a) and 6-(b) of the telegraphers' agreement by assigning the operator at Kingston (Pa.) Yard Office, a one-shift office, to work eight consecutive hours daily, except Sunday, 8:00 A. M. to 4:00 P. M., with no meal period and without pay for the meal period not allowed, effective October 19, 1937, and continuing until March 16, 1943; and that operators assigned to work on this position during the period this improper assignment of hours was in effect shall be compensated in accordance with Rule 6-(b) of said agreement for the meal period thus worked on each day.

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.

Kingston Yard is a one-shift office listed at page 23 (Wage Appendix) of the current telegraphers' agreement. One "operator" position is listed thereat, rate of pay (May 1, 1940) 70¢ per hour. That rate has since been increased in accordance with the national wage agreements of 1941 and 1943.

The carrier assigned the operators, who have occupied the position in question from time to time, to work eight consecutive hours daily, except Sunday, 8:00 A. M. to 4:00 P. M. with no meal period and without pay for the meal period worked, effective October 19, 1937 and continuing until March 16, 1943.

POSITION OF EMPLOYES: Preliminarily the Board's attention is directed to the fact that this dispute is companion to the disputes now before it designated as Dockets TE-2467, TE-2468 and TE-2469 in that meal periods have not been allowed at one-shift offices such as are involved in the instant proceeding and those proceedings covered by Dockets TE-2467 and 2469, and, in Docket TE-2468, meal periods were allowed at a two-shift office when the applicable rules provide otherwise.

That Kingston Yard is a one-shift, one-man 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.

This Board has also held in Award 2137, Referee Thaxter, that "repeated violations acquiesced in by employes may bring into operation the doctrine of estoppel."

See also Award 8511, of the First Division.

On October 3 and 24, 1940, a number of cases were handled between the Carrier's General Superintendent and Mr. O. L. Chadwick, then General Chairman of the Employes, including one involving the discontinuance of the second trick position at Kingston. Mr. Chadwick wished the second trick operator at Kingston restored. His request was denied. However, at that conference no reference was made to the hours of assignment of the first trick operator. Under such circumstances the Carrier maintains that Awards 1289, 1806, 1911 and 2137 of this Division apply and that the claim should be declined.

OPINION OF BOARD: This claim is based on alleged violation of Rules 6 (a) and 6 (b) of the current agreement, effective May 1, 1940. It seeks compensation for one hour each week day from Oct. 19, 1937, to March 16, 1943, because the Employe was assigned to work eight consecutive hours and was not allowed one hour for meal period each day. Kingston Yard is a one-shift and one-man office. Rule 6 of Telegraphers' Agreement reads:

"Rule 6—MEAL PERIOD

(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."

The Carrier assigned the operator at Kingston to work eight consecutive hours daily except Sunday, 8:00 A. M. to 4:00 P. M., with no meal period and without pay for the meal period. Thus, we find there was a violation of the rule of the current agreement.

The Carrier contends, however, that the assignment was made to accommodate Operator Paradise who held the position and that he benefited by reason of being able to return home one hour earlier each day; that no complaint was made for nearly three years after the May 1, 1940, agreement became effective and that there was a voluntary agreement between the employe who filled this position and the Carrier.

The Agreement involved in this case clearly provides for an allowance for the meal period within a time specified. The Agreement is not between the Employe and the Carrier and the essence of the claim here is for the enforcement of the Agreement. Regardless of what the individual Employe may agree to, the Carrier is bound to pay him the amount the Agreement called for, see recent award of this Division, No. 2784.

If the Carrier could enter into agreements, be they voluntary or not, with its individual employes to vary the terms of the current agreement, it would certainly mean an end of collective bargaining, for what was made collectively could be promptly unmade individually.

It is next contended by the Carrier that under this record no retroactive compensation should be allowed. It is admitted that for a period of nearly three years after this agreement became effective, all concerned were content to let the straight eight-hour assignment continue and it was not until March 6, 1943, that the Organization filed any monetary claim. The record shows that on March 16, 1943, the Carrier corrected the violation.

There is a long line of awards by the First Division of this Board, some with referees and some without, that hold that the claim will not be allowed prior to the date that the protest was made to the Carrier.

This Division, as this Referee sees it, has been quite consistent in holding that retroactive pay will only be allowed from the date the claim or protest was made to the Carrier. Early in its awards this Division said, speaking through Referee Arthur M. Millard, in Award No. 491:

> "Insofar as the question of additional compensation is concerned, or the claim for a difference in wages between those received since July 1, 1935, and those claimed, the Board submits that in view of the long-standing differences of opinion between the parties as to the proper application of Rule 19 and previous rules to the points at issue, of the sincere efforts evidenced by both carrier and employes to adjust such differences in a manner satisfactory to both parties to the agreement, of the fact that the employes affected are paid on a monthly salary basis, and that this claim had not previously been submitted for hearing before this Division, no retroactive award will be made for additional compensation, but that the future compensation of these employes through the proper application of the rule or rules involved be determined by and made the subject of negotiations between the parties."

In Award 788, this Division without a referee said:

> "There is evidence that both parties were under some misapprehension as to the understanding reached during negotiation of the agreement as to the status of these claimants. When that fact became apparent an adjudication of the dispute should have been sought with more promptitude. The Board does not undertake to place responsibility for the delay but the circumstances surrounding this case are such as to justify limiting retroactive payments to the period subsequent to April 1, 1938, the approximate date definite claim was presented to the carrier."

In Award 1289, speaking through Judge Rudolph as referee, this Division said:

> "We recognize the prior awards of this Board relating to delays in presenting claims for acts which constitute continuing violations of agreements. We have no quarrel with these prior awards, however, we do not feel that these Awards are controlling of the fact situation now before us. We do not hold that mere delay will preclude this Board from considering the merits of a claim, but what we do hold is, where there has been no protest of the carrier's acts and the delay has been so extended that the carrier is justified in believing the employes have concurred in its acts, and in this belief the carrier at the demand of the employes increases rates of pay, it is too late thereafter for the employes to demand of this Board that positions, long out of existence at the time the increase in pay was granted, or the work of these positions, should be restored under the increased rates of pay."

In Award 1609, speaking through Judge Blake as referee, this Division said:

> "When the present agreement was negotiated, the 'tonnage rate' had been in effect at the Reading Transfer platform for fifteen years. Whether the Organization knew about it is immaterial. It is chargeable with knowledge of the working conditions and rates of pay existing at the time the agreement was negotiated. If it wanted the practice abolished the matter should have been made the subject of negotiation and agreement; and that is the only recourse the Organization now has. The Board cannot reform or alter the terms of the agreement.

To read Rules 17, 24, and 63 as the Organization would have us read them would be to inject into the agreement a meaning that is not expressed and cannot be inferred by any fair—much less, necessary—implication."

In Award 1806, speaking through Judge Thaxter as referee, this Division said:

"The committee has called our attention to numerous awards which hold that repeated violations of a rule do not change it. There is no doubt of this principle. But repeated violations acquiesced in by employes may bring into operation the doctrine of estoppel or there may be a bar because of laches. Awards 1289, 1606, 1640, 1645. It seems to us that this is particularly true where the controversy concerns simply the rates of pay. Employes do not ordinarily accept wages over a period of a year and a half or longer without protest if they believe they are not receiving what is due them according to the terms of their contract. They 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."

In Award 2281, speaking through Judge Fox as referee, this Division said:

"* * * Those were the only rates of pay fixed either by agreement or arbitration. But he did not protest. For thirteen years, lacking ten days, he accepted the salary paid him, including two increases in pay, without complaint, either to his employer or to his Brotherhood. Only after he was removed from the position did he raise the question. 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."

In Award 2700, speaking through Judge Carter as referee, this Division said:

"* * * No claim for monetary loss was ever presented until June 17, 1943. During all these years, the Organization acquiesced in the manner in which Carrier was classifying and paying Cafe Car Chefs. While this cannot change the agreement, it does have the effect of estopping a claim for monetary loss prior to the time actual demand was made therefor. We think the correct rule was stated in Award 2695, wherein we said: 'We must adhere to the principle that the contract supersedes an existing practice and when the practice is continued after an agreement is made, the agreement may be enforced at any time even though the parties may have estopped themselves from any retroactive benefits by their acquiescence in the continuance of the practice'."

In the very recent Award No. 2784, this Board cites other awards covering this same proposition. This Division can come to no other conclusion than that where there are long delays in filing claims such as in this case, retroactive pay should not be allowed prior to the date claim was filed with the Carrier.

It is next contended that under Rules 6 and 11, the Employes should be paid at the penalty rate rather than at the pro rata rate. With this we cannot agree. Clearly under Rule 6 if the employe was not allowed time therein provided for meals, all he is entitled to receive is the pro rata rate.

Claim will be allowed at the pro rata rate from March 6, 1943, until March 16, 1943.

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 current agreement.

AWARD

Claim will be sustained between the dates of Mar. 6 and Mar. 16, 1943.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of March, 1945.