Award No. 3002

Docket No. CL-2891

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:—

(a) The correct rate of pay for position of Completion Report Clerk occupied by Roy E. Burcham, Los Angeles General Office, is $214.15 per month instead of $201.91 per month, and

(b) That said rate be so adjusted with appropriate adjustment in wages paid retroactive to September 1, 1933.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1933 the following positions existed in the A and B section of the D. A. B., Los Angeles General Office:

Position No.	Title	Occupant	Seniority	Rate	Date Est.
363	Completion Report Clk.	C. E. Clow	6- 8-10	$183.55	1-18-32
364	" " "	R. E. Burcham	1-16-11	183.55	2- 1-32
365	" " "	J. R. Lane	10-27-16	171.31	2- 1-32
366	" " "	B. R. Jackson	12-16-18	164.46	2- 8-32
367	" " "	R. L. Morgan	4- 1-20	159.04	2- 1-32
368	" " "	W. G. Lothridge	9-15-22	159.04	2- 1-32
369	" " "	P. T. Rice	10- 1-23	152.20	1-18-32

Effective August 31, 1933 position Nos. 364 and 368, then occupied by R. E. Burcham and W. G. Lothridge, were nominally abolished Mr. Burcham exercised seniority rights over J. R. Lane and established himself on position No. 365.

When referring to the abolishment of position No. 364 we used the word "Nominally" advisedly because we expect to show that it was an abolishment in name only and that Burcham continued to perform essentially the same work and carry the same responsibilities on position No. 365 after August 31, 1933 as he had theretofore on position No. 364.

Mr. Burcham's duties on position No. 364 as of August 31, 1933 were:

1. Draw off labor, rental and repairs to equipment
2. Summarize material
3. Price and weigh material and show point of origin

duties on position No. 365 were quite similar to or closely resembled his former duties on position No. 364. The rules cited do not support any such claim. The Section 5 referred to has to do only with the establishment of new positions while the claim deals only with the abolishment of positions. The Section 6 referred to relates only to the abolishment of one position and the creation of another in its place, whereas nothing of the sort occurred in this case. There is no rule in the agreement permitting a transfer of a rate of pay from one position to another because of similarity of assigned duties, but there is a rule prohibiting any transfer of rates whatever, i. e., Section 1 of Article XII of the Agreement, reading as follows:

> "Positions (not employes) shall be rated and the transfer of rates from one position to another shall not be permitted."

This rule is valid and applicable as between two positions of a close degree of resemblance, as well as between two positions wholly dissimilar. The employes are obviously and completely in error in the assertion quoted above, that an employe may take his rate of pay with him from one position to another upon a mere showing of a close resemblance or a considerable degree of similarity between the assigned duties of the two. Yet this error is the whole substance of the claim in this case.

The employes say with respect to another citation of Section 6—

> "We believe position No. 364 was abolished for the purpose of reducing the rate of pay for the type of work performed on it."

It is difficult for the management to believe that the employes are sincere in bringing this grave charge of bad faith, in the face of the well known and wholly undisputed fact that the force reduction of August 31, 1933, which included the abolishing of position No. 364, was actually caused by an extraordinary falling off in the volume of work to be performed, that it was discussed in every detail with the employes' authorized representatives in advance of the effective date, and that it was not made the basis of any claim or charge of bad faith whatsoever until some 8½ years later.

In conclusion the Carrier asserts that:

(1) The instant claim for penalties retroactive to September 1, 1933 was not a pending an unadjusted dispute on June 21, 1934, the date of approval of the Railway Labor Act and is, therefore, not properly within the jurisdiction of the Board.

(2) The absence of any complaint from either the claimant employe or the Organization during the ensuing eight and one-half (8½) years warrants a denial of the claim on the basis of the Board's conclusions in Third Division Awards 1806, 2281 and 2605.

(3) The claim is entirely without merit and wholly lacking of support under the applicable agreement and,

(4) The employes' charge of bad faith is entirely unjustified.

OPINION OF BOARD: On August 31, 1933, there were seven Completion Report Clerks positions in the Los Angeles General Office carrying consecutive numbers 363 to 369, inclusive. On September 1, 1933, positions Nos. 364 and 368 were abolished. Claimant, the occupant of position No. 364, then exercised seniority rights to position No. 365. The former position was rated at $183.55 per month (now $214.15) and the latter was rated at $171.31 (now $201.91). It is the contention of Claimant that after he assumed position No. 365 he continued to perform relatively the same class of work that he performed when he occupied position No. 364. The claim is that under these circumstances, he should have received the same rate of pay as he received in the former position. On January 13, 1942, the first claim was filed claiming the difference in the two rates of pay from September 1, 1933 until he assumed a position paying the same rate on September 18, 1942. On November 15, 1943, due to increase of business, positions Nos. 364 and 368 were reestablished.

It is very evident from the record that there was great similarity in the working assignments of all the Completion Report Clerks. The main difference appears to be that the more difficult and intricate reports were assigned to the higher rated positions. When a reduction of force became necessary on September 1, 1933, one higher rated position (No. 364) and one lesser rated position (No. 368)) were abolished. It is natural, of course, that some of the work of the two abolished positions must be assigned to the remaining five positions. The decision is necessarily a question of fact to be determined from the record as to whether Claimant performed relatively the same class of work on position No. 365 that he formerly performed on position 364. In this respect the failure of the Claimant or the Organization to protest or object for a period of eight and one-half years is of great importance.

The record shows that the reduction of force on September 1, 1933, was made after notice to the Organization. No objection was then made. Negotiations were subsequently had in 1937 and 1941 which resulted in pay increases and still no objection was voiced. For eight and one-half years, Claimant acquiesced in the rate of pay he received while occupying position No. 365. This delay in making a claim makes it unnecessary for us to determine whether the two positions consisted relatively of the same class of work. The long acquiescence of the Claimant in the assigned rate has the effect of estopping him from now denying that it was correct and from claiming reparations for so long a period of time.

It is true that there is no statutory limitation as to the period of time in which a claim must be initiated under the Railroad Labor Act. It is also true that repeated violations of a rule do not change or abrogate it. But repeated violations, over a long period of time, and we do not here decide whether in fact there was any violation, acquiesced in by the employe may give rise to the doctrine of laches and in effect operate as an estoppel. This is particularly true where rates of pay are concerned. The Claimant is estopped from asserting a claim. See Awards Nos. 2281, 2605, 1289.

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 there is no basis for an affirmative award.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary.

Dated at Chicago, Illinois, this 29th day of November, 1945.