

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**

UNION PACIFIC RAILROAD COMPANY (Western Districts)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Union Pacific Railroad Company (Western Districts) that the Carrier violated the Clerks' Agreement:

1. When approximately October 1936 (exact date not known by the Brotherhood) it assigned Clerk H. W. Hare to the position of demurrage clerk, a six day position, to work Sunday with Saturday as the assigned day of rest, and failed to compensate Hare at punitive rate of pay on Sunday.
2. That Clerk Hare shall now be compensated the difference between pro rata and punitive rate of pay for all Sundays worked from October 1936 until February 16, 1945 at which time the violation was corrected and he has been properly compensated subsequent to that date.

EMPLOYEES' STATEMENT OF FACTS: In October 1936 H. W. Hare was assigned to the position of demurrage clerk six days per week, Sunday to Friday inclusive, with Saturday as assigned day of rest. A position that was not necessary to the continuous operation of the Carrier.

On February 1, 1945, Clerk Hare wrote the Division Chairman advising him of the length of time that he had been working the above referred to assignment and stated that it had just been called to his attention that Rule 41 was being violated and under date of February 16, 1945 Division Chairman Eoff requested the Superintendent to compensate Hare in accordance with the agreement, retroactive to the time the violation started. Attached as Exhibit "A" is Division Chairman's letter.

Under date of February 21, 1945 the Division Superintendent replied to the Division Chairman as follows:

"Your letter of February 16th, file R-41 in regard to Demurrage Clerk at Albina not being compensated at premium rate for time worked on Sunday; we are arranging to pay him premium time worked on Sunday, effective February 16th."

Under date of February 24, 1945 the Division Chairman again wrote the Division Superintendent asking that Clerk Hare be reimbursed retroactive to the time the violation started. Attached as Exhibit "B" is copy of Division Chairman's letter.

has been complied with and then after a long lapse of time enter a claim for accumulations of pay." Awards 1289, 1806, 1811. (Emphasis supplied.)

Award 3002 (Edward F. Carter, Referee) is a further statement showing how such claims are considered:

"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." (Emphasis supplied.)

The attention of this Board is also invited to the following Third Division Awards: Award No. 3168, Award No. 2784, Award No. 1289, and Award No. 788.

In conclusion, the Company asserts that because of the long passage of time involved in this claim and the consequence that full details and records are no longer available regarding it, this claim should be denied.

OPINION OF BOARD: In October 1936, Claimant was assigned to the position of demurrage clerk six days per week, Sunday through Friday, with Saturday as assigned day of rest. The position was not one necessary to the continuous operation of the Carrier. On February 16, 1945, it was first called to the attention of the Carrier that the Sunday work of this assignment should be compensated at the time and one-half rate. On February 21, 1945, the Carrier acknowledged the error and arranged to pay the premium rate for the Sunday work after that date. Claimant now claims reimbursement at the time and one-half rate for all Sundays worked from October 1936 to February 16, 1945.

That Claimant was improperly compensated from 1936 to 1945, a period of nine years, cannot be questioned. Immediately after the error was called to the attention of the Carrier, it was corrected. For nine years the Claimant accepted the rate fixed by the Carrier without objection of any kind. Both the Carrier and the Claimant assumed all during this time that the Agreement was being correctly applied. This Board has held many times that such acquiescence on the part of the Claimant bars any claim for retroactive compensation prior to making demand for a correct application of the Agreement. Awards 1289, 1609, 1806, 2281, 2700, 3518.

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 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

No basis exists for an affirmative award.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 11th day of August, 1948.