Award No. 4454
Docket No. TE-4390

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY
(Line West)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Line West of Buffalo,

(a) That C. P. Roney, agent-telegrapher, North Judson, Indiana, who was used commencing December 19, 1943, by instruction of the Carrier to pilot locomotives of foreign railroads over New York Central Railroad Company's tracks at North Judson, which class of service is covered by an agreement between the Carrier and the Brotherhood of Locomotive Engineers, shall be paid for such service the same as if an engineer had been called; and

(b) That C. P. Roney shall, under Articles 7 (a), 13 and the applicable rule of the agreement between the Carrier and the Brotherhood of Locomotive Engineers providing for rates of pay for engineers, be paid for one hundred (100) miles at engineer's rate of pay for piloting the locomotive of a foreign railroad at North Judson on December 19, 1943, and on each time subsequent thereto that he was called upon to pilot locomotives of foreign railroads at North Judson.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement between the parties bearing effective date of February 1, 1943 as to rules of working conditions, said agreement was superseded by the agreement of July 1, 1946 which is now in effect, copy of which is on file with the Board and by reference is made a part of this Statement of Facts.

On December 19, 1943 and on subsequent dates, Agent-Telegrapher C. P. Roney was called during overtime hours or while on duty for the purpose of boarding a locomotive of a foreign railroad and pilot such locomotive over a certain portion of the New York Central Railroad at North Judson, Indiana to secure supplies of coal and water on the New York Central, and after the locomotive had been supplied with coal and water, piloting it back to the tracks of the foreign railroad.

On January 6, 1945, Agent-Telegrapher C. P. Roney was used during overtime hours to pilot Chesapeake & Ohio passenger train No. 17 over the New York Central tracks from the Erie Railroad to the Chesapeake & Ohio Railroad, also to pilot Chesapeake & Ohio Local No. 58 from the Chesapeake & Ohio Railroad to the Erie Railroad.

Approximate distances on the New York Central tracks it was necessary to perform pilot service as follows:

7. The claim is wholly unjustified, without support on any logical premise and should be denied.

(Exhibit not reproduced.)

OPINION OF BOARD: On December 19, 1943 and subsequent dates, Agent C. P. Roney was used to pilot locomotives of foreign railroads over a portion of Carrier's railroad at North Judson, Indiana, to secure supplies of coal and water from Carrier to meet the necessities of the foreign locomotives. For the service rendered, Claimant was paid as Agent-Telegrapher. He claims he should have been paid the rate of a locomotive engineer, it being work within the Engineers' Agreement.

Claimant was an employe under the Telegraphers' Agreement. This is the only Agreement to which he is a party and he must look to that Agreement in support of a claim for contract violation. It is fundamental that one has no rights under an Agreement to which he is not a party except as they may be adopted by the provisions of his own Agreement. In the present case, Claimant was directed to perform higher rated work falling within the scope of the Engineers' Agreement. As compensation for such work, he is entitled to the higher rate. (Article 13 (a), Current Agreement. This is by virtue of the provisions of his own Agreement. The determination of the engineers' rate is a matter of evidence. The Carrier having fixed the rate to be paid for the work in the engineers' schedule, it may properly be considered as evidence in determining the rate to be paid this Claimant. The rate being established, the direction of the Carrier to the employe to perform it, although he is not a member of the craft to whom the work belongs, gives rise to an implied agreement that Carrier will pay the established rate for such service. In addition to the foregoing, it appears to be a traditional practice when an employe is temporarily assigned to the work of another class coming under the provisions of another Agreement to compensate him at the rate paid the position to which temporarily assigned, if higher than his own pay. Awards 3489, 3299, 3117, 2703. This is further borne out in Decision 3815 of the United States Railroad Labor Board wherein it is said:

> "It has been the recognized practice when employees are temporarily assigned to the work of another class coming under the provisions of another agreement to compensate them at the rate paid the position to which temporarily assigned if higher than their own rate. This principle has been recognized and approved not only by the United States Railroad Administration and the Railroad Labor Board but in individual negotiations between the Carriers and their employes."

We think this rule is well established and, consequently, the failure of the Carrier to pay the rate of the position worked constitutes a violation of Article 13 (a) of the Telegraphers' Agreement.

The Carrier contends that it never authorized Claimant to perform the work for which claim is made. The Carrier is in no position to make such a defense. It had full knowledge that the work was being performed. It ratified its performance by paying Claimant therefor over the full period of the claim. It is the correct compensation to be paid for the work that engages our attention under such circumstances.

Carrier contends that the claim is barred by laches. We think not. There was no cut-off rule in the Agreement. No limitation exists as to when a claim may be processed. The lapse of time alone will not bring the doctrine of laches into operation. Laches may operate as a defense only where there has been inexcusable delay in asserting a right which has resulted in prejudice to the adverse party. We find no such situation arising in the present case. The delay has not prejudiced the Carrier in making its defense. This being so, laches cannot be successfully asserted.

It is claimed also that Claimant is estopped to assert his claim. The record does not show any acquiescence in or waiver of Carrier's violation of

the Agreement which, in conjunction with the lapse of time, would estop its assertion. So far as the record shows, neither party misled the other. The record does not show that either party was cognizant of the rule violation until the claim was presented to the Carrier. No estoppel exists under such circumstances.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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

The Agreement was violated as charged.

AWARD

Claim sustained less compensation already received.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of July, 1949.