

Award No. 4574

Docket No. TE-4337

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY

(Buffalo and East)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad Company, Buffalo and East:

(1) That the Carrier violated the terms of the current Telegraphers Agreement and those of the Rest Day, Sunday and Holiday Rule, effective July 1, 1946, when on or before July 1, 1946, and weekly thereafter it required the incumbent of the third trick telegraph position at Signal Station "WJ" with assigned hours from 2:00 AM to 10:00 AM, six days per week, to suspend work on Mondays and to perform eight (8) hours service on Sundays at the pro rata rate of pay; and

(2) That the Carrier shall be required to pay the incumbent of the third trick telegraph position at Signal Station "WJ" a day's pay of eight (8) hours at the pro rata rate of pay for each Monday on which he has been required to suspend work, except that on such of these Mondays as were observed by the State, Nation or by proclamation as one of the seven (7) designated holidays, pay therefor shall be at the time and one-half rate, since the violation began and thereafter as long as the violation continued to exist; and

(3) That in addition thereto the Carrier shall be required to pay the incumbent of the third trick telegraph position at Signal Station "WJ" the difference between the pro rata rate of pay which he was paid for services performed on Sundays during the period in question and the time and one-half rate of pay to which he is entitled for such service.

EMPLOYES' STATEMENT OF FACTS: An agreement between the parties, herein know as the Telegraphers' Agreement, bearing effective date of January 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Signal State "WJ" is located as Mahaffey, Pennsylvania. Prior to May 24, 1948, the hours of the personnel on duty at this location were as follows:

Award No. 3002: The last paragraph of Opinion of Board reads:

"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."

CONCLUSION: The Carrier has shown that—

1. Incumbents of the third trick (2:00 A.M. to 10:00 A.M.) assignment at Signal Station "WJ" have been paid in accordance with the provisions of applicable rules of the agreement.

2. The method of payment was known to and not contested by either the employes directly involved or representatives of the Telegraphers' Organization for a period of at least seven years, which is evidential of the fact that the Employes acquiesced in the Carrier's interpretation and application of the rules.

3. When objections to the assignment were brought to the attention of the Carrier a study was made which developed that the assignment could be changed to satisfy the objections of the Employes without detriment to the service and the Carrier acted in good faith in changing the assignment with reasonable promptness.

The claim of the Employes is, therefore, without merit and should be denied.

OPINION OF BOARD: The Carrier maintains Signal Station "WJ" at Mahaffey, Pennsylvania. Three telegraphers are assigned at this point on a six-day week assignment. The occupant of the third trick operator's position was assigned six days each week with Monday as his rest day. On July 1, 1946, a new Rest Day, Sunday and Holiday Agreement became effective. It is the contention of the Organization that the six-day assignment with Monday assigned as the day of rest was in violation of the latter Agreement. The controlling portions of the controlling Agreement provide:

"Section 2. (a) Employes whose positions are not subject to the relief arrangement set forth in Section 1 will be excused from Sunday and holiday duties as much as the condition of business will permit."

"Section 5. A regularly assigned employe shall receive one day's pay within each twenty-four hour period, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than eight hours as per location, except on his rest day when occupying positions covered by Section 1, or on his rest day (Sunday) and holidays when occupying positions covered by Section 2." Sunday and Holiday Agreement effective July 1, 1946.

The third trick telegrapher's position here involved falls within Section 2(a) above quoted. It will be observed that the Carrier is not obliged to assign all positions under this section on a six-day basis with Sunday as the day of rest. Employes under this section are to be relieved from Sunday and holiday work "as much as the conditions of business will permit." The record does not affirmatively show that conditions of business were disregarded by the Carrier to such an extent that the Assignment made constituted a violation of the Agreement.

Claimant was clearly entitled to be compensated for his Sunday work at the time and one-half rate in accordance with Section 2(b). The Carrier contends that this portion of the claim, if sustained, should commence on February 11, 1948, the date the claim was filed. We think not. This portion of the claim is not for a penalty; it is for compensation earned at an agreed upon rate.

The claim is not stale, it having been made approximately nineteen months after the Agreement became effective. The Carrier did not act promptly to correct the violation when it was called to its attention. More than three months of indifference to the plain provisions of Section 2 were permitted to pass before the Carrier took any action whatever. Such circumstances when considered together do not warrant the interposition of any theory that Claimant is estopped to assert his rights.

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 Employee involved in this dispute are respectively carrier and employee 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 Agreement was violated.

AWARD

Claim (1) sustained in part. Claim (2) denied. Claim (3) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of October, 1949.