Award No. 4766

Docket No. CL-4790

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles S. Connell, Referee

PARTIES TO DISPUTE:

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

NEW YORK CENRTRAL RAILROAD, BUFFALO AND EAST

STATEMENT OF CLAIM: Claim of System Committee of the Brotherhood on the New York Central Railroad Company, Buffalo and East:

(1) That the platform employes — truckers, stevedores, checkers, clerks and foremen — working at West 37th Street freighthouse, which constitutes part of the facilities comprising the New York Central Railroad Company's West 33rd Street Freight Station, New York City, were compensated improperly and in violation of the Agreement when paid at straight time rate for time worked during their ninth (9th) hour of service.

(2) That all employes thus compensated improperly and in violation of the Agreement be reimbursed in full for the difference between payment received at straight time rate for time worked during their ninth (9th) hour of service and what their earnings for such time would be when computed at the rate of time and one-half, this covering the period from October 15, 1943 until the U. S. Army relinquished its use of the West 37th Street freighthouse on or about January 15, 1946.

EMPLOYES' STATEMENT OF FACTS: In September, 1942, the United States Army obtained exclusive use of freighthouse at West 37th Street, part of the facilities which comprise the New York Central Railroad Company's West 33rd Street Freight Station, New York City, for the receiving and forwarding of army material and supplies. The Carrier furnished the men used to load and unload this army freight at West 37th Street, together with the employes necessary to supervise such work. Positions established for that purpose were assigned to work from 8:00 A.M. to 5:00 P.M. and from 9:00 A.M. to 6:00 P.M. with one (1) hour meal period.

Subsequently, due to increase in the volume of this traffic, a 4 P.M. to 12 Midnight shift and a 12 Midnight to 8 A.M. shift were added. Those shifts were assigned to work eight (8) straight hours and allowed twenty (20) minutes in which to eat without deduction in pay.

On October 15, 1943, representatives of the U. S. Army requested the Carrier to discontinue the one (1) hour meal period for the two (2) day shifts, 8 A.M. to 5 P.M. and 9 A.M. to 6 P.M., and instead to allow these employes twenty (20) minutes in which to eat without deduction in pay. The Carrier

tinue 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."

Award No. 2784: The three paragraphs preceding the last paragraph of Opinion of Board read:

"There is a long line of awards by the First Division of this Board which hold that protests must be made prior to the time the violation is terminated and that the claim will only be allowed from the date that the protest or claim is filed.

"In Award No. 2088, this Division, speaking through Judge Tipton, said:

> '* * * but since the record shows this claim was not prosecuted with proper dispatch, the claim for compensation should date from February 25, 1938, from which date it was advanced to the submission now considered.'

"In Docket No. CL-2756 which was submitted to this Referee, the Employes in that case recognize this rule and only ask for the allowance of claim from the date it was filed. The reason for the rule is sound. There is no reason why there should be delays in filing claims. In addition to that, the Carrier is entitled to know that the Brotherhood is contending the arrangement made is a violation of the current agreement."

Award No. 2849: The two paragraphs preceding the last paragraph of Opinion of Board read:

"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."

Award No. 4070: The last paragraph of Opinion of Board reads:

"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."

CONCLUSION: The Carrier has shown that claimant employes were paid in accordance with the provisions of applicable rules of the agreement. The claim is, therefore, entirely devoid of merit and should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: In September 1942 the Carrier's freighthouse at 37th Street, New York City, was turned over to the Army, and the forces necessary to handle loading and unloading at that point were recruited from Carrier's employes. The so-called daytime forces, which are those here involved, were assigned by bulletin to work 8:00 A.M. to 5:00 P.M., and 9:00 A.M. to 6:00 P.M., with one hour assigned for lunch in accordance with Rule 28 (a). Subsequently, night shifts were added with hours 4:00 P.M. to midnight,

and midnight to 8:00 A.M., and they worked eight hours straight, with a twenty minute lunch period in accordance with Rule 28 (b). In October 1943, at the request of the Army to further expedite the work, the two days shifts were worked through their one hour meal periods and allowed twenty minutes in which to have lunch without deduction of pay. Employes assigned to the day shifts were paid pro rata rates for their assigned hours, plus one hour at pro rata rate for their meal period, and were so paid until the Army relinquished its use of the 37th Street freighthouse on January 15, 1946.

The dispute is in the application of Rule 28—Meal Period, and Rule 30—Overtime, and they are quoted below:

"Rule 28—Meal Period

"(a) Length of meal period. Unless agreed to by a majority of employees in a department or subdivision thereof, the meal period shall not be less than thirty (30) minutes nor more than one (1) hour.

(b) Continuous work without meal period. For regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a day's work, in which case not to exceed twenty (20) minutes shall be allowed in which to eat, without deduction in pay, when the nature of the work permits.

(c) Meal period. When a meal period is allowed, it will be between the ending of the fourth hour and beginning of the seventh hour after starting work, unless otherwise agreed upon by the employes and the employer.

(d) Work during meal period. 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 twenty (20) minutes, with pay, in which to eat shall be afforded at the first opportunity."

"Rule 30—Overtime

"Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis, at the rate of time and one-half. (Effective April 1, 1923.)"

There is no question about the assignments prior to October 15, 1943. The day forces were assigned eight hours with an hour for meal period under Rule 28 (a), and the night forces were assigned eight hours with twenty minutes for meal period under Rule 28 (b). The two sections of that rule clearly authorize the Carrier to make the assignments it did. The claim dates from October 15, 1943 when, with agreement by the majority of employes under Rule 28 (a), the day shifts were worked through their assigned meal period and were given twenty minutes for meals. The record is not clear if these shifts worked their meal hour every day or on occasions, but it is clear that on the days they worked their meal period, they were paid pro rata rate for that hour, in accordance with Rule 28 (d). On October 15, 1943, the date the day shifts were worked through the meal period, the positions affected were not discontinued and rebulletined but, to the contrary, the positions were bulletined on other occasions during the time in question, specifying eight hours with one hour for lunch.

The Organization contends that when the meal period was eliminated, the position was automatically reduced to an assignment of eight consecutive hours and Rule 28 (b) applied, and that Rule 30 applied to the ninth hour. They state that the employes on the day shifts worked the meal period each day, and the ninth hour should have been paid at overtime rate of pay. The record is silent as to the method claimants were instructed to work the meal period and leaves doubt as to the frequency of working the meal period. There is no question that during the time in question the claimants' positions were

bulletined to work eight hours with one hour meal period. The Carrier had the right under Rule 28 (a) to assign a meal period, and if the meal period is worked, Rule 28 (d) applies and states that in that case, employes shall be paid at pro rata rate for that meal period so worked. There is nothing in the rule which provides that if the meal period is worked regularly that the assignment is automatically changed, or that it shall be rebulletined on a continuous work basis without meal period. This Board has consistently held that it has no jurisdiction or authority to alter or add rules to the Agreement between the parties, even to avoid inequitable results from its operation. The function of this Board is limited to interpreting and applying the Agreement in question. Rule 28 deals specifically with the question at hand and has not been violated by the actions of the Carrier, and the claim will be denied. Rule 30 has the following exception: "Except as otherwise provided in these rules", Rule 28 (d) states that the meal period, if worked, shall be paid at pro rata rate and therefore comes within the exception quoted, hence Rule 30 is not applicable to the instant claim.

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

That both 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

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 14th day of March, 1950.