Award No. 5130
Docket No. TE-5151

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis-Southwestern Railway Lines that,

(a) The carrier violated the Articles 2, 5-1, 5-2, and 6-2, of the Telegraphers' Agreement when, from April 21, 1949, to January 4, 1950, both inclusive, it assigned the agent-telegrapher at Humphrey, Arkansas, a one shift office, to work eight (8) consecutive hours with no meal period and without pay for the meal period not allowed; and that,

(b) The carrier shall be required to compensate the agent-telegrapher occupying the position at Humphery, Arkansas, in accordance with Article 5-2 of the Telegraphers' Agreement, for each of the days on which the meal period was not afforded and was thus worked.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties to this dispute, bearing date of December 1, 1934, copies of which are on file with your Board.

Prior to April 21, 1949, the carrier maintained the following positions, under the Telegraphers' Agreement at Humphrey, Arkansas:

Agent-Telegrapher	7:55 A.M. to 3:55 P.M.	7 days per week.
Clerk-Telegrapher	11:55 P.M. to 7:55 A.M.	7 days per week.

Effective April 21, 1949, the position of clerk-telegrapher at Humphrey was abolished, leaving only the position of agent-telegrapher at this station.

Instead of correcting the hours of assignment of the agent-telegrapher to conform to the rules of the Agreement at the time the position of clerk-telegrapher was abolished, Carrier permitted the assignment to remain eight (8) consecutive hours with no meal period allowed, or paid for, until January 5, 1950.

This violative assignment of hours came to the attention of the General Chairman on December 14, 1949, when it was immediately called to the attention of carrier's Superintendent. The assignment was not corrected until January 5, 1950.

Claim was filed for one hour at overtime rate for each day on which the agreement was thus violated. Carrier declined the claim.

It is the Carrier's opinion that such a claim resulting from Claimant's failure to protest any violation of the rules either because he preferred to work under such conditions or in order that he might receive a large sum of money in retroactive penalties is contrary to the intent and meaning of the Railway Labor Act.

There is a long line of awards by this Board, some with referees and some without, that hold that claims will not be allowed prior to the date that protest is made to the Carrier.

Third Division Award No. 2849, referred to as having previously decided that under circumstances practically identical with those in the instant claim the Claimant is entitled to receive only pro rata rate for a similar claim, also decides it 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.

Award No. 2849 cites many previous awards of the same Division in support of this conclusion. Too, there have been subsequent decisions rendered by this Board in disputes involving the question of retroactive payments which follow this conclusion. Some of those subsequently decided by this Division were in Awards 2913, 3136, 3430, 3503 and 4628.

Any claim for retroactive payment prior to the date protest was made to the Carrier is contrary to the rules of the current agreement as well as contrary to the long established doctrine of laches and estoppel.

Too, it is the Carrier's opinion that the Employes are estopped from filing any claim as result of not complying with Article 6-5, reading:

> "Overtime will not be allowed employes unless prescribed form is mailed to Manager or Chief Dispatcher within three (3) days from the time service is performed."

The Carrier respectfully submits that the employe is due no payment under the rules and that its offer to pay one hour each day at pro rata rate from the date protest was made was very liberal. Under these circumstances, the Carrier respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Effective April 21, 1949, the position of clerk-telegrapher at Humphrey, Arkansas was abolished leaving only an agent-telegrapher on assignment. The Carrier, through oversight, neglected to reschedule the agent-telegrapher's hours and he continued on an assignment of eight consecutive hours until January 5, 1950, with no meal period allowed, or payment made in lieu thereof.

In view of the Carrier's admission that the employe would have been assigned a new schedule of hours to include a meal period, in accordance with Rule 5-1, except for its oversight, it cannot now be heard to say that Rule 5-1 does not require that a meal period be assigned.

The Carrier's other contentions, in some form or another, have been before the Board in earlier cases where claims were sustained, and for this reason must be overruled. See Awards 2542, 2913, 2914, all without the assistance of a referee. Also see Awards 2602, 2849.

As to the applicable rate of pay to which the employe is entitled it is noted that Awards 2542, 2913 and 2914 allowed only pro rata pay; one reason being that nothing more was permissible or allowable since this was all that was claimed. Claim (b) in the instant case, however, appears to be founded on Awards 2602 and 2849, and is in language comparable to the claims in those cases. In Award 2849 the claim was allowed only at the pro rata rate.

It is not clear from the language in Award 2602 the rate at which compensation was allowed, but admittedly it affords a basis for the Organization's argument that the employe is entitled to the overtime rate. However, we are unable to agree that more than pro rata pay is proper. The claim is for compensation in accordance with Article 5-2 which does not impress us as being an overtime rule, but is a penalty measure to compensate the employe pro rata for loss of his regular meal time. Therefore, we are of the opinion this constitutes the proper basis of pay in this case.

There remains, however, the question of whether the claim for compensation is barred by Article 6-5, and if not barred, whether it is allowable back of the date on which the claim was filed. In accordance with our earlier statement that we do not consider the claim properly one for overtime, it follows that Article 6-5 is not applicable. Neither do we see in the claim the unconscionable delay which has been the basis for the Board holding that reparations should not be allowed back of the date of the claim. Therefore, the claim is proper for the full period of the violation.

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 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 Carrier violated the Agreement from April 21, 1949 to January 4, 1950, both inclusive.

AWARD

Claim sustained (a and b) as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of November, 1950.