

Award No. 6095

Docket No. CL-6199

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

HOUSTON BELT AND TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The assigned hours of Order Clerk position No. 1354 (new number 510) at Congress Avenue are in violation of Rule 42 (a). Also

(b) Claim that the occupant of the Order Clerk position be paid additionally at the rate of time and one-half for all time required to report for duty in advance of the specific hours named in Rule 42 (a).

EMPLOYEES' STATEMENT OF FACTS: On June 1, 1950, the Carrier had the following force at the Congress Avenue Yard Office, with assigned hours as shown below—

POSITION		ASSIGNED HOURS
Checker (*)	No. 1362	7:00 A. M. to 3:00 P. M.
Transfer Clerk	No. 122	3:00 P. M. to 11:00 P. M.
Transfer Clerk	No. 1364	11:00 P. M. to 7:00 P. M.

(*) Reclassified to Transfer Clerk effective December 1, 1951.

On June 7, 1950, Carrier issued Bulletin No. 101 advertising position of Order Clerk No. 1354 (new number 510) at Congress Avenue with assigned hours 8:00 A. M. to 5:00 P. M., meal period 12:00 noon to 1:00 P. M.

Effective July 3, 1950, Carrier changed the assigned hours of the Order Clerk so that he worked 9:00 A. M. to 6:00 P. M., with meal period 1:00 P. M. to 2:00 P. M. Those assigned hours are still in effect.

orders outside of the assigned hours of the Agent-telegrapher on the days specified in the claim. For the reasons stated in Award 4281, the claim should be sustained as to all violations occurring between October 21, 1947, the date the violation was called to the attention of the Carrier, and October 27, 1947, when the cause of complaint was eliminated."

It has previously been shown that in case here involved, the 9:00 A. M. starting time on the position of Order Clerk was established effective July 3, 1950, and claim was first filed by the Division Chairman with the Superintendent, March 8, 1952, some twenty months later. Attached hereto and made a part hereof is copy of Bulletin No. 214, dated June 30, 1950, addressed "To Employees Concerned", changing the starting time from 8:00 A. M. to 9:00 A. M., effective July 3, 1950. (Marked Carrier's Exhibit "A"). Copy of this bulletin notice was sent to the incumbent of the position involved, to the Local Chairman, Division Chairman and to the General Chairman. Therefore, it cannot be argued by any of those recipients that they did not have knowledge of the change in the starting time of the position, either prior to or at the time the change was made. This being so, and in view of the fact that no exception thereto was taken until twenty months later, it is evident that during the twenty months interim the Organization representatives were in accord with the Carrier's interpretation and application of Rule 42. If they were not, then they were guilty of the same questionable conduct as was the claimant in the case covered by Award 4281, supra, and in which case your Board stated, in declining that claim: "It is clear that the Claimant knew of the violations as they occurred. He made no complaint. Apparently he was willing that these violations should accumulate into a sizable number before he voiced any protest. * * * * We cannot sustain any such claim."

SUMMATION

The claim here presented by the Organization is without basis, merit or justification and accordingly should be unqualifiedly denied for the following reasons:

1. Rule 42 (a) was not violated in the instant case, and could not have been violated as that rule has no applicability here. That rule specifically refers to and is applicable only to positions working in continuity covering a twenty-four-hour period. The position of Order Clerk here in dispute was not an assignment such as contemplated by this rule.

2. There is no rule in the governing agreement providing for, or that even remotely contemplates, paying employees two and one-half times the daily rate for service performed under any circumstances.

3. Claims for payment in the circumstances here existing antedating the date first filed with the Carrier (in this instance March 8, 1952) have consistently been denied by your Board in numerous awards, some of which are cited herein above.

The substance of matters contained in the foregoing record has been the subject of correspondence and/or conferences between the parties to this dispute.

Secretary's file.

OPINION OF BOARD: Our Award No. 1591 interpreted a rule identical in language to that of Rule 42(a), here involved, and was rendered long prior to the readoption of Rule 42(a) in the agreement effective July 1, 1950 between these parties. That rule was first adopted in the agreement effective November 16, 1940 which was negotiated and signed by the same persons who negotiated the rule interpreted by Award No. 1591. Since the language

used in the rule is susceptible of the interpretation placed upon it by that award, we think that award governs the interpretation of the rule here involved. In accordance with that interpretation the carrier violated Rule 42(a) when it changed the starting time of Order Clerk Position No. 1354 (now number 510) to 9:00 A. M.

It is contended that, although the starting time was changed July 3, 1950, the claim should be effective only from its date, March 8, 1952, because a copy of the bulletin changing such starting time was furnished to employes and representatives of the organization. There is no evidence that representatives of the organization knew that work was performed covering the twenty-four hour period at the office involved, so as to recognize such change as a violation of the agreement. The party relying upon acquiescence has the burden of establishing the facts to support such doctrine. Under the evidence presented we decline to apply that doctrine as a bar to this claim.

The position in question started work at 8:00 A. M. prior to July 3, 1950, and at 9:00 A. M. from then until May 19, 1952 when it again was started at 8:00 A. M. It was at all times a day time position. Under such circumstances the appropriate penalty is to require payment to the incumbent from the proper starting time of a day position, 8:00 A. M., until work actually commenced at pro rata rate, that being the proper penalty where no work was performed.

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

That the 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 Agreement was violated.

AWARD

Claim sustained to the extent stated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of February, 1953.