

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

**THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

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

(a) The Carrier violated the Agreement when, effective September 1, 1949, it assigned rest days of Tuesday and Wednesday to Clerk A. J. Schwaeble, the occupant of a six-day position, and

(b) As a penalty for the violation in Claim (a) the Carrier shall be required to additionally compensate Claimant Schwaeble and/or his successors the difference between pro rata and time and one-half rate for each Sunday worked, plus pro rata rate for an additional week day not allowed to work from September 1, 1949, until the condition is corrected.

EMPLOYES' STATEMENT OF FACTS: Claimant Schwaeble is employed as Clerk at the Carrier's Gest Street Terminal at Cincinnati, Ohio. On March 23, 1949, the Carrier issued Bulletin No. 13 (Employees' Exhibit "A") announcing a vacancy on the position of Reconsigning Clerk, a six-day position. Claimant Schwaeble bid on and was assigned to this position. Effective September 1, 1949 (the effective date of the 40-Hour Week Agreement) Claimant Schwaeble was notified by the Carrier that his rest days would be Tuesday and Wednesday. According to information supplied by the Carrier, Claimant Schwaeble's position had, prior to September 1, 1949, been worked six days per week (except weeks in which holidays occurred), and had, in addition, been worked under the Call Rule as follows:

1947—38 Sundays—3 holidays—3 hours
14 Sundays—4 holidays—8 hours

1948—21 Sundays—3 holidays—3 hours
1 Sunday — 4 hours
30 Sundays—4 holidays—8 hours

1949 (January to August, inclusive)
25 Sundays—2 holidays—3 hours
6 Sundays—1 holiday —4 hours
4 Sundays—1 holiday —8 hours

necessary to be performed seven days a week and cannot be dispensed with or carried over on Sundays.

SUMMARY

Carrier has shown that:

This claim was not presented to the Board until September 1954, five years after it was declined by the Carrier in 1949.

Work of the reconsigning clerk position is necessary to be performed seven days a week.

Mr. Schwaeble occupies a "seven-day position" under the forty-hour work week provisions of the effective agreement.

Effective September 1, 1949, Carrier properly assigned claimant a work week of forty hours as provided in Rule 25 (a), with two consecutive rest days as provided in Rule 25 (d), and included necessary work on the two rest days of this position in a regular relief assignment as provided in Rule 25 (e).

For the reasons set forth, this claim should be denied in its entirety and Carrier respectfully requests that the Board so hold.

All pertinent facts and evidence in this case have been made known to the employees' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant occupies the position of Reconsigning Clerk at the Gest Street Terminal, Cincinnati, Ohio. His position is assigned as a 7-day position with a work week of Thursday through Monday, with Tuesdays and Wednesdays as rest days. Relief is afforded on Tuesdays and Wednesdays by a regularly assigned relief employee. Claimant contends that his position should have been assigned as a 6-day position with Saturday and Sunday or Sunday and Monday as rest days. The claim is for reparations growing out of the alleged improper 7-day assignment.

The Carrier asserts that the claim was filed out of time before this Board. The record shows that the claim was first filed with the Carrier almost immediately after assignments of rest days were made pursuant to the 40-Hour Week Agreement, effective September 1, 1949. It was declined by the Division Superintendent. An appeal was taken to the General Manager on October 15, 1949 and it was promptly declined. An appeal was taken to the highest officer designated to handle appeals on October 27, 1949. The claim was declined on November 11, 1949. The dispute was discussed in conference on December 6, 1949 and the declination of the claim was adhered to. On December 23, 1949, the Carrier again reiterated its declination. There appears to have been further discussions of the claim on June 27, 1950; September 29, 1953 and May 3, 1954. It was submitted to the Board on September 15, 1954, five years after its inception.

There is no time limit provided within which an appeal must be taken to this Board from an adverse determination by the Carrier, either by the Railway Labor Act or the agreement before us. It is contemplated that appeals shall be expeditiously handled. A party is entitled to a reasonable time to appeal in the light of all the circumstances surrounding the case. Award 4941. The claim in this case was finally denied by the highest officer of the Carrier designated to consider it on November 11, 1949 and at a subsequent conference on December 6, 1949.

The claim in the present case is a continuing one. The Organization was fully advised of Carrier's refusal to pay the claim on November 11,

1949, and reiterated after conference on December 6, 1949. We think the Carrier had a right to assume that the matter was closed when an appeal was not taken within a reasonable time thereafter. A delay of almost five years is unreasonable. It is an unconscionable delay when it is considered that the claim was continuously growing larger while the Organization delayed in giving notice of an appeal to the Board. The unconscionable delay on the part of the Organization is such as to terminate the right to appeal. One may not sleep on his rights indefinitely and then avoid the effects of acquiescence, estoppel and laches. Awards 2576, 3002, 3778, 4277, 5190, 5949, 6228, 6229, 6494, 6650, 7000.

There is evidence that there were discussions of this claim subsequent to December 6, 1949. We are obliged to point out that the Organization may not extend the time to appeal to this Board by discussing the claim from time to time after it has been finally denied, unless it has been by a mutual understanding of the parties. In the latter case the Carrier would be estopped to assert the excessive delay to obtain a dismissal at the hands of this Board. The Organization contends that it delayed the appeal in the hope that another appeal pending before the Board would decide and bring about a settlement of the present claim. No such understanding was had with the Carrier and consequently the Carrier is not estopped to assert the delay. It is also contended that there was a duty on the part of the Carrier to submit the dispute to the Board. We cannot concur in this view. It was the Organization that was pressing the claim. The duty to expedite the appeal with diligence rested upon the Organization, not with the Carrier that had no grievance or claim to be resolved.

We are of the opinion that the claim must be dismissed because of the unreasonable delay in taking an appeal from the final declination of the claim by the Carrier's highest officer designated to handle such claims.

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 Employees involved in this dispute are respectively Carrier and Employees 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 appeal is barred by lapse of time.

AWARD

Appeal dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1955.