Award No. 11958
Docket No. TE-10741

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

William N. Christian, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk Southern Railway Company, that:

1. The Carrier violated the Telegraphers' Agreement when, commencing on the 25th day of March, 1957 and continuing thereafter (Monday through Friday of each week), it failed and refuses to properly assign in accordance with the articles of the Agreement existing Telegrapher's work which is being performed improperly at Durham Yard.

2. The Carrier shall compensate the senior idle extra operator, or the senior idle operator if no extra operator available, a day's pay (8 hours) at the branch line minimum hourly rate-of-pay for each and every day (Monday through Friday), commencing June 19, 1957—(sixty (60) days prior to August 17, 1957 the date of this claim), and continuing until such violation is discontinued.

3. The Carrier shall permit joint check of records to ascertain number of days, idle employes and amounts due them.

EMPLOYES' STATEMENT OF FACTS: Durham (N.C.) Yard is located on Carrier's Durham Branch 35.9 miles north of Duncan, North Carolina, the main line junction point for said branch. The Durham Freight Station is located 4.6 miles beyond in the heart of the city. The operator-clerk's position is located at the Freight Station. The time table locations on the Durham Branch and mileage between stations are as follows:

Distance from Duncan	Stations
40.5	Durham
	1.2

settlement as contained in the general chairman's letter of June 11, 1958 (Carrier's Exhibit "B"), is predicated upon doing the same things that he contends in letter of August 17, 1957 (Carrier's Exhibit "A") is in direct violation of the agreement rules.

All of the data contained herein has been discussed with the employe representative either in conference or by correspondence, and/or is known and available to him.

This submission is being made in accordance with the provisions of motion of the Third Division, dated November 26, 1957, (effective January 1, 1958), and the carrier reserves to itself all of the rights accorded it under the provisions of said motion.

(Exhibits not reproduced.)

OPINION OF BOARD: In 1936 B. G. Howard was the successful applicant for the new position of Operator-Clerk at Durham, North Carolina. In 1940 a Carrier officer entered into an agreement with Mr. Howard for Mr. Howard to perform certain work at Durham Yard, located 4.6 miles from the freight house in downtown Durham where Mr. Howard worked his regular shift. For such work at Durham Yard between 6:00 P.M. and 7:00 P.M. after Mr. Howard's regular tour of duty, it was agreed that Carrier would pay Mr. Howard for one hour at the time and one-half rate. Substantial performance of such agreement continued for 16 years, with some conflict in the record as to whether Mr. Howard was paid the extra compensation each day he worked at Durham Yard, or whether, on the other hand, Mr. Howard sometimes absorbed the Durham Yard work into his regular eight-hour shift. In 1957 Carrier re-arranged Mr. Howard's hours, starting Mr. Howard one hour later at Durham freight station and assigning Mr. Howard the Durham Yard work within Mr. Howard's regular eight-hour shift. Thereupon, Carrier quit paying Mr. Howard the extra compensation. This gave rise to the instant claim.

It appears from the record that the same person was General Chairman of the Organization from March 1935 until October 1940, and thereafter was the Carrier Officer who made the agreement with Mr. Howard in 1940, and thereafter was General Chairman from May 1951 until and after the institution of this claim.

Employes contend that Carrier by its agreement and conduct has established Durham Yard as a position separate from Durham freight station; that Carrier should be required to pay a day's pay (8 hours) for an operator at Durham Yard for each day (Monday through Friday) commencing 60 days prior to date of claim, and continuing until the alleged violation is discontinued. Carrier points out that there is only one hour's work each day at Durham Yard, that nothing in the Agreement either: (a) requires Carrier to pay eight hour's pay for one hour's work, or, (b) prohibits assignment of Claimant to work at both Durham freight station and Durham Yard.

The Organization is chargeable with knowledge from 1951 of the existence of the agreement between Mr. Howard and Carrier; likewise, the Organization knew for some six years that Mr. Howard was actually performing the work both at Durham freight station and at Durham Yard. Having such knowledge, the Organization did nothing. Consequently, the Organization is estopped by its own laches from claiming that the work at Durham Yard

cannot be performed by the Durham operator. Without deciding whether the claim would otherwise be invalid in so far as it seeks eight hours' pay for the one hour of work at Durham Yard, we hold that the claim for this total aspect must be denied on the ground of estoppel.

It is suggested in panel discussion that if this Board finds that the total claim cannot be sustained as a proper quantum of damages, then the appropriate measure of damages would be the one hour at time and one-half rate of the position of Operator-Clerk at Durham. In support, it is argued that although the contract made in 1940 between Mr. Howard and Carrier's Officer was voidable as a private agreement (O.R.T. v. Railway Express Agency, Inc., 321 U.S. 342), the Carrier is estopped from refusing payment of the "arbitrary" as in Award 11329 (Coburn). We note a distinction between the instant statement of facts and that in Award 11329. The latter involved interpretation and application of a collective bargaining agreement between the Organization and the Carrier for the payment of an arbitrary. Here, the agreement was between a single employe and the Carrier, in disregard of the collective bargaining agreement between the Organization and Carrier. Such private agreement is contrary to public policy. In O.R.T. v. Railway Express Agency, Inc., supra, the Court said:

> "1. The Company contends that special voluntary individual contracts as to rates of pay, rules, and conditions of employment may validly be made, notwithstanding the existence of a collective agreement, and that the terms of the individual agreements supersede those of the collectively bargained one. If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually. . . ."

Accordingly, it is our opinion that the agreement between Mr. Howard and the Carrier is not enforceable by this Board in behalf of the Organization for Mr. Howard's benefit.

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

That the parties waived oral hearing;

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1963.