Award No. 13345
Docket No. CLX-13535

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Ross Hutchins, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INCORPORATED

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood (GLX-5204) that:

(a) The Agreement governing hours of service and working conditions between R E A Express and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated at the Q. Express Terminal, Chicago, Illinois, when furloughed employe T. A. Johnson was not called for work beginning April 14, 1960, to and including September 16, 1960, except on the dates of July 26, August 7 and 15, and September 3, 11 and 15, 1960.

(b) He shall be compensated for eight hours at straight time hourly rate for each day he was subject to call, April 14 to and including September 16, 1960; and

(c) Reparations to be determined by a joint check of Carrier's records for the purpose of ascertaining what positions Claimant Johnson, as a furloughed employe, should have been called to work and the rate of pay of such positions.

EMPLOYES' STATEMENT OF FACTS: T. A. Johnson, with seniority date of October 5, 1956, was a furloughed employe under Rule 19 and as such was available for and ready to perform extra and substitute work, April 14 to September 16, 1960, inclusive.

On April 14, 1960 employe Johnson was given verbal notice by Assignment Clerk that he was obliged to bring his Union dues up to date before he could obtain further work. Although he had not been formally cited for violation of the existing Union Shop Agreement between the parties, he was not again called for work during the period April 14 to September 16, 1960, inclusive, except on the dates of July 26th, August 7th and 15th and September 3rd, 11th and 15th, while junior furloughed employes were called

revocation took place by notification to the Carrier of the claim on April 23, 1945. Accordingly, we hold that Claimant should be paid * * * beginning with the 23rd day of April, 1945."

Award No. 6494, Referee Whiting:

"We have repeatedly held that acquiescence in a practice contrary to a rule does not effect a change in the rule but does act as a bar to retroactive claims * * *."

Award No. 6840, Referee Messmore:

"Acquiescence in the violation of an agreement does not prohibit enforcement of its terms. It does preclude retroactive application of reparation for a period prior to the time the claimed interpretation was first asserted. See Awards 5430, 5872."

Award No. 7771, Referee Smith:

"* * * This Board has often held that silent acquiescence will not preclude later reliance upon, or enforcement of the rules. Such action merely precludes the granting of retroactive reparations * * *."

Award No. 2576, Referee Shake:

"* * * Where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in and, as a consequence, he acts on that belief over a long period of time, this Board will treat the matter as closed, insofar as it relates to **past transactions** * * *." (Emphasis by Referee.)

CONCLUSION

The Organization precipitated and benefited from the practice at Q.X.T. and yet it now attempts to make Carrier pay because it acquiesced in the practice. It is patently unfair that Carrier should be required to do so. The instant claim represents the first protest of this practice that has ever been made by the Organization. While this practice has been abolished at Q.X.T., the Organization is barred by reason of its participation in and approval of the practice from collecting retroactive reparations prior to the date that the instant claim was filed. Therefore, this claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: A union shop Agreement was entered into by the Brotherhood and Carrier involved in this Docket. This Agreement became effective April 1, 1952, and provides in part as follows:

"4. (a) * * * The organization will notify the Agency in writing of any employe who by reason of failure to comply with the terms of this Agreement, is not entitled to continue in employment. Upon receipt of such notice, the Agency will, as promptly as possible, but within ten calendar days of such receipt, so notify the employe con-

cerned in writing by registered mail, return receipt requested, or by personal delivery evidenced by receipt. Copy of such notice shall be given the organization. * * *"

Sometime thereafter the Brotherhood authorized Mr. Erkiletian, the Secretary-Treasurer of Lakeside Lodge, 2219, to formally institute initial proceedings to enforce the union shop Agreement against any employe or member of Lakeside Lodge, 2219. This particular Lodge is the Lodge of the member upon whose behalf this claim is being prosecuted. On May 1, 1956, the Carrier issued a memorandum to its various agents informing them of the Secretary-Treasurer's authorization. Though the nature of the authorization by the Organization is not before us, it appears that the authorization ran to Mr. Erkiletian as the Secretary-Treasurer rather than to the office of the Secretary-Treasurer.

As recited in Mr. Ripp's letter of July 7, 1961, Mr. Erkiletian's term of office expired January 1, 1960. From Mr. Gurovich's letter of December 30, 1960, it appears the Carrier was aware of Mr. Erkiletian's retirement from the office of Secretary-Treasurer. The record does not indicate that anyone subsequent to Mr. Erkiletian's retirement was formally designated by the Brotherhood or acknowledged by the Carrier to be the person authorized to notify the Carrier of delinquent members.

In April of 1960, there were employed at the Quincy Express Terminal in Chicago, a Mr. Brown by day and a Mr. Pavlik by night. Brown and Pavlik had as part of their duty the calling of furloughed employes. Brown and Pavlik were also dues collectors for the Brotherhood of which they and the Claimant were members.

In April of 1960, Brown and Pavlik notified the Claimant that he would be required to pay his delinquent union dues before he would be allowed to perform further work. Then on April 14, 1960, the fact of the delinquency was communicated to the Carrier verbally by Brown and/or Pavlik. As a result of this notice, the Claimant was not called again to work for the period of April 14, 1960, to September 16, 1960 with six (6) exceptions. These exceptions were as follows:

July 26 — called at 0937 for 1600, but failed to report

Aug. 7 — called at 2210 for 2400, not home

Aug. 15 — called at 2110 for 2400, failed to report

Sept. 3 — called at 0940 for 1200, failed to report

Sept. 11 — called at 2040 for 2400, not home

Sept. 15 — called at 0850 for 2400, not home

Though no formal designation by the Brotherhood of persons authorized to give notice to the Carrier of members delinquent ever appears to be made, it was the practice at the Quincy Terminal for the Carrier at the request of the Stewards, Brown and Pavlik to refrain from calling in employes who were long over-due in payment of their union dues. This procedure was known and encouraged by the Secretary-Treasurer, Erkiletian, and the former General Chairman, Scholl, at least until August 31, 1960, according to Mr. O'Malley's letter of December 6, 1960.

The Agreement does not by its terms specify the person who shall give notice to the Carrier of the delinquency of a member. The Agreement does provide that the notice shall be given in writing and the notice in this case was not given in writing. However, this Board holds that the notice was given and that notice was given by persons with actual or implied authority to give such notice. The notice was not given in writing as required by the Rule, but the Brotherhood is estopped to raise the absence of the communication being in writing as the notice was actually given and they cannot use their own failing, upon which the Carrier relied, as the basis for a claim. (Award Number 11607 — Coburn.)

No violation is urged by the Claimant, other than the lack of authority on behalf of Brown and Pavlik.

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 has been violated, but the Brotherhood is estopped to assert the violation.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1965.