



Award No. 17250

Docket No. CL-17728

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John B. Criswell, Referee

PARTIES TO DISPUTE:

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

BROOKLYN EASTERN DISTRICT TERMINAL

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6459) that:

1. The Carrier violated the understanding and provisions of the Clerks' Agreement, particularly, Rules 20½, 21, 48, 50 among others when it failed and refused to pay employes working over eight (8) hours daily at the rate of time and one half on the actual minute basis.

2. The Carrier shall pay the employes listed below or their successors at the rate of time and one half for all time worked over eight (8) hours per day effective March 30, 1967, and each day thereafter until the violations are corrected:

F. Tieniber, W. Kretzmer, P. Montagano, E. Thomas, E. Lome-
lius, A. Buglione, S. Carini, J. Riley, J. Vilpisauskas, A. Serluco,
R. Griffith, T. Massic, J. Calak, G. Gimmler, P. Orlando, M.
Hannigan, T. Locoscio.

EMPLOYEES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective April 1, 1938 and revisions of September 1, 1949 and July 7, 1955, and the National Agreements signed at Chicago, Ill., on August 21, 1954, August 19, 1960, June 5, 1962, November 20, 1964 and December 15, 1966, covering Clerks, Chauffeurs, Checkers, Yard Clerks, Watchmen, Freight Handlers, etc., between this Carrier and this Brotherhood. The Rules Agreement will be considered a part of this statement of facts. Various Rules and Memorandums may be referred to from time to time without quoting in full.

This dispute involves the question of whether or not this Carrier can arbitrarily refuse to pay employes at the rate of time and one half for all time worked over eight (8) hours per day or over forty (40) hours per week in accordance with the provisions of the Clerks' Agreement, particularly, the Agreement signed at Brooklyn, N.Y. on July 30, 1949 in which it is stipulated that the Rules shall remain in effect until changed in accordance with provisions of Rule 50 of the current agreement effective April 1, 1938.

worked would be on a pro-rata basis. We could now serve our late customers and the checkers would only be required to remain ten (10) hours on the property as compared to the personnel that worked eight (8) hours with one hour for lunch, a total of nine (9) hours on the property and only eight (8) hours pay. On the other hand, the checker with ten (10) hours on the property received ten (10) hours pay and an adequate lunch period. Later on the lunch period was set at 12 noon to 12:20 P.M. and incorporated in the bulletins. Two examples of such a bulletin are introduced as Exhibits 25 and 26. This Agreement had been in effect for some 30 years when a sharp decrease in revenues due to a decided drop in business and the complete demolition by fire of two warehouses being rebuilt but not yet completed, and a third fire with only partial damage, made a reappraisal imperative as there was no longer any business activity after 5 P.M.

The unionization of teamsters over the years since 1938 was complete and truckers found it too expensive to work overtime, rendering our 10-hour service obsolete.

For several years we contemplated remedying a situation that became more burdensome each day, and finally when this Carrier suffered tremendous financial losses in January, February and March of 1967, a decision had to be made, and since we regard the Memorandum of March 8, 1938 a permissive agreement, we arranged a meeting with the Organization and told them in effect what we proposed to do.

(Exhibits not reproduced)

OPINION OF BOARD: The Organization, representing a number of Claimants, believes that the Agreement was violated when employees were required to work 10 hours daily and not compensated at the overtime rate for two hours.

The Carrier maintains that this practice for these particular employees has been in effect since the 1930s, based on a Memorandum Agreement dated March 8, 1938, and revised in 1949.

It must be noted that the Memorandum Agreement was not agreed to by the official of the Organization designated to make such agreements. However, for a period of 29 years the practice it allowed was continued. We must find that because of this long and continuous practice the Organization, in effect, acquiesced to the 1938 and 1949 Memorandums.

In Award 15827 (Ives) this Board said:

"... Acquiescence is conduct from which may be inferred assent. Under the doctrine of equitable estoppel a person may be precluded by his silence when it was his duty to speak, from asserting a right which he otherwise would have had."

We must deny the claim.

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 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June 1969.