



Award Number 17590

Docket Number CL-18062

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Gladden, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6513) that:

- 1) Carrier violated and continues to violate the Rules of the Clerks' Agreement at Chicago, Illinois when it refused to provide a work week of forty (40) hours consisting of five days of eight (8) hours each for the occupants of the Janitress positions in Seniority District No. 83.
- 2) Carrier shall now compensate employes M. Dzakovich, M. Latsaras, T. Haackl, J. Skrzpac, M. Turek, M. Gluchman, A. Malenczak, C. Hankins, J. Metzler and M. Siepka, their successor or successors, an additional three (3) hours' pay at the pro rata rate of the Janitress positions for each and every work day retroactive 60 days from September 22, 1967, the date of this claim, and for all subsequent work days until the violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: The Carrier has at its Fullerton Avenue Building in Chicago, Illinois, the following Janitress Positions having only five (5) hour assignments.

<u>Pos. No.</u>	<u>Occupant</u>	<u>Pos. No.</u>	<u>Occupant</u>
04250	M. Dzakovich	04300	M. Gluchman
04260	M. Latsaras	04310	A. Malenczak
04270	T. Haackl	04320	C. Henkins
04280	J. Skrzpac	04330	J. Metzler
04290	M. Turek	04340	M. Siepka

All of the above listed Janitress positions have assigned hours of service from 7 P.M. to 12 Midnight, Monday through Friday, with Saturday and Sunday rest days, and no lunch period. Such assignments, although in effect for many years, are contrary to the provisions of the rules and on February 20, 1967, General Chairman H. C. Hopper, Vice General Chairman J. R. McPherson, and Local Chairman K. A. Stone, met with Assistant Comptroller J. Jacobson, for the purpose of discussing the assignments of these positions at Fullerton Avenue, and if possible secure the necessary corrections to comply with the Rules without necessity for filing claims. See Employees' Exhibit "A".

A further conference was held on August 24, 1967 with no meeting of the minds.

Under date of September 22, 1967, General Chairman Hopper filed the instant claim.

So that your Board will be aware of the number of years each of the claimants willingly and preferentially worked Janitress Positions having assignments of less than eight (8) hours per day there follows a list of the claimants along with their seniority dates:

<u>Name</u>	<u>Seniority Date</u>
Skrzypac, J.	October 11, 1926
Malenazek, A.	March 30, 1946
Turek, M.	August 31, 1954
Dzakovich, M.	March 21, 1956
Sieпка, M.	September 29, 1958
Hackl, T.	January 6, 1959
Gluchman, M.	June 1, 1960
Metzler, J.	January 22, 1963
Hankins, C.	September 20, 1965
Latsaras, M.	August 31, 1966

Upon presentation of the instant claim however, the Carrier, only so as to preclude a long running claim of 4 to 5 years, abolished three (3) Janitress Positions effective September 29, 1967 and changed, effective October 2, 1967, the assigned hours of the remaining seven (7) Janitress Positions from 7:00 P.M. to 12:00 Midnight (5 hours) to 5:00 P.M. to 1:30 A.M. (8 hours with a one-half hour lunch period).

The three (3) abolishments were necessary because there existed only fifty (50) hours of Janitress work per day (ten (10) positions @ five (5) hours each). With said abolishments there remained seven (7) positions @ eight (8) hours each, a total of fifty-six (56) assigned hours, six (6) more assigned hours than was necessary.

The changes made in connection with the Janitress Positions at Carrier's Fullerton Avenue Office Building (Seniority District No. 83) were not made because the Carrier in any way recognized a violation because such was not and is not the case.

Attached hereto as Carrier's Exhibits are copies of the following letters:

Letter written by Mr. Amour to Mr. Hopper under
date of February 9, 1968 Carrier's Exhibit "D"

Copy of letter written by Mr. Amour to Mr.
Hopper under date of February 19, 1968 Carrier's Exhibit "E"

(Exhibits Not Reproduced)

OPINION OF BOARD: On September 1, 1949 the following 40 hours week rule went into effect on the property.

"RULE 27—40 HOUR WEEK

(a) There is hereby established for all employees, except those occupying positions listed in Rule 1(b), a work week of forty (40) hours, consisting of five days of eight (8) hours each,"

There is no dispute that for many years prior to September 1, 1949 and at all times from that date to October 2, 1967 the positions made the basis of the instant claims were operated on less than 8 hour days and less than 40 hour weeks.

The record reflects that in 1953 the Organization complained of the short work week on these positions, but took no action to enforce the provisions of Rule 27. No other complaint was made by the Organization until February 20, 1967, and after no satisfactory disposition of the complaint the Organization filed the instant claim on September 22, 1967.

Immediately following the filing of the instant claim, the Carrier established 8 hour day, 40 hour week positions of those made the basis of the claim effective October 2, 1967.

The Carrier has pointed to the fact that a "days work" has been defined in the Agreement as "eight (8) consecutive hours work . . . shall constitute a days work . . ." since its inception January 1, 1920. It was not however, until September 1, 1949, that a ". . . work week of forty (40) hours, consisting of five days of eight (8) hours each, . . ." was "established" by the parties to the controlling agreement.

We find that the Organization was fully aware of and acquiesced in the Carrier's continued operation of the positions on a short week basis after September 1, 1949.

The Carrier contends that after the failure of the Organization to make timely demand upon it to comply with the Agreement, and its acquiescence in this practice of providing a short work week for the employees here concerned it is now barred from asserting the provisions of Rule 27. We do not agree.

In Award No. 7914 (Shugrue) we said:

" . . . When the meaning and intent of the provisions of a collective bargaining Agreement are clear and unambiguous unprotested past practices, which are violations thereof, are not controlling and will neither be permitted to vitiate the force nor prevent the enforcement thereof. See Awards 3444 and 5834 of this Division."

We do, however concur in Carrier's contention that the doctrine of estoppel applies in the instant case. To compensate claimants retroactively, or even for the very brief period taken by the Carrier to correct the contract violation, upon presentation of the formal claim filed herein, would bring about an unjust result. This is particularly true, considering the Organizations inaction for the seventeen years preceding the filing of 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 violated.

A W A R D

Claim sustained as to Part 1). Denied as to Part 2).

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 25th day of November 1969.