Award No. 4461

Docket No. TE-4500

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Delaware, Lackawanna and Western Railroad Company that the person occuping the Netcong, New Jersey, agency position whose assignment on week-days ends at 6:00 P. M., who has been required and who continues to be required by the Carrier to remain on duty on Sundays and the seven specified holidays until 8:25 P. M. shall be additionally compensated for two (2) hours and twenty-five (25) minutes at time and one-half rate each Sunday and holiday since March 8, 1944 (date the claim was first made) and shall continue such payments so long as the assignment continues.

EMPLOYES' STATEMENT OF FACTS: Agreements by and between the parties, hereinafter referred to as Telegraphers' Agreements, bearing effective dates of May 1, 1940 and November 1, 1947 are in evidence; copies thereof are on file with the National Railroad Adjustment Board. The November 1, 1947 agreement superseded the May 1, 1940 Agreement, except that Articles 8 and 24 as written in the November 1, 1947 Agreement superseded, respectively, Rule 8 and 23 of the May 1, 1940 agreement effective March 1, 1945.

Netcong is a two trick office employing one agent-operator and one clerk-operator. The clerk-operator's assignment, not here involved, is 6:25 A. M. to 2:25 P. M. daily. March 8, 1944, the date of claim, found the agent-operator with these assignments:

Weekdays (except Monday)	10:00 A.M. to 6:00 P.M.
Mondays	11:30 A.M. to 6:00 P.M.
Sundays & holidays	2:15 P.M. to 8:25 P.M.

Effective May 22, 1944, the above assignments were changed to:

Weekdays & holidays, except Monday	10:00 A.M. to 6:00 P.M.
Mondays	11:30 A.M. to 6:00 P.M.
Sundays	2:25 P.M. to 8:25 P.M.

and effective February 24, 1945 the assignments were changed to:

Weekdays, except Mondays	10:00 A.M. to 6:00 P.M.
Mondays	12:00 Noon to 6:00 P.M.
Sundays & holidays	2:25 P.M. to 8:25 P.M.

This claim is not supported by rule, precedent or practice, and should be denied not only on the merits but for laches as well. See Awards 2914, 2913, Third Division.

Accordingly, the Board has no jurisdiction. (325 U. S. 711)

OPINION OF BOARD: The occupant of the agency position at Netcong, New Jersey, is monthly rated and assigned eight hours per day for the 365 days of the year. It is conceded that any time worked before or after his regularly assigned hours is within the overtime or call rules. The position was assigned 10:00 A. M. to 6:00 P. M. on week days, except Monday when he was assigned 11:30 A. M. to 6:00 P. M. No issue is here raised concerning the Monday assignment. On Sundays and holidays, the position was assigned 2:15 P. M. to 8:25 P. M. It is the contention of the Organization that the occupant of the position should be paid time and one-half for the two hours and 25 minutes worked after 6:00 P. M., it being work performed after the close of his regular assignment if it had been correctly made.

While two starting time rules are involved, we shall quote only the one contained in the Agreement effective November 1, 1947, the previous Agreement being to the same effect.

> "Regular assignments shall have a fixed starting time and the regular starting time shall not be changed without at least eighteen (18) hours' notice to the employes affected." Article 7 (a), Current Agreement.

We concur with the assertion of the Organization that the foregoing rule means that a regular assignment shall have a uniform starting time on each day of the week. The holdings of this Board have been to this effect, the only exception occurring to the writer being regularly assigned relief positions which from their very nature do not come within the rule.

Awards 3836, 3229, 2205, 1307. We must conclude therefore that the Sunday assignment was not in accord with Article 7 (a) and that the time worked continuous with and outside of the regularly assigned hours, should be paid for at the time and one-half rate under the overtime rule.

Carrier asserts that the claim is barred by laches. We think not. The violation was called to the attention of the Carrier, which elected to do nothing about it. The passage of time has not prejudiced its position. There has been no acquiescence by the Organization since the violation was called to the attention of the Carrier. The elements of an estoppel do not exist.

The record shows that the occupant of the position for which this claim was made is one Tregenza. He is described in the claim as "the person occupying the Netcong, New Jersey, agency position". The claim describes the person injured by the violation with sufficient certainty. The objection to the claim on this ground is without merit.

There appears in the record a disclaimer of any right to reparations by Tregenza, the occupant of the position during the period of the claim. The Carrier insists that this operates to defeat the claim. We think not. The Organization has the authority to police the Agreement. It is authorized to correct violations and to see that the Agreement is carried out in accordance with its terms. In so doing, it acts on behalf of all the employes who are members of the Organization. Individual members are not permitted to contract with the Carrier contrary to the provisions of the collective agreement and thereby make the collective agreement nugatory. Neither can such a result be secured by indirect action. The Carrier will not be permitted to protect itself against its own violations of the Agreement by securing waivers, disclaimers, releases, or other formal documents having the effect of excusing its contract violations. Such methods, carried to the extreme, would ultimately result in the destruction of the collective Agreement. We quote with approval from Award 2602 on this point:

> "It appears, however, that no less an authority than the Supreme Court of the United States, has declared in the case of The

Order of Railroad Telegraphers v. Railway Express Co. (No. 343, decided February 28, 1944) that where collective bargaining agreements exist their terms cannot be superseded or varied by special voluntary individual contracts, even though a relatively few employes are affected and these are specially and uniquely situated. The Court based its decision upon the fundamental proposition that if it were otherwise 'statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually.' The decision is precisely in point, clear, positive and unequivocal, and we have no other choice than to apply the law of the land, as declared by the nation's highest tribunal. The Carrier will have to find whatever solace it can in the thought that it was motivated by a generous humane impulse, for the benefit of an unfortunate employe."

The Carrier cites E. J. & E. R. R. v. Burley, 325 U. S. 711, in support of its contention. The holding there was that an agreement of settlement could not be negotiated by the Organization without proper authority from the employe who has suffered wage losses. The Organization cannot bargain away an employe's rights without his consent. It does not require that express authority be obtained to enforce the Agreement and to demand penalties for Agreement violations. Unless penalties and wage losses can be asserted by the Organization, its primary method of compelling enforcement of the Agreement is gone.

The employe, Tregenza, in disclaiming any desire to prosecute the claim asserts that if it is collected he will return it to the Carrier. Such a procedure, if followed, raises no question under the collective Agreement, the only agreement with which we are concerned.

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 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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of July, 1949.