

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTES.—

"Claim of the General Committee of The Order of Railroad Telegraphers, Southern Pacific Company (Pacific Lines), that Telegrapher D. V. Cronin, regularly assigned to an advertised seven-day position in 'UN' Tucson, Arizona, be paid a day of eight hours for December 26th, 1932, and January 2nd, 1933, respectively (week-days observed as holidays), on which he was not permitted to work and his duties assigned to another regular employe in the office."

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

The carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock Willard E. Hotchkiss was called in as Referee and on request a second hearing was held on June 29, 1936, at which representatives of the parties argued the case before the Board with the Referee sitting as a member thereof.

The parties have jointly certified the following Statement of Facts, and the Division so finds:

"Telegrapher D. V. Cronin was assigned as telegrapher in Tucson Office, assigned hours 8:00 A. M. to 4:00 P. M.; he was not used on Monday, December 26th, 1932, and Monday, January 2nd, 1933 (both being holidays)."

There is in evidence an agreement between the parties bearing effective date May 1, 1927, also of certain supplementary documents dated November 29, 1932, and Memorandum of June 9, 1933. The following rules have been cited:

"RULE 1—SCOPE

"This schedule will govern the employment and compensation of the following: Agents, assistant agents and ticket agents incorporated in wage schedule, agent-telegraphers, agent-telephoners, agents, small non-telegraph; block operators, car distributors (if required to telegraph in the performance of their duties), drawbridge tenders (levermen), managers, punchers, staffmen, telegraphers, telephone operators (except switchboard operators), towermen, tower and train directors, and wire chiefs, and will supersede all previous schedules, agreements, and rulings thereon. In application of these rules, employees covered thereby will be considered as telegraphers."

"RULE 5—GUARANTEE

"Regular assigned telegraphers will receive one day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on Sundays and holidays

"A regular assigned telegrapher is one who is assigned to a position by bulletin."

"RULE 6—SUNDAY AND HOLIDAY WORK

"(a) Telegraphers will not be required to work on holidays, except when necessary to protect the Company's interests.

"(b) Time worked on Sundays and the following holidays: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid for at the pro rata hourly rate when the entire number of hours constituting the regular week-day assignments are worked.

"(c) When notified or called to work on Sundays and the above specified holidays a less number of hours than constitute a day's work within the limits of the regular week-day assignment, employees shall be paid a minimum allowance of two (2) hours at overtime rate for two (2) hours' work or less, and at the regular hourly rate after the second hour of each tour of duty. Time worked before or after the limits of the regular week-day assignment shall be paid for in accordance with overtime and call rules.

"(d) Where two or more telegraphers are employed and the condition of service will permit, one telegrapher may be used on alternate Sundays, except as provided for in Rule 20."

"RULE 21—REDUCTION OF FORCES AND DISPLACEMENT RIGHTS

"(g) Senior extra telegraphers, when available and competent, will be used in preference to junior extra telegraphers. Senior extra telegraphers, not working will be allowed to displace either THE junior extra telegrapher on the division, or THE junior extra telegrapher in general, relay, or dispatchers' offices at any time."

During discussion of the case, certain other rules have been referred to and there have been frequent references to past practice with the implication that such practice is substantially on a par with rules of the agreement.

Petitioners contend that Rule 6 applies; that telegrapher Cronin was regularly assigned to position No. 4, first telegrapher, which was a train order assignment; that train order assignments have invariably been considered seven-day positions where offices are open seven days, and the incumbents of such positions are entitled to fill the positions when they are worked on Sundays and holidays within the limits of the week-day assignment. Petitioner also contends that printer-mechanician-assistant wire chief Kitchens, who performed Morse telegraph work on the two holidays in question, did not perform the regular duties of his assigned position but performed only the Morse telegraph work that Cronin performed on week-days, and further that Kitchens was supplanted in the performance of the duties of his position on these days by an extra-unassigned puncher.

The carrier contends that there are no regularly assigned seven-day positions in this office. It submits in evidence the bulletin upon which the position was awarded to Cronin, which does not state that the position was a train order position or that it was a seven-day assignment. It further asserts that there were no train order assignments in the "UN" office, that the two Morse telegraph operators handled train orders and the general run of telegraph messages, and that the manager-wire chiefs, and printer-mechanician-assistant wire chief also performed telegraph work; that on the days in question it was necessary to fill Kitchens' position as printer-mechanician-assistant wire chief in order that the Morkrum printer machines might not be without attention for too long a period; and that Kitchens performed the duties of his regularly assigned position on the days in question as well as the Morse telegraph work. The carrier further asserts that Morse telegraph work was part of the service regularly performed by Kitchens week days, and that Cronin's position was not filled on the days in question, and that since Kitchens was working his own position he could not have been supplanted by the extra unassigned puncher.

Tucson, Arizona, where this dispute had its origin, is a division telegraph office in which, at the time the dispute arose, there were regular assigned employees

including manager-wire-chief, two wire chiefs, one printer-mechanician-assistant wire chief, and two Morse telegraph operators. Morkrum printer machines were used in the office. Carrier submits that it was the practice to have the manager-wire-chief, and the printer-mechanician-assistant wire chief operate Morse telegraph keys and do puncher work when not engaged with the specific duties of their assignments.

OPINION OF THE REFEREE.—Some of the pertinent facts are in dispute. These include the following: (a) The part that past practice should play in deciding the case is asserted by one of the parties and denied by the other; (b) the question whether Cronin was or was not on a regular seven day assignment; (c) the question as to some of the holidays and Sundays on which he did or did not work; (d) the question whether Kilcheus was exclusively occupied during the days to which the dispute pertains with work which had been Cronin's work on other Sundays and holidays on which he was called for duty as well as on week days, or whether he did some of that work in addition to the work of his regular assignment as Mechanician-Assistant-Wire Chief.

The Referee is disposed to apply the applicable language of the agreement to this dispute in the light of the policies and basic purposes by which clearly the agreement is animated. The fact that the parties contradict each other in respect to certain circumstances which might perhaps modify this approach to a decision if one contention or the other in respect to the facts should prevail, confirms the Referee in the purpose of deciding the issue primarily from the agreement itself and its known purposes.

As the Referee interprets the language of the agreement and the purposes and policies of it which are applicable to the case the issue takes shape somewhat as follows:

1. The agreement undertakes to give employees certain specific guarantees in respect to wages and working conditions.

2. The agreement undertakes equally to insure to management the cooperation of employees in all proper efforts to manage the business efficiently and well, which do not transgress the provisions of the agreement, nor encroach upon the rights of the employees as specified or reasonably implied in the terms of the agreement.

3. Finally the agreement undertakes to embody certain items of policy in respect to which the parties are in agreement or to which they are both subject under laws and public policies governing their relations with each other.

1. *Employees' Guarantees.*—The agreement guarantees employees that when regular telegraphers are ready for service and not used they will receive a day's pay except on Sundays and holidays—(Rule 5).

Rule 6 guarantees employees certain things in respect to Sunday and holiday work, to wit:

(a) They will not be required to work on Sundays except when necessary to protect the company's interests.

(b) Work performed on Sundays and on the seven specified holidays shall be paid for pro rata if employees work a full day.

(c) Employees notified or called for duty for less than a full day on any of the above days shall be paid in accordance with Rule 6 (c) quoted above.

(d) Where two or more telegraphers are employed and conditions of service will permit, one telegrapher may be used on alternate Sundays except as provided in Rule 20. (Reference will be made to this exception later in the opinion.)

All of the above provisions are clearly intended to operate beneficially for the employees and it appears equally clear that one of the protections intended is protection against excessive Sunday and holiday work.

2. *Managerial Responsibilities and Rights.*—Since responsibility for operating the business to which a labor agreement pertains is the responsibility of management, labor agreements are usually less explicit in respect to guarantees enjoyed by management than they are in respect to those enjoyed by employees. Rules of agreements and of law governing the operation of a business are chiefly operative to restrict the freedom of action which management would otherwise possess. But in all agreements management retains the right and the duty to exercise judgment over a considerable part of its total activities. It goes without saying that all such residual or reserved powers must be exercised legally and so as not to transgress the agreement either specifically or by reasonable implication.

A careful study of the agreement has convinced the Referee that the carrier, under the terms which run beneficially for the employees, is obligated to restrict Sunday and holiday employment of regularly assigned telegraphers as much as it consistently can. The Referee does not find in the agreement or in the laws which govern the relations between the parties any restriction upon management as to the exercise of its best judgment as to the Sundays and holidays on which it is essential to protect the company's interests to employ a regularly assigned telegrapher as distinguished from the Sundays and holidays when an extra unassigned telegrapher may be employed instead. If management finds that on one Sunday or holiday the protection of the Company's interests requires the employment of an employee possessing a higher degree of skill and receiving a higher rate than is required on some other Sunday or holiday, the Referee can find nothing in the agreement to prevent management from acting accordingly.

However, the parties appear to be in agreement that an extra unassigned telegrapher should not be called to do work which is preponderantly the work of a regularly assigned telegrapher, but the language and spirit of the agreement indicate clearly that the Sunday and holiday work of regularly assigned telegrapher should be kept to a minimum.

In the same connection the parties apparently agree that regular telegraphers may perform other duties during their regular assignments when there is not enough work on the regular assignment to keep them fully occupied. Unless it can be affirmatively shown that such supplementary work has become in fact the predominant work of an employee, it would not operate to change the designation of the regular assignment.

If it could be shown in any case that management had acted in a perverse, capricious, or obviously unfair manner, either in selecting an extra unassigned telegrapher for Sunday or holiday service or in calling one regularly assigned telegrapher rather than some other regularly assigned telegrapher, and had not exercised reasonable managerial judgment in making a selection, the agreement by implication would doubtless support a claim for redress for any injury shown to have flown from such perverse, capricious, or unfair action.

The Referee finds in the instant case that the carrier has acted in a reasonable manner in calling a regular telegrapher who possessed a special type of skill for service on the days to which this claim applies.

3. *Question of Policy Involved.*—Discouragement and restriction of Sunday and holiday work by employees who work regularly on other days is a recognized and accepted item of public policy. It is an avowed policy of organized labor. It is specifically embodied in the agreement in two different sections of the rule cited by petitioners in support of their claim, to wit:

"6a. Telegraphers will not be required to work on holidays, except when necessary to protect the company's interests."

"6d. Where two or more telegraphers are employed and condition of service will permit, one telegrapher may be used on alternate Sundays, except as provided for in Rule 20."

The provisions of Rule 20 do not appear to conflict in any way with the above reasoning. It should be noted, however, that Section (j) of Rule 20 refers to first, second, and third wire chiefs having preference where telegraphers at several telegraph offices are required to work Sundays and holidays. While this phrase might appear to suggest that it is a privilege to work on Sundays and holidays, the 36 hour notice provided for in the same section and the provisions of 6a and 6d have a different implication and one that accords with acknowledged policy.

In conclusion, the Referee finds that as a matter of public policy, of general union policy, and of policy reasonably deductible from the agreement between the parties, Sunday and holiday work should not be required of persons regularly employed on other days unless necessary, and persons regularly employed on other days should not expect to be employed on Sundays and holidays as a matter of right unless that right is shown to flow from the agreement.

Further, the Referee finds in accord with the above policy, management has the right and the duty to decide when work that has to be done on a Sunday or a holiday requires the service of a regularly assigned telegrapher possessing one type or degree of skill and when it can be done by a telegrapher possessing a different type or degree of skill, and when it can be done by an extra un-

assigned telegrapher, provided only that the decision does not transgress any of the terms of the agreement, provided that it is legal, and provided that it is a normal and reasonable exercise of managerial judgment.

Finally, the Referee finds that no rule of the agreement was violated when the carrier decided to call Mechanician-Assistant Wire Chief Kitchens to duty on December 26, 1932, and January 2, 1933, and did not call Telegrapher D. V. Cronin.

AWARD

Claim disallowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON,
Secretary

Dated at Chicago, Illinois, this 8th day of October, 1936.