Award Number 310
Docket Number TE-196

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

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

DISPUTE.—

"Claim of the General Committee of The Order of Railroad Telegraphers, Southern Pacific Company (Pacific Lines), that the hours a towerman in the Fourth Street Tower, San Francisco, is used, 7:00 A. M. to 10:45 A. M. and 3:00 P. M. to 7:00 P. M., constitutes a split trick and should be discontinued and those who have been used on the position paid at overtime rate for all time in excess of eight continuous hours from the time first required to report each day."

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

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

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

The dispute being deadlocked, Willard E. Hotchkiss was called in as Referee and upon request of the Carrier a second hearing was held on June 30, 1936, at which the parties argued the case before the Division with the Referee sitting as a member thereof.

There is in evidence an agreement between the parties, bearing effective date of September 1, 1927 (Wage Scale effective May 1, 1927).

The parties have jointly certified the following statement of facts, and the Third Division so finds:

"At Fourth Street, San Francisco, Coast Division, a continuously operated interlocking plant, there are employed three regularly assigned towermen covering the 24-hour period.

"Beginning July 5th, 1932, an extra towerman was used from 7:00 A. M. to 11:00 A. M. and from 3:00 P. M. to 7:00 P. M., daily except Sundays. This continued for several months, following which the extra towerman has been used approximately from 7:00 A. M. to 10:45 A. M. and from 3:00 P. M. to 7:00 P. M., daily except Sundays and Holidays, with the further exception that on Saturdays usually is used from 7:00 A. M. to 11:00 A. M. and 12 noon to 1:00 P. M. Towerman thus used has been paid at the straight time rate for actual hours worked each day."

The petitioner contends that the Carrier is in violation of Rules 19 (c), 14, 7, and 3 of the said agreement, in using a towerman as set forth in the Statement of Facts. Those rules are:

"RULE 3—BASIC DAY

"Except as specified in Rule 7, eight (8) consecutive hours, exclusive of the meal hour, shall constitute a day's work except that where two (2) or more shifts are worked, eight (8) consecutive hours with no allowance for meals shall constitute a day's work."

"RULE 7—INTERMITTENT SERVICE

"At small non-telegraph or non-telephone agencies where service is intermittent, eight (8) hours actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employees filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours, and also for all time in excess of twelve (12) consecutive hours, computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one hour.

"Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the management and duly accredited representatives of the employees. For such excepted positions the foregoing paragraph shall not apply.

"This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

"Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one hour's duration and service of the employees cannot otherwise be utilized.

"Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours."

"RULE 14—OVERTIME

"Except as otherwise provided, time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate."

"RULE 19—QUALIFICATIONS FOR AND BULLETINING OF VACANCIES

"(c) Telegraphers will be notified by the Company every thirty days when positions are created or vacancies occur on the divisions where located, and telegraphers may file application for the same within ten (10) days from the date of notification. All applications for vacancies to be made in duplicate, one copy of which will be returned to applicant previous to close of bulletin, as an acknowledgment of receipt. Assignment to be made within ten (10) days after close of bulletin, and except in emergency successful applicant placed on position within thirty (30) days thereafter. If not placed thereon within the thirty (30) day period, employee will thereafter be compensated on basis of not less than the rate of position to which assigned."

For some time prior to July 3, 1932, five towermen were employed at the Fourth Street Tower with assigned hours respectively as follows:

7 A. M. to 3 P. M.; 8:01 A. M. to 4:01 P. M.; 3 P. M. to 11 P. M.; 4:01 P. M. to 12:01 A. M.; and 12:01 A. M. to 8:01 A. M.

Because of decrease in business, the management decided in June 1932 that one towerman on each shift was sufficient to operate the tower except between 7 A. M. and 11 A. M., and between 3 P. M. and 7 P. M. on regular full working days, and except between 7 A. M. and 11 A. M., and between noon and 1 P. M. on Saturdays. Accordingly, the Carrier desired to discontinue one of the five positions and tried to reach an agreement with petitioners under Rule 7 to work one of the four remaining positions on an intermittent service basis between the hours of 7 A. M. and 7 P. M. Failing to reach an agreement, the Carrier abolished two of the five positions and beginning July 5, 1932, employed and paid an extra towerman as set forth in the above joint statement of facts.

There has been much discussion and voluminous citations as to rules, decisions, and past practice applicable to this case and there are certain inconsistencies in arguments advanced. The facts involved in the different citations are sufficiently varied to account for conflicting conclusions drawn from them and to explain if not to justify any inconsistency revealed by the parties to this dispute. A careful examination of all the facts, citations, and arguments leads to the conclusion that while many of the citations appear to have a certain

pertinence they do not appear controlling. In the judgment of the Referee, decision must hinge exclusively on the rules of the agreement as it stands and on their application to the facts and circumstances of the instant case.

Rules 3, 7, 14, and 19c have been cited. Rules 3, 14, and 19c provide, respectively, for a basic consecutive eight hour day, for basis on which overtime is to be paid, and for the bulletining of positions. Any violation of these rules in the instant case is predicated upon an improper application of Rule seven which accordingly becomes the crucial rule in the case.

The first paragraph clearly relates to small non-telegraph and non-telephone agencies. The second paragraph provides that the parties may agree to except individual positions from the application of the provisions of paragraph one but it does not say that either party must agree and it does not give any indication as to what sort of individual positions are contemplated. Superficially, the rule appears to be a sort of safety valve but that is conjecture.

In contrast to paragraph two, paragraphs three and four are definite and explicit, to-wit:

> *Paragraph three.*—"This rule shall not be construed as authorizing the working of a split trick where continuous service is required."
>
> *Paragraph four.*—"Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one hour's duration and service of the employees cannot otherwise be utilized."

The carrier, being well advised as to the meaning of these paragraphs and conscious of the burden they entailed, as result of decline of business undertook to secure agreement under paragraph two in order to be relieved of that burden. Failing to secure relief in that way the carrier abolished two positions and proceeded to put an extra towerman into intermittent service first for a total of eight hours daily and later for a total of seven hours and forty-five minutes daily.

Throughout the argument of the carrier insistence is placed on the contention that the employee in question was an extra towerman to whom the provisions of paragraphs three and four do not apply. Throughout the argument of petitioners runs insistence on the contention that calling this employee an extra towerman was a fiction invoked to escape one of the burdens of the agreement. As the Referee views the case this is the only issue.

To uphold the carrier's contention would vitiate the protection afforded in paragraphs three and four of Rule 7 and this is not permissible through ex parte action. A person employed regularly on the same work under a definite schedule over such a period of time as to amount to permanent regular employment must be held to be a regular employee entitled to the protection of rules applicable to regular employees, even though the carrier may have omitted to bulletin the position and though the employee was called an extra employee.

On the face of the record the carrier was confronted with a situation which made it natural to seek relief through the channels provided in the agreement. The record does not reveal the reasons for failure of the carrier to obtain relief in this way. Possibly the petitioners felt that agreement under paragraph two of Rule 7 to waive the restriction on intermittent service contained in paragraphs three and four might constitute an unwise precedent to establish in connection with a major position such as towerman at the Fourth Street Tower in San Francisco. The issues involved in the case would appear to be susceptible of practical solution; but be the equities what they may, the meaning of the rule is clear. Until the rule is changed in the manner prescribed by law or its restrictions modified by mutual agreement, the carrier must bear whatever burdens the rule, as it stands, may impose.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this Eighth day of October, 1936.