

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 Mechanician-Assistant Wire Chief J. B. Kitchens be paid for eight hours he was not permitted to work on his position in 'UN' Tucson Telegraph Office, Sunday, January 1st, 1933, on which day an extra employe was used on his position."

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 result of 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:

"Mr. Kitchens was assigned as Mechanician-Assistant Wire Chief, Tucson, office, 8:00 A. M. to 4:00 P. M. On Sunday, January 1st, 1933, Mr. Kitchens did not work, an extra unassigned puncher was used to perform punching duties, 8:00 A. M. to 4:00 P. M. that date."

There is in evidence an agreement between the parties bearing effective date May 1, 1927; also of certain supplementary documents including understanding 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, staff-men, 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."

Petitioners contend Rule 6 applies; that the printer mechanician-assistant wire chief is required to do puncher work in connection with his other duties, and that such work is, in fact, a part of his duties; that when any duties of a regular assigned position are required to be performed on Sunday, within the hours of the week day assignment, the regular assigned employee is entitled to the work; that the work performed January 1, 1933, by the extra unassigned puncher was part of the work regularly performed week days by the printer mechanician-assistant wire chief; and that the incumbent of that position was entitled to Sunday work.

The Carrier contends that the title of the position of printer mechanician-assistant wire chief is descriptive of its duties and that Morse telegraph and punching work performed by the incumbent is incidental work performed in spare time when the regular assigned duties of the position permit; and that the same is true of the position of manager wire chief. The carrier asserts that there is no specific assignment of the Morse telegraph and puncher work in the office; that during periods of heavy movement of perishable traffic the puncher work frequently exceeds the capacity of the manager wire chief and assistant to perform, and it is customary at such times to call in extra unassigned punchers to perform the work on such occasions. The carrier also points out that the position of printer mechanician-assistant wire chief is not a seven-day assignment and that there is no guarantee of Sunday and holiday work under the rule.

OPINION OF THE REFEREE.—Tucson, Arizona, where this dispute arose, is a Division Telegraph office in which, at the time to which the dispute pertains, there were regular assigned employees including a manager wire chief, two wire chiefs, one printer mechanician-assistant wire chief, and two Morse telegraph operators. Morkrum printer machines were in use 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.

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. As the Referee interprets these purposes and policies they are substantially as follows:

1. To give to the employees specific guarantees in respect to wages and working conditions.
2. 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. To embody matters of general policy in respect to which the parties are in agreement or to which they are both subject under the laws and public policies governing their relations with each other.

1. *Employees' Guarantees.*—In respect to guarantees which the agreement affords the employees, the Referee finds a specific guarantee in Rule 5 that regular telegraphers will receive one day's pay if ready for service and not used or if required on duty less than the required minimum number of hours except on Sundays and holidays. A regular assigned telegrapher is defined in this rule as one who is assigned to a position by bulletin. Rule 6 contains certain guarantees as to how employees shall be treated 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 the condition of service will permit, one telegrapher may be used on alternate Sundays except as provided in Rule 20.

All of the above guarantees appear to the Referee intended to operate beneficially to the employees and he is unable to find any other specific guarantees applicable to the circumstances of this case which operate in that way.

2. *Managerial Rights and Responsibilities.*—Labor Agreements are usually less explicit in respect to the rights and guarantees enjoyed by managements under them, since the responsibility for operating the business to which the agreement pertains is the responsibility of management and the rules of agreements and of law governing the operation of a business operate chiefly to restrict the freedom of action which management would otherwise possess. In other words, all agreements of necessity leave with management a considerable zone of operation within which management has the right and the duty to exercise judgment as to the best and most efficient way to run the business. It goes without saying that all such implicit or reserved powers must be exercised legally and in such a way as not to transgress the agreement either specifically or by reasonable implication.

In addition to the provisions of Rules 5 and 6 outlined above, reference has been made to Rule 21-G. Rule 21-G by any reasonable interpretation of its language has the purpose of safeguarding seniority rights in connection with reductions of force, and in respect to the use of senior extra telegraphers in preference to junior extra telegraphers. The Referee does not find that Rule 21-G applies specifically to the instant case.

Except for the provisions of Rules 5 and 6 set forth above, and which run beneficially to the employees, the Referee does not find in the agreement or in the laws applicable to the relations between the parties any restriction upon management in the exercise of its best judgment as to the Sundays and Holidays when it is essential to employ a regularly assigned telegrapher as distinguished from the Sundays and Holidays when an extra unassigned telegrapher (Puncher) may be employed.

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. In the judgment of the Referee, it would not be a reasonable interpretation of the agreement to hold that such supplementary work would change the character of the assignment so as to preclude the employment of an extra unassigned telegrapher (puncher) to do it on Sundays or Holidays unless it should be affirmatively shown that work of a nature not specified in the assignment had become in fact pre-

dominantly the regular work of the position in question. There is perhaps one other set of circumstances which if affirmatively established would defeat the freedom of the employer to exercise his best judgment, within the specific terms of the agreement, as to whether on a given Sunday or holiday a regularly assigned telegrapher or an extra unassigned telegrapher (puncher) should be employed. If it should be shown that management had exercised its right to decide this question in a perverse, capricious, or obviously unfair manner rather than in accord with normal and reasonable managerial judgment, 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 not exceeded the limits of reasonable managerial judgment. The duties performed by Mr. Kitchens on week days supplementary to his regularly assigned duties on those days were not sufficient to change the nature of the assignment so as to make it incumbent on the carrier to call him a regularly assigned telegrapher—to perform those supplementary duties on a Sunday or a Holiday on which those duties had to be performed.

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 has to be done on a Sunday or a holiday requires the service of a regularly assigned telegrapher and when it can be done by an extra unassigned telegrapher (puncher), 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 not to call Mechanician-Assistant Wire Chief Kitchens to duty on Sunday, January 1, 1933, and did call an extra unassigned telegrapher (puncher).

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.