

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 Extra Telegrapher R. C. Smith be paid a minimum of eight hours for service performed 5 P. M. to 9 P. M. at Dunsmuir, California, December 23rd, 1931."

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

An agreement bearing date of September 1, 1937, as to rules, and August 1, 1932, as to rate of pay, is in effect between the parties.

The parties jointly certified to the following facts:

"On December 23rd, 1931, Dunsmuir telegraph office was a continuously operated office, there being four regularly assigned telegraphers. On that date, it was necessary to work an additional telegrapher from 5 P. M. to 9 P. M. Extra telegrapher R. C. Smith worked from 5 P. M. to 9 P. M. and was allowed four hours' compensation at the hourly rate."

This case was brought under Rule 3 of the Agreement which reads as follows:

"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."

Other rules cited in the course of argument include the following: Rule 4 "Basis of Pay," Rule 5 "Guarantee," Rule 7 "Intermittent Service," Rule 8 "Deadheading," Rule 9 "Regular Assigned Men Doing Relief Work," Rule 10, "Emergency Service," Rule 16 "Call Rule."

HISTORY OF CASE.—In the first instance, claimant reported his service at straight time, following which a revised claim was submitted under Rule 16, which reads as follows:

"RULE 16—CALL RULE

"(a) Telegraphers notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis. Each call to duty after being released will be a separate call.

"(b) Telegrapher required to report for duty before assigned starting time and continues to work through his regular shift, shall be paid three (3) hours for two (2) hours' work or less, and time and one-half thereafter on the minute basis for the time required to work in advance of his regular starting time."

Superintendent Fitzgerald denied the revised claim in a letter dated January 16, 1932, and used this language:

"Rule 16 of the Telegraphers' Agreement applies only to service performed outside of regular work period and you were used on date in question, as 5th telegrapher, the position being used for only one-half day." (Petitioners' Exhibit "A"; Carrier's Exhibit "B.")

On January 22, 1932, Local Chairman Putnam in referring to the above letter from Mr. Fitzgerald to Mr. Smith, wrote Mr. Fitzgerald and used this language:

"* * * This service was not continuous with the regular work period and Rule 16 provides compensation in the form of a call as Mr. Smith originally claimed.

"If as your letter states, the work performed was in Position 5, that of the 5th Telegrapher, Mr. Smith is entitled to compensation for 8 hours in accordance with Rule 5." (Petitioners' Exhibit "B," Carrier's Exhibit "A.")

On March 1, 1932, General Chairman Pritchett wrote Supervisor of Wage Schedules Beach, referring to the above correspondence and saying that Mr. Fitzgerald's statement that a 5th telegrapher's position was established for one-half day established the correctness of the claim for 8 hours' pay. (Carrier's Exhibit "C.")

On March 9, 1932, Mr. Beach responded denying the claim, and saying that Mr. Smith was not entitled to 8 hours' compensation, "based on either past practice or the rules of the Telegraphers' agreement." (Carrier's Exhibit "D.")

On July 25, 1932, Mr. Pritchett wrote Mr. Beach, referring to a conference held on June 2, and called attention to Questions 28, 29, and 30, Interpretation No. 4 to Supplement No. 13, to General Order No. 27, as expressing the purpose to guarantee a minimum of eight hours' pay. (Carrier's Exhibit "E.")

On August 25, 1932, Mr. Beach replied and made the point that Article 2 of Supplement 13 to General Order No. 27 and Interpretation 4, etc., deal with regularly assigned employees and make no reference to extra employees. (Carrier's Exhibit "F.")

In advancing the case the parties have submitted extensive briefs and arguments but the essence of their contentions is contained in the above correspondence. The parties are in disagreement as to the applicability of rules, as to the relevancy of many facts submitted respectively in support of their arguments, and they disagree in some particulars upon the facts themselves.

OPINION OF REFEREE.—The Referee is unable to find in Rule 3 language to support the contention that it guarantees eight hours of employment when a telegrapher is called as was the claimant in this case. The title of the rule—"Basic Day" does not lend itself to such an interpretation.

Rule 4 (b) to-wit: "Telegraphers will receive the same compensation in relief service as the telegrapher they relieve" is cited in support of an argument that it was never intended that a carrier might assign extra telegraphers to perform service under less favorable conditions of employment or rates of pay than is provided thereunder for regular assigned employees.

This argument assumes that the claimant in this case was performing relief service which in the judgment of the Referee, was not the case, inasmuch as the regular telegrapher had completed his tour of duty before Mr. Smith went into service. Moreover, insofar as the less favorable conditions or rates of pay mentioned refer to overtime pay, the argument runs counter to some of the basic purposes of the agreement. Compelling management to pay overtime rates is a punitive measure, the purpose of which is to discourage the employment of regular employees in excess of their regular hours. It is no part of the purpose of overtime rates to enable one group of employees to earn high wages at the expense of other employees. When an extra employee is called he is not working excessive hours and the basic argument for overtime does not apply. Therefore, claims for overtime pay for extra employees cannot rest on the basic

principles underlying punitive overtime. Management is under a clear obligation to hold overtime down to the lowest minimum which the demands of the service will permit. Management is also under another obligation which applies in situations of this kind and that is the obligation to operate the business as economically as is consistent with its other obligations under the agreement. Naturally management may not violate the agreement nor deal unfairly with employees, but management is certainly obligated to avoid needless expense.

The next rule cited in the order in which they occur in the agreement, is Rule 5, the "Guarantee Rule." This rule deals exclusively with regularly assigned employees.

Whether Superintendent Fitzgerald intended to create a regular position for only one-half day or whether he merely used language carelessly and erroneously is not entirely clear from his letter of January 16, 1932. Be that as it may, the requirements for creating a regular position were not met.

Occasions arise in which it is permissible to apply a reasonable and sensible construction to acts, even though certain prescribed technicalities are not carried out. In a recent case from this same property it was held that "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 the 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." In other words, when in reason and common sense a position is a regular position it is competent so to hold in applying the agreement to a particular case. Per contra, when in reason and common sense a position is not a regular position it is equally competent so to hold even though the technicalities had been more fully complied with than was true in the instant case. The claimant in this case was clearly not a regularly assigned telegrapher within the meaning of Rule 5.

Rules 7 and 8 have no application to this case but were cited by the Carrier as embodying specific guarantees in contrast to Rule 3. Rule 9 would be applicable only on the assumption that the claimant was a regularly assigned telegrapher and on the further assumption that the work performed by him between 5 P. M. and 9 P. M. was relief work, both of which assumptions are held to be contrary to fact. Rule 10 applies to regular telegraphers and since it is held that the claimant was not a regular telegrapher this rule cannot apply to the claim. Moreover it is not clear that the service in question was emergency service as contemplated by Rule 10.

This brings us to the question whether Rule 16, the "Call Rule" applies. The reading of this rule is as follows:

"RULE 16—CALL RULE

"(a) Telegraphers notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis. Each call to duty after being released will be a separate call.

"(b) Telegrapher required to report for duty before assigned starting time and continues to work through his regular shift, shall be paid three (3) hours for two (2) hours' work or less, and time and one-half thereafter on the minute basis for the time required to work in advance of his regular starting time."

It will be noted that in both Section (a) and Section (b) this rule refers to "telegraphers," whereas Rule 5 refers to "regular assigned telegraphers," Rule 8 to "extra telegraphers," Rule 9 to "regularly assigned telegraphers," and Rule 10 to "regular telegraphers." The absence of any qualifying adjective before the word "telegraphers" in Rule 16 makes it necessary to determine what telegraphers are covered from the context, from any basic principles applicable, from past interpretations, or from all these together.

The reference to "regular work period" in Section (a) and to "regular shift" in section (b), indicates strongly that regular telegraphers are contemplated. As for basic principles, as indicated above in considering an argument predicated on Rule 4, overtime payment is a punitive measure, the object of which is to discourage management from employing regular employees excessive hours. Since an extra employee called for less than a full day is not working excessive

hours, claim for overtime for extra employees cannot rest on the basic principles underlying punitive overtime. They might be predicated on the inherent unfairness of compelling an employee to respond to a call for a trifling amount of compensation, but this would hardly apply to a full half day of service unless the rule so specified by its language, by reasonable implication or by past interpretation.

As to past interpretation by the parties, the Carrier maintains that past practice establishes the meaning of the rule as providing for only straight time for continuous service such as was performed by the claimant in this case. Petitioners submit that past practice is in line with their contentions which however were advanced under Rule 3. The record of the case as it relates to past practice is highly argumentative but does not contain specific evidence to show clearly what past practice has been.

Past practice is only useful as applied to questions upon which the meaning of applicable rules is in doubt. When a rule contains ambiguities which makes its application to a particular case uncertain, pertinent facts as to past practice should be accurately ascertained and given whatever weight they are found to merit. The two significant uncertainties in this case are, (a) as to the applicability of Rule 16 to extra telegraphers, and, (b) as to past interpretations placed on that rule by the parties.

AWARD

1. The Third Division finds that R. C. Smith was an extra telegrapher and not a regular telegrapher in respect to the service he performed from 5 P. M. to 9 P. M. on December 23, 1931.

2. Mr. Smith's claim under Rule 3 for eight hours' pay for this four hours of service is disallowed, without prejudice to any merit a revised claim for overtime under Rule 16 may have.

3. Past interpretations of Rule 16 by the parties are pertinent to the issues of this case. Inasmuch as the record leaves the parties in dispute as to these past interpretations, the case is remanded to the parties with the following instructions:

A. To ascertain jointly the facts concerning past interpretations as to the applicability of Rule 16 to extra telegraphers.

B. To clarify the rule through negotiation.

C. To adjust the case in conference in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON

Secretary

Dated at Chicago, Ill., this 17th day of November, 1936.