

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific (Pacific Lines) that Telegrapher R. D. Jones, South Fontana, California, is entitled to compensation for eight calls during August, 1938, account train orders being sent from Bloomington and Ontario to South Fontana in care of train and engine-men for delivery to trains at the latter point to avoid payment of calls to Telegrapher Jones."

EMPLOYEES' STATEMENT OF FACTS: "Telegrapher Jones is the regular assigned telegrapher at South Fontana, a one shift office. He resides in company quarters adjacent to the station and was available for service at the time orders were handled at his station."

"Claim for calls are as follows:

August 6, 1938, account Order No. 226 being sent to No. 830 at South Fontana care Extra 3613 West.

August 8, 1938, account Order No. 227 being sent to No. 830 at South Fontana care Engr. No. 819.

August 9, 1938, account Order No. 217 being sent to No. 830 at South Fontana care Engr. No. 819.

August 11, 1938, account Order No. 219 being sent to No. 830 at South Fontana care Engr. No. 819.

August 16, 1938, account Order No. 219 being sent to No. 830 at South Fontana care Engr. No. 819.

August 20, 1938, account Order No. 230 being sent to No. 830 at South Fontana, care Engr. Extra 2780 West.

August 24, 1938, one call account Order No. 292, being sent to Extra 4308 West at South Fontana care Engr. No. 6.

August 29, 1938, one call account Order No. 213 being sent to No. 830 at South Fontana care Engr. No. 819.

"In each instance, orders handled between 4:00 A. M. and 6:00 A. M., with exception of August 24, which was handled about 10:00 P. M., during the time Telegrapher Jones was not on duty."

'Rule 16

'(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) Telegraphers 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.'

has absolutely no application.

"In the absence of any rule, which would sustain claim, and in view of Rule 217 of the Rules and Regulations of the Transportation Department, and established practice of years standing which we have conclusively proven, we believe your Board will recognize the injustice of the claim presented and accordingly deny it."

OPINION OF BOARD: This claim does not arise, as is often the case, under the scope rule of the Agreement, whereby telegraphers contend, as a general proposition, that work covered by the scope rule may not be performed by employes not subject to the Agreement; it is submitted under Rule 29, dealing specifically with the handling of train orders. The provisions of this rule are very explicit. Under its terms "no employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in emergency, in which case the telegrapher will be paid for the call."

There can be no question that at Bloomington and Ontario the train orders were handled entirely by telegraphers; but it appears to be equally clear that at South Fontana, also a telegraph office, to which the train orders were directed and where they were to be executed, they were handled by train-service employes rather than by the agent-telegrapher who was there employed and was available or could be promptly located. Rule 29 does not except telegraph offices which are closed (that is, where the telegrapher is off duty); on the contrary, the wording of the rule expressly contemplates such situations. Under these circumstances—the rule itself being clear and unambiguous—it is unnecessary to go outside the Agreement to discover the intent of the parties, nor is there any basis for altering the express provisions of the rule.

It must be concluded, therefore, that in so far as Rule 217 of the Rules and Regulations of the Transportation Department, or the practice thereunder upon which the carrier relies, applies to points which are not telegraph or telephone offices, it is not in conflict with the Agreement; but that in so far as it applies to points at which telegraph or telephone offices are closed, without regard to the availability of the operators, there is such a conflict and the express provisions of the Agreement must prevail.

It cannot be overlooked, however, that the practice here in issue under the operating rules of the carrier is one of very long standing and wide use, and that, despite considerable evidence of such practice since September 1, 1927, the effective date of the current Agreement, this is the first claim based on this practice which has been submitted to the carrier under Rule 29. In these circumstances the equities of the situation will be fully met if, subsequent to the date of this award, the interpretation herein placed upon Rule 29 will be controlling, without reparation for violations prior to that date.

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 employe involved in this dispute are respectively carrier and employe 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 Rule 29 is applicable to the practice here involved, but that the evidence of record does not justify an award of reparation.

AWARD

Claim as to applicability of Rule 29 sustained, and claim for reparation denied, both in conformity with Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of May, 1940.

DISSENT TO AWARD No. 1096, DOCKET No. TE-995

The record in this case, including exhibits, constitutes evidence that the method of handling train orders here made subject of complaint was one pre-existent to the effective date of the restrictive rule (which rule only was relied upon and was determinative in the decision) and a method that continued thereafter as a normal procedure until the instant and first claim represented by this docket was pursued. There is no refutation of this pre-existing and continuing method as applied to the immediate circumstance presented in the docket; in fact, the maximum of argument by the petitioners in respect to the evidence of such continued practice was to the effect that it was not possible for their organization to police such practices, now alleged to have constituted a violation.

Under these circumstances, it is submitted that such understanding and recognition prior to the negotiation of the Agreement and subsequent thereto up until this time represented an intention of the parties that the purpose of the restrictive provision (Rule 29) was not to prohibit the method of handling train orders or to pay a telegrapher a call therefor when done as in this instance. Such evidence of understanding and recognition as interpretative of the intent and meaning of the rule as here required to be applied should have outweighed the decision to give express meaning to words of the rule even though such meaning is by the decision restricted to situations arising after the rendition of this Award.

S/ R. H. ALLISON
S/ R. F. RAY
S/ C. P. DUGAN
S/ A. H. JONES
S/ C. C. COOK