Award No. 2126
Docket No. TE-2088

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, 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 Company, Pacific Lines, that the Carrier violated Rule 12-(c) in fixing the starting time of positions at Ancho, Orogrande, Newman, Afton and Separ, New Mexico, and that the Carrier correct the starting time for these positions to conform to the proper interpretation of Rule 12-(c), and that the occupants of such positions be compensated under the rules of the Telegraphers' Agreement because of such erroneous starting time, from May 22, 1938 until correction in starting time is made.

EMPLOYES' STATEMENT OF FACTS: Ancho, Orogrande, Newman, Afton and Separ were one-man telegraph agencies at the time this dispute was initiated in 1938. The hours of assignment at that time were—

Ancho,	3:00	P. M. to	12:00	midnight
Orogrande,	2:30	P. M. to	11:30	P. M.
Newman,	5:00	P. M. to	2:00	A. M.
Afton,	1:00	A. M. to	10:00	A. M.
Separ,	11:00	P. M. to	8:00	A. M.,

all five positions being assigned eight within nine hours.

POSITION OF EMPLOYES: EXHIBITS "A" to "L" are made a part of this submission.

This and kindred claims have been in course of prosecution continuously since the date of this claim.

Four disputes were submitted to this Board and Division and the position of the Committee is fully sustained in each Award 1558, 1559, 1560 and 1561 issued as a result of these four disputes reaching this Board.

The Carrier has continuously had knowledge that this dispute has been a pending and unadjusted item since the inception of the claim on the Division. (See EXHIBIT "G", second paragraph, lines 7, 8, 9).

The Committee endeavored to have the Carrier apply the principles of Award 1588, 1559, 1560, 1561 to this dispute but the Carrier declined. (EXHIBITS "H" and "I".)

There is in effect an agreement between the parties to this dispute dated May 1st, 1927 as to rates of pay, amended as of July 1st, 1930, August 1st, 1937 and December 1st, 1941 and dated September 1st, 1927 as relates to rules.

upon and no consideration whatever was given the clear and explicit language of Rule 12 (c), namely, "If a day office." It was absolutely essential that a determination be made whether Grenada was a "day office." What further proof need be offered that Award 1558 and the subsequent awards that followed the alleged interpretation established by Award 1558, are clearly erroneous.

Awards 25 and 705 are cited in Award 1558 in support of the conclusion arrived at, but an examination of the said awards discloses that the factual situations and the agreement rules involved in the said awards are in no way similar or analogous to the factual situation and the rules involved in Award 1558, and therefore were in no way applicable.

The carrier submits that it has conclusively established that Awards 1558, 1559, 1560, and 1561 are erroneous and should be overruled by the Board establishing in the instant case a proper interpretation of Rule 12 of the current agreement and denying the alleged claim in the instant case.

CONCLUSION

The carrier submits that the Board should dismiss the alleged claim in the instant case for want of jurisdiction, but in the event that it does not, then the carrier submits that the Board should deny it.

OPINION OF BOARD: There are involved here a number of different claims each of which alleges a violation of Rule 12 (c) of the agreement. In each instance the violation is alleged to have started May 22, 1938 and to have extended over various periods of time, in one case to May 25, 1941, in another to August 5, 1941, in another to October 19, 1941, and in two others to October 28, 1941.

Rule 12 (c) and the relevant part of an applicable note read as follows:

> "(c) At stations where but one (1) telegrapher is employed, if a day office, the hours of service shall begin between six (6) A. M. and nine (9) A. M. At stations where but two (2) telegraphers are employed the hours of service for agent or first trick telegraphers shall begin between six (6:00) A. M. and nine (9:00) A. M."
>
> "NOTE: * * *
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> "It is understood that at stations where but one (1) telegrapher is employed, if the necessities of the service require starting telegrapher outside of specified period set forth in Section (c) the starting time will be mutually agreed upon between representatives of the carrier and the employes, but in no case will one-man assignments begin earlier than five (5:00) A. M., nor later than twelve (12:00) noon."

In each instance but one telegrapher was employed at the station and the Carrier without any agreement between the parties fixed the starting time for the occupant of the position after 12 o'clock noon and before 5 A. M. In other words, assuming Rule 12 (c) to be applicable there was a violation.

The Carrier justifies its action on the ground that the rule applies only if the station is a day office, and that in none of these instances was the station a day office. What is a day office would seem to be determined by the provisions of Rule 12 (h) which reads as follows:

> "(h) Telegraphers, the greater part of whose assigned hours are between six (6:00) A. M. and six (6:00) P. M., will be considered day telegraphers within the meaning of this agreement."

In each of the instances now before us the starting time was so fixed that the greater part of the assigned hours was not between 6:00 A. M. and 6 P. M.

It it were not for the note there would we think be no doubt that the Carrier's contention would have to be sustained. The question is whether the note which prohibits a starting time before 5:00 A. M. and later than 12:00 noon applies to all assignments as claimed by the employes or only to assignments in a day office as claimed by the Carrier.

We are greatly impressed with the force of the Carrier's claim. If the restriction applies to all assignments there would seem to be no meaning to the words "if a day office" in the rule. We cannot assume that those words were inserted for no reason whatsoever. The employes call attention to the all embracing language of the rule to the effect that "in no case will one-man assignments begin earlier than five (5:00) A. M. nor later than twelve (12:00) noon." We think, however, that the language of the note referring as it does to Rule 12 (c) was intended to apply only to cases to which Rule 12 (c) is applicable. Furthermore, the extension by mutual agreement as provided in the note of the time of starting to the hours between 5:00 A. M. and 12:00 noon, as well as the restriction in the rule itself to the time between 6:00 A. M. and 9 A. M., can apply to nothing but a day office, because in each instance more than one half of the time of the assignment would be between the hours of 6 A. M. and 6 P. M. Were this question now before this Board for the first time we should hold that the provision of the note which restricts the starting time of assignments to the hours of 5:00 A. M. and 12:00 noon applies only if the station is a day office. We are, however, faced with four awards, 1558, 1559, 1560 and 1561, which have decided otherwise.

Referee Garrison in a most convincing memorandum accompanying Award 1680 sets forth the conditions under which this Board should overrule a prior award. He points out, however, the uncertainty and confusion which is certain to result if there is no assurance that an interpretation of a rule once made in good faith is likely to hold, but rather is subject to qualification or modification according to the views of each referee who may have it before him for interpretation. Under such circumstances he points out that the tendency to deadlock cases "would be stimulated, which would impede the effectiveness of the Board's work, delay the disposition of cases, and run counter to the intent of Congress in creating the Board." Where an interpretation of a rule has been made and acted upon it should be adhered to, unless to do so renders it unworkable or creates undue hardships on one or the other party. For these reasons we feel that the interpretation placed on the rule here involved in Awards 1558, 1559, 1560 and 1561 should be followed.

The violation here alleged was first called to the attention of the Carrier by letter on May 22, 1938. On June 11, 1938 the Carrier replied pointing out that as the stations involved were not day offices, the provisions of the rule did not apply to them. This interpretation was affirmed by a letter of the Carrier of August 31, 1938 to the General Chairman of the order of Railway Telegraphers and the requested change in the assignment of hours at the stations involved was denied. For almost a year and a half nothing more appears to have been done about the claim, when in a letter to the Carrier from the general chairman dated January 5, 1940 the claim with respect to one station was withdrawn, but notice was given that with respect to the other stations the claims would be prosecuted. Nothing was, however, done for nearly two years, when on November 13, 1941 after the filing of Awards 1558, 1559, 1560 and 1561, the matter was again brought to the attention of the Carrier. The explanation for this delay is that the Committee was awaiting the settlement of the controversies which resulted in these awards. Such intention was not, however, so far as the record shows made known to the Carrier.

We have here a case where the enforcement of a claim has been permitted to drag over a long period after the Carrier's position with respect to it

had been made perfectly clear to the employes. There has been almost what would amount to acquiescence. Whether it has been of such a nature as to amount to a technical estoppel it is unnecessary to decide. For we are satisfied, particularly in view of what we regard as a proper and reasonable interpretation of the rule by the Carrier, that it would be inequitable under the circumstances of this case to award reparation for past violations. Following the reasoning in Award 1096 which was adopted in Award 1680, we hold in accordance with the opinion in Award 1680 that "the question of interpretation involved in this case must be deemed to have been settled in favor of the employes," but that there will be no reparation in this case for violation prior to the date of this award.

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 employes involved in this dispute are respectively carrier and employes 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 12 (c) as qualified by the note and as interpreted in Awards 1558, 1559, 1560 and 1561 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 12 (c) sustained, and claim for reparation denied, both in conformity with the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.

Dissent
to
Award 2126, Docket TE-2088
Award 2127, Docket TE-2096
Award 2128, Docket TE-2106
Award 2129, Docket TE-2109

This Opinion correctly interprets the real and common sense intent of Rule 12, including the Note.

In view of the interpretation here announced, which is contrary to the interpretation of the rule as made in Awards 1558 to 1561, it is our opinion that the correct interpretation and true meaning of the rule should prevail.

/s/ A. H. Jones
/s/ R. H. Allison
/s/ R. F. Ray
/s/ C. P. Dugan
/s/ C. C. Cook