Award No. 3655
Docket No. TE-3599

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph L. Miller, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE COLORADO & SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Colorado & Southern Railway Company, that A. McFarland, regularly assigned to the agent-telegrapher position at Leadville, Colorado, a one-man station, shall be compensated at the established rate of pay for this position for eight hours on each day, May 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28 and June 1, 3, 4, 5, 6, 7, 8, 12, 13, 14, 15, 1946, under Rule 10 of the telegrapher's agreement, account having been suspended during his regular hours without pay on each of these days in violation of Rule 12 of said agreement, because of production at the mine at Climax, Colorado, being temporarily reduced.

EMPLOYES' STATEMENT OF FACTS: There is in effect and in evidence an agreement bearing effective date of June 16, 1924, between The Order of Railroad Telegraphers and the Colorado & Southern Railway Company, copies of which are on file with the National Railroad Adjustment Board. At page 18 of the above mentioned agreement there is listed the Leadville agent-telegrapher position, rate 87 cents an hour, the present rate being $1.29½ an hour.

Under date of May 1, 1946, the regularly assigned agent-telegrapher, A. McFarland, at Leadville, was notified by the trainmaster that he was pulled off until further notice after completing his tour of duty May 4th. Mr. McFarland was recalled to that position at Leadville and worked May 29, 30 and 31, when he was again pulled off and did not resume work until June 10th, working the 10th and 11th, when he was again pulled off until June 17th; since which time he has worked continuously at that agent-telegrapher position.

POSITION OF EMPLOYES: Rules 10—Guarantee; 12—Suspension of Work; 24-a—Reduction of Force; and 25-a—Bulletin Vacancies, of the current agreement are most pertinent to the dispute involved in this case. We quote those rules for ready reference:

> "Rule 10—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.
>
> "Rule 12—Suspension of Work: Employes will not be required to suspend work during regular hours or to absorb overtime.

The Order of Railroad Telegraphers are basing their claim on Rules 10 and 12 of the current agreement. They contend that when we closed the station effective May 4th and worked the Agent temporarily that we were in violation of these two rules. They also contend that we did not comply with Rules 24 and 25 of the agreement.

Rule 10 reads as follows:

> "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.
>
> "(Note) This rule shall not apply in cases of reduction of forces nor where traffic is interrupted or suspended by conditions not within the control of the Company."

Rule 10 is not applicable to this claim as the agency at Leadville was closed effective with May 4th until June 17th. Therefore, there was no regularly assigned agent at Leadville during the period the station was closed. The note under the rule provides that the rule shall not apply in cases of reduction in force, nor when traffic is suspended by conditions not within the control of the Company. The traffic of the Climax Molybdenum Company was suspended by that Company.

Rule 12 reads as follows:

> "SUSPENSION OF WORK OR ABSORBING OVERTIME. Employes will not be required to suspend work during regular hours or to absorb overtime."

Rule 12 is not applicable because the employe was not suspended during regular hours, but his assignment was cancelled.

Rule 24 has no bearing on this case. When the station was closed, Mr. McFarland was not restricted from exercising his seniority; in fact, he was asked if he desired to do so, but declined to displace another telegrapher. He continued to retain his seniority.

Rule 25 is not applicable, as Rule 36, which has been previously quoted, does not provide for bulletining positions when stations have been closed less than three months.

There is no rule in the agreement which prohibits the closing of a station and reopening the station when business necessitates; in fact, Rule 36 contemplates just such a situation.

As the Carrier did not violate any rule in the agreement when it closed the agency at Leadville and later reopened same, all in accordance with the rules of the agreement, this claim should be denied, and we hereby request that your Board deny this claim.

OPINION OF BOARD: The Carrier operates as a segment of its Railway, a line running from a junction with the D. & R. G. W. at Leadville, Colorado, 14.06 miles to Climax, Colorado. Its sole customer on this segment is the Climax Molybdenum Company.

This mining company notified the Carrier in the Spring of 1946 that, on account of the lack of business, it would need no train service for approximately 30 days starting May 1.

The Carrier, in turn, on or about May 1 "cancelled the assignments" of all save one of its employes on the line. (A section foreman assigned to patrol the property and track was excepted). Among those whose "assignment" was "cancelled" (the phrase is the Carrier's) was the Claimant, A. McFarland, agent at Leadville. He has testified that a Carrier official told him personally the morning of May 2 that he was going to "pull off the job for

30 days or so and he was going to put me on vacation." "The next morning he also told me he was closing down the job for at least 30 days and that I was to be placed on vacation," McFarland added.

Whether the "assignment was cancelled," the "job pulled off," the "job closed down" or, in common industrial parlance, the agent laid off, McFarland was given through May 4 to complete his records and then was without further duties for the time being.

At about the time he first heard of what was in store for him, McFarland requested a pass to Sioux City, S. D., to visit relatives. En route, he reported to the Chief Dispatcher in Denver who asked whether he wished to exercise his seniority rights on another position. McFarland said he did not and left his South Dakota address where he could be located when he was needed at Leadville.

May 21 the Carrier wired McFarland in Sioux City that an agent would be required in Leadville May 27-28, owing to notice from the mining company that incoming shipments would be available at Leadville for movement to the mines at that time. McFarland replied he would protect the job. Later this assignment was changed to May 29-30-31, and McFarland returned to handle it. Again the agent, and presumably the other employes on the line, had their "assignments cancelled," this time until June 10-11, when McFarland was again called back to duty because of additional shipments destined to the mines. A third time the "assignment was cancelled" and McFarland was off duty until June 17 when he was called back to duty in his old position for an indefinite period, owing to resumption of ore concentrate shipments from the mine.

The Organization later filed claim for 31 days' pay for those days McFarland lost because of his "cancelled assignment." In the claim, the Organization did not take into consideration the 12 days' vacation pay McFarland received, contending that the vacation was an enforced one and not taken at the time McFarland wished to take a vacation that year. In support of the claim, the Organization maintains the Carrier violated Rules 10 and 12 of their agreement dated June 16, 1924.

The Board will first dispose of the last facet of the claim: That McFarland should be paid again for his twelve-day vacation. We think not. The Organization, in its statement supporting the claim quotes a Carrier official (Bruner) as stating in McFarland's notice of May 1 that "Agent McFarland wishes to take two weeks vacation commencing Sunday May 5." The Organization stated that McFarland "protested . . . but to no avail." Presumably the protest, if any, was verbal. However, the Carrier, in its statement, quotes a written communication from McFarland wrote to Chief Dispatcher during his May 29-31 tour of duty:

> "Please place me on vacation for 15 days account station closed."

The weight of the evidence leads us to believe that McFarland eventually at least, acquiesced to the Carrier's suggestion that he take his vacation during his enforced idleness and therefore we believe the claim must be reduced by 12 days.

Now to the principal questions. Did the Carrier, in fact, abolish McFarland's position, as all hands agree it had the unfettered right to do? Or was the "cancellation of assignment" a subterfuge to permit laying off McFarland for a relatively few days? If so, the Carrier runs afoul of Rule 10.

This Board, on the basis of the facts before it, cannot agree that the station was **closed** and the Agent's job **abolished** in any common sense of those words. Nor was the Agent's assignment **cancelled**. Those words connote finality. There certainly was no finality in the instant case. McFarland had been away less than three weeks when his employer called him back to work. Three times in about six weeks the same station was closed, the same job abolished, the same assignment cancelled. It doesn't make sense. We are of

the opinion that, on the basis of the facts here involved, McFarland's position continued to exist throughout the period in question.

Now if the Carrier had the right to lay off McFarland every day there was no work for him, as is the general custom in industry other than the railroads, we would find differently. However Rule 10 of the agreement between the parties, described as "Guarantee," clearly circumscribes that right. It says:

> "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."

The Carrier's contention that it frequently opens offices for brief periods and closes them, as business demands, is irrelevant to this case. McFarland's was a full time position, and remained as such throughout the three brief periods he was laid off.

Nor can this Board, in the face of these facts, accept the Carrier's reliance on Rule 36—or rather what Rule 36 does not say. We accept Rule 36 at its face value, as far as this case is concerned, and find it inapplicable.

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 or 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 the Carrier violated the Agreement to the extent indicated in the Opinion.

AWARD

Claim sustained, save for the 12 days' pay McFarland received for vacation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1947.