

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC LINES IN TEXAS AND LOUISIANA

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Missouri Pacific Lines in Texas and Louisiana, that the Carrier violated the third paragraph of Rule 13-(e) of the telegraphers agreement when effective September 12, 1944, it assigned the assistant depot ticket No. 2 position at Austin, Texas, to the first shift in this three continuous shift office with hours 2:00 A. M. to 10:00 A. M.; and that the incumbent or incumbents of this shift since September 12, 1944, shall be paid for a call of four hours—2:00 A. M. to 6:00 A. M.—at time and one-half for each day required to begin work in advance of 6:00 A. M., the earliest starting time fixed by the third paragraph of Rule 13-(e) for the first shift in such an operated office.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date October 15, 1940, as to rates of pay and rules of working conditions is in effect between the parties.

The positions of ticket agent and assistant ticket agents in the passenger depot at Austin, Texas, are covered by said agreement.

Prior to on or about December 1, 1942, the force under the telegraphers' agreement in the passenger depot was arranged as follows:

Ticket Agent, hours 8:00 A. M. to 4:00 P. M.

Assistant Ticket Agent, hours 4:00 P. M. to 12:00 midnight.

Effective on or about December 1, 1942, due to increased business, a temporary position of assistant ticket agent was created in this office with hours 12:00 midnight to 8:00 A. M., and was bulletined and filled as a temporary position. Around August, 1943, the Carrier created this temporary position as a permanent position and assigned the same hours. This newly created permanent position was bulletined and regularly filled by the assignment of C. R. Hays. Thereafter the force under the telegraphers' agreement in this office was as follows:

Ticket Agent, hours 8:00 A. M. to 4:00 P. M.

Assistant Ticket Agent No. 1, hours 4:00 P. M. to 12:00 midnight.

Assistant Ticket Agent No. 2, hours 12:00 midnight to 8:00 A. M.

Effective September 12, 1944, the Carrier changed the hours of assignment of the assistant ticket agents Nos. 1 and 2 to 2:00 P. M.—10:00 P. M. and 2:00 A. M.—10:00 A. M. respectively. Since this date—September 12,

of Facts,) when notice was served on the Carrier that the claim was being changed to read four hours overtime instead of two hours overtime each day. In this connection, attention is directed to the following quoted from "Opinion of Board" in Award No. 2126 (ORT v. SP Co.) involving the starting time of Telegraphers at several one man stations:

"The violation here alleged was first called to the attention of the Carrier by letter on May 22, 1937. 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, as 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 employees. There has been almost what would amount to acquiescence. (Underscoring ours.) 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 of Award 1680 that 'the question of interpretation involved in this case must be deemed to have been settled in favor of the employees,' but that there will be no reparation in this case for violation prior to the date of this award."

OPINION OF BOARD: Prior to September 12, 1944, the three shifts covered by the Telegraphers' Agreement at Austin, Texas, worked assigned hours as follows:

8:00 A. M. to 4:00 P. M.
4:00 P. M. to 12 midnight.
12:00 midnight to 8:00 A. M.

On September 12, 1944, the shifts were given the following regularly assigned hours:

2:00 A. M. to 10:00 A. M.
8:00 A. M. to 4:00 P. M.
2:00 P. M. to 10:00 P. M.

The organization contends that the assignment of 2:00 A. M. as the starting time for the first shift constituted a violation of the third paragraph of Rule 13 (e) of the Agreement and that each man who has worked the shift since September 12, 1944, is entitled to pay for a call of four hours—2:00 A. M. to 6:00 A. M. for each day worked.

The second and third paragraphs of Rule 13 (e) are as follows:

"Where three (3) consecutive shifts are worked, covering the twenty-four (24) hour period, no shift shall have starting time after twelve (12) o'clock midnight and before six (6) A. M.

"Where three continuous shifts are employed, assignment will be for eight (8) consecutive hours with no allowance for meals. Starting time of the first shift will be between the hours of 6:00 A. M. and 8:00 A. M."

The Carrier contends that the arrangement of shifts which it made on September 12, 1944, is not a violation of the third paragraph of Rule 13 (e) because the three shifts are not continuous; that for the three shifts to be "continuous" they must cover the twenty-four hour period; that there must not be any break between the third and the first shifts; that the word "consecutive" and "continuous" as used in the second and third paragraphs of said Rule 13 (e) are synonymous.

With this interpretation by the Carrier we cannot agree. If the word "continuous" as used in the third paragraph of the Rule was intended to describe an arrangement of three shifts covering the entire twenty-four hour period, the three shifts would necessarily have to be "consecutive" since Rule 13 (a) provides that "eight (8) consecutive hours with no allowance for meals shall constitute a day's work". The Carrier's interpretation would then give us two paragraphs describing three identical shifts with different provisions as to starting times.

Ordinary rules of construction compel us to attribute to the parties an intention to describe in the two paragraphs of Rule 13 (e) two different arrangements of three shifts.

The ordinary meaning of the word "continuous" is connected, unbroken, or uninterrupted. The second paragraph of this rule is speaking of "three continuous shifts". There is continuity in a series of three when there is no break between the first and second and none between the second and third. That was true of the three shifts here in question. The three shifts were continuous.

We are not impressed with the argument of the Carrier that the shift starting at 2:00 A. M. was not the "first shift". There were three shifts within the day and this one started six hours before the next one.

We must, therefore, conclude that starting this shift before 6:00 A. M. constituted a violation of the third paragraph of Rule 13 (e).

Nor are we impressed with the contention of the Carrier that since the four hours claimed was continuous with the claimant's regular work period it was not a "call" and, therefore, compensation cannot be properly claimed. Since this was the first shift, claimant's starting time could not be before six and he was entitled to work eight hours after that time, Rule 13 (c). Four hours could not be cut off of the end of that eight hour period to avoid payment of overtime for the four hours immediately preceding the period which he was required to work, Rule 13 (f).

The first complaint of the Organization to this starting time was made June 26, 1945, in a letter by the Local Chairman to the Carrier. The letter claimed pay for two hours overtime and was apparently based on the second paragraph of Rule 13 (e). A second letter from the General Chairman to the Carrier dated August 8, 1945, made the same claim. The claim was progressed to the Assistant General Manager and then to the Chief Personnel Officer who on December 15, 1945, declined the claim.

A little more than one year later the General Chairman in a letter to the Carrier, dated December 18, 1946, adopted the theory on which the claim is now based and increased the demand to four hours per day at the overtime rate.

It would seem most inequitable to permit a recovery on a claim for the period back to September 12, 1944, when no proper claim was made therefor, either in theory or amount, prior to December 18, 1946.

We also have here, as we had in Award No. 2126, a case where the enforcement of a claim was permitted to drag over a long period after the Carrier's position with respect to it had been made perfectly clear to the Employees, here a period of more than a year of utter silence after the final decision of the Carrier on the first claim presented. That furnishes additional reason for not permitting recovery for the period from September 12, 1944 to December 18, 1946.

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 Employees involved in this dispute are respectively carrier and employees 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

The Carrier violated the Agreement as claimed.

AWARD

Award sustained for payment for four hours overtime for each day worked subsequent to December 18, 1946.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 22nd day of March, 1948.