Award No. 6771
Docket No. TE-6690

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO & WESTERN INDIANA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago & Western Indiana Railroad:

1. That Carrier violated the terms of the Agreement between the parties, when on the 6th day of January, 1949, it declared the position of first shift levermen at 47th Street, Chicago, Illinois, to be abolished, and wrongfully removed M. L. Reynolds from his regularly assigned position.

2. That M. L. Reynolds shall be restored to his position as first shift leverman at 47th Street, Chicago, and in addition shall be compensated as provided in Rule 9 (c) of the Agreement, plus any other monetary loss, as a result of Carrier's violative action.

3. That all other employes under the Telegraphers' Agreement who were displaced from their regularly assigned positions, shall be restored to their positions and in addition shall be compensated as provided in Rule 9 (c) of the Agreement, plus any other monetary loss, as a result of Carrier's violative action.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect an agreement, effective May 1, 1946, between the Chicago & Western Indiana Railroad Company, hereinafter called Carrier, and The Order of Railroad Telegraphers, hereinafter called Employes or Telegraphers, governing wages, hours of service and working conditions of employes covered in the scope rule of the agreement. A copy of said agreement is on file with this Board and is made a part hereof as though set out herein word for word.

Among positions covered by the Agreement is that of first trick leverman at 47th Street, Chicago, Illinois. On January 3, 1949, Carrier declared this position to be abolished, effective January 6, 1949. This action forced the occupant of the position, M. L. Reynolds, in order to continue work, to exercise displacement rights. His displacement of R. Warren on first shift leverman-telephone operator at 59th Street, Chicago, started a series of displacements, which will be more fully set out in our position.

On January 6, 1949, the same day of declared abolishment, Carrier advertised a vacancy on the position of first shift leverman at 47th Street. It will not be denied by Carrier that the first shift leverman's position was not, in fact, abolished. Indeed, it will be shown that the position was not

3. That other employes affected were not required to work temporarily on other than their regular assignments, therefore, are not entitled to additional compensation as contemplated by Rule 9 (c).

4. That Carrier's action was proper in order that the status of the position, that is whether seven day or six day, would be a matter of record and not one of dispute, and because the work on one day each week disappeared; was not performed by any other employe, nor was it permitted to accumulate for the following day. It was definitely a force reduction of one day each week on which service was not required. The new position was properly bulletined and assigned in accordance with Rule 20 (b), which is quoted on page 3 of this submission.

5. The claims as listed by the organization, Numbers 1, 2, and 3, should be denied.

All of the data contained in this submission have been discussed in conference or by correspondence with the employes' representatives.

(Exhibits not reproduced).

OPINION OF BOARD: On January 3, 1949, Carrier issued a bulletin advising Claimant and all others concerned that the position of first trick leverman at 47th Street Tower, Chicago, would be abolished, effective January 6th. On the same day Carrier advertised for bids for what it called a new position with the same title, duties, hours and rate of pay, but with Sunday instead of Saturday as rest day. As a result of these bulletins the Claimant was succeeded by a senior employe and he displaced a junior employe on another position, resulting in the other displacements referred to in Item 3 of the Claim.

The Organization contends that the effect of the Carrier's conduct merely amounted to an irregular change in the rest day of a continuing position, resulting in a violation of Rules 7 and 28 of the effective Agreement, and requiring that Claimants be compensated at time and one-half under Rule 9(c) thereof.

The Carrier undertakes to defend against the Claim on the ground that it was abandoned by the Organization for a period of 2⅔ years after it had been rejected on the property; that the Organization has not discharged the burden resting on it to establish that the Agreement was violated, and that in the absence of a specific rule prohibiting the Carrier's action, its conduct was proper as an exercise of its managerial prerogatives.

The record discloses that the Carrier's action was protested by the then General Chairman on January 10, 1949, and was progressed with what may be regarded as reasonable diligence until August 17, 1949, when the General Manager declined the Claim. Nothing further occurred until April 15, 1952, when a new General Chairman asked the Carrier's Vice President to review the matter. On August 4, 1952, the Vice President reiterated the Carrier's previous conclusion that no rules of the Agreement had been violated. The Organization's advance notice of its intention to come to this Board was filed on March 30, 1953.

We find no unusual delay in the progressing of the Claim, except for the period from August 17, 1949, when it was declined by the General Manager, until April 15, 1952, when the new General Chairman asked the Vice President to reconsider it. Had the Vice President in his letter of August 4, 1952, taken the position that the matter in dispute had been finally disposed of by the General Manager's letter of August 17, 1949, there would be merit in the Carrier's contention that the appeal to this Board was unduly

delayed. The Vice President placed no reliance on the subject of delay, however, but, on the contrary, undertook to justify the Carrier's action on the theory of the lack of an applicable rule. Many awards of this Board hold that claims must be progressed with reasonable promptness and that claimants will not be permitted to resurrect demands that have long been treated as settled by the parties. On the other hand, such a defense is one that may be waived. In this instance we feel obliged to hold, and do hold, that the Carrier waived the defense of delay, which it otherwise might have had.

Rule 28 provides that, "Established position shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rates of pay or evading the application of these rules." Whether this Rule was violated presents a question of fact to be resolved from a consideration of all the information relating to that subject as disclosed by the record. There is no evidence that the Carrier's action was taken for the purpose of reducing the rates of pay and it denies that it was attempting to evade the application of the rules. The intent with which an act is done can only be determined, however, from a consideration of the effect thereof. Every person is chargeable with having intended the natural and logical consequences of his acts; and, from that point of view, we must conclude that there was a violation of Rule 28. See Awards 3655 and 5529.

The Carrier says that Article 1 of Rule 7 came into the current Agreement as a result of the National Mediation Agreement of July 13, 1945, and was merely designed to prevent the confusion that would develop from a general change in the work week program if bumping and rolling was authorized. Conceding the history of the rule, it is general in character and we would not be justified in ascribing to it the narrow and special character that the Carrier suggests.

It is specifically provided in Section 1(a) of Article 1 of Rule 7 that there may be a change in the rest day of a position to meet service requirements by giving not less than seventy-two (72) hours written notice to the employes affected. This Rule provided the means whereby the Carrier might have accomplished what it attempted to do. If, as the Carrier suggests, there was no longer any need for the position to be worked on Sundays that presents a matter with which we are not concerned in the consideration of the case here before us.

Having concluded that the Claim is properly before us and that the Carrier violated the Agreement, the only remaining question is the matter of the penalty to be imposed. On this issue Rule 9 (c) appears to be decisive. It says that, "Regularly assigned employes required to work temporarily on other than their regular assignment will be compensated at rate of time and one-half for all time worked."

However, the employes involved should not be permitted to profit as a result of the delay on the part of their Organization in prosecuting the Claim with diligence, even though the Carrier has, by its conduct, estopped itself from asserting such delay in bar. The original Claim will be considered as having been abandoned following the rejection thereof by the General Manager on August 17, 1949, reasserted by the new General Chairman on April 15, 1952, and declined by the Vice President on the merits, without invoking the defense of estoppel, on August 4, 1952. The Claim will, therefore, be sustained retroactively only to April 15, 1952 and subject to the limitations of Rule 12.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of September, 1954.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 6771

Docket No. TE-6690

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: Chicago & Western Indiana Railroad Company.

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

Award 6771 is before the Board on the Employes' Petition for an Interpretation. A brief review of the situation is therefore in order.

On April 16, 1953, the Employes filed their original Ex Parte Submission, by which they asserted the following Claim:

> "1. That Carrier violated the terms of the Agreement between the parties, when on the 6th day of January 1949, it declared the position of first shift leverman at 47th Street, Chicago, Illinois, to be abolished, and wrongfully removed M. L. Reynolds from his regularly assigned position.
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> 2. That M. L. Reynolds shall be restored to his position as first shift leverman at 47th Street, Chicago, and in addition shall be compensated as provided in Rule 9 (c) of the Agreement, plus any other monetary loss, as a result of Carrier's violative action.
>
> 3. That all other employes under the Telegraphers' Agreement who were displaced from their regularly assigned positions, shall be restored to their positions and in addition shall be compensated as provided in Rule 9 (c) of the Agreement, plus any other monetary loss, as a result of Carrier's violative action.

As a part of their Submission the Employes set out a list of nine named and identified employes who were alleged to have been displaced as a result of the violation charged.

In our Opinion we said:

> "Having concluded that the Claim is properly before us and that the Carrier violated the Agreement, the only remaining question is the matter of the penalty to be imposed. On this issue Rule 9 (c) appears to be decisive. It says that, 'Regularly assigned employes required to work temporarily on other than their regular assignment will be compensated at rate of time and one-half for all time worked.'
>
> "However, the employes involved should not be permitted to profit as a result of the delay on the part of their Organization

in prosecuting the Claim with diligence, even though the Carrier has, by its conduct, estopped itself from asserting such delay in bar. The original Claim will be considered as having been abandoned following the rejection thereof by the General Manager on August 17, 1949, reasserted by the new General Chairman on April 15, 1952, and declined by the Vice President on the merits, without invoking the defense of estoppel, on August 4, 1952. The Claim will, therefore, be sustained retroactively only to April 15, 1952 and subject to the limitations of Rule 12."

The Award bears date of September 28, 1954, and the Carrier was ordered to make it effective on or before December 1, 1954. Rule 12, referred to in the Award, provides that in no event will money payments be made retroactive to a date more than sixty (60) days prior to presentation. This, under the terms of the Award, would establish a date sixty days prior to April 15, 1952, or February 15, 1952, as the earliest date for which a monetary claim could be asserted. The parties do not appear to be in disagreement as to this limitation.

It now appears that at a joint conference of the representatives of the parties, held on November 17, 1954, for the purpose of applying the Award, a disagreement developed as to its import. As we understand it, the Employes take the position that the Carrier is required to compensate the nine displaced employes for all time worked, at time and one-half during the period that they were engaged on assignments other than those from which they were displaced, retroactive to February 15, 1952, and continuing until said employes are restored to the positions from which they were displaced.

On the other hand, the Carrier contends that no monetary redress is due the claimants. In support of this it is asserted that the position occupied by the Claimant Reynolds when he was displaced by Warren on January 6, 1949, was abolished on October 3rd of the same year, and that all of the other claimants moved from the positions they chose, when displaced, to other positions by the exercise of seniority, or returned or had an opportunity to return to their original positions, or resigned, before February 15, 1952. Carrier also contends that since no time slip claims have been presented to it for money demands on account of any alleged violations of the Agreement since February 15, 1952, there is now no basis for financial redress.

We find no basis for the contention of the Carrier that it was necessary for the claimants to file time slips or make other formal demands in support of the claims that accrued subsequent to February 15, 1952. The Award adjudicated all defenses that the Carrier asserted or might have asserted up to the time the Claim was before the Board, and no such defense to the merits of the case was made. It was not necessary for the claimants to take any such steps to preserve rights that had accrued and that were sustained by the Award. The Claim was sustained retroactive to April 15, 1952, which simply meant that, by application of Rule 12, money demands for any period prior to February 15, 1952, were barred.

The record presently before us, consisting of the Employes' Petition for an Interpretation and the Carrier's Reply thereto, contain data that purports to disclose the employment record of the nine claimants from the time they were wrongfully displaced from the positions they occupied in January, 1949, to the date of the conference of the representatives of the parties held on November 17, 1954, in their effort to apply the Award. We do not consider it to be the function of this Board to undertake to reconcile this data or to apply it to the Award. That task is the responsibility of the parties. All we are called upon to do is to give our interpretation of the Award with respect to the questions that have been raised.

We think the following statement discharges our responsibility in the premises:

Interpretation

The nine employes embraced by Item 3 of the original Claims (Reynolds, Warren, Hayn, Halliday, Guthrie, Faber, Hale, Hauenschild, and De Christopher) are entitled to be restored to the positions they occupied in January, 1949, and with respect to which they were displaced as a proximate result of the action of the Carrier in attempting to abolish the position of first trick leverman at 47th Street Tower, Chicago, by bulletin issued on January 3rd, and effective January 6, 1949. The Carrier is not now obligated, however, to restore any such employe to a position that may have been duly and regularly abolished since January 6, 1949.

Any of said employes, if such there were, who worked, on and after February 15, 1952, on other positions covered by the Agreement than those which they occupied in January, 1949, are entitled to be compensated under Rule 9 (c) at the rate of time and one-half for all time worked on such other positions on and subsequent to February 15, 1952, and continuing until they are restored to the positions from which they were displaced, as aforesaid. The Award does not enure to the benefit of any of said employes who may have ceased to be employed by the Carrier or who may have returned to the positions from which they had been displaced prior to February 15, 1952. The question as to whether there were claimant-employes who might have returned, by the exercise of their seniority, to the positions from which they had been displaced, was not before this Board when Award 6771 was adopted; and, in our judgment, no such question is now properly before us. We do not consider it to be our proper function, therefore, to express any opinion with respect to such question and neither said Award nor this Interpretation is to be construed as a determination of any such issue.

Referee Curtis G. Shake who sat with the Division, as a member, when Award No. 6771 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April, 1956.