Award No. 11804
Docket No. TE-10606

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Spokane, Portland and Seattle Railway that:

1. Carrier violates and continues to violate the Agreement between the parties when it fails and refuses to provide suitable living quarters for the Agent-Telegrapher at Finley, Washington.

2. Carrier shall compensate Mrs. D. R. Landers, Agent-Telegrapher Finley, or her successor, in the amount expended for rent, fuel and water plus seven cents per mile for use of personal automobile between Finley and the nearest point where suitable living quarters are available, beginning on June 5, 1957, and continuing thereafter until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

The three stations, Finley, Yellepit and Kennewick, which will be mentioned in this case are all in the state of Washington and on the Vancouver Division of this Carrier's lines. The claim arose because of the Carrier's refusal to provide suitable living quarters for the occupant of the position of Agent-Telegrapher at Finley, Washington. The claim is based on Rule 24 (b) of the agreement which reads as follows:

"(b) Where living quarters cannot be secured at isolated points, the Carrier shall provide suitable quarters without charge for each employe, and in addition furnish fuel, ice and water free of charge."

Mrs. D. R. Landers, Claimant in the instant dispute, was assigned to a telegrapher's position at Yellepit, Washington, an isolated point within the meaning of Rule 24(b), during which time she was furnished, free of charge, living quarters with fuel, ice and water. The position at Yellepit was abolished and Mrs. Landers took the assignment on a position of telegrapher at Kenne-

to answer any data not previously submitted to the Respondent by the Petitioner is reserved by the Respondent.

OPINION OF BOARD: Claimant was assigned to a telegrapher's position at Yellepit, Washington. Carrier had provided her with living quarters, fuel, ice and water without charge. The facilities were available at Yellepit. When the position at Yellepit was abolished, Claimant exercised her seniority rights and accepted a telegrapher's position at Kennewick, Washington, which is a community of about 14,000 persons. It is not an isolated point contemplated in Rule 24(b) and Carrier was not obliged and had no free facilities available to Claimant. By rail Kennewick is about twelve (12) miles from Yellepit. Claimant preferred to live in Yellepit while assigned to the position at Kennewick. She made arrangements with the Carrier to continue to occupy Carrier's living quarters at Yellepit and to pay Carrier a rental of $20.00 per month.

Effective on June 5, 1957, Carrier reestablished a position of Agent-Telegrapher at Finley, Washington. This position had not existed at Finley during the previous twenty years. Such a position did exist, from time to time, during the 1920's and the early 1930's. Finley is located about four miles (by rail) west of Kennewick.

Claimant again exercised her seniority rights, bid for the position at Finley, and was assigned thereto. Bulletin 26, advertising the position, specifically stated: "There are no living accommodations with this position."

Claimant continued to live in the Carrier's quarters at Yellepit under the same rental arrangement and drove to and from her work at Finley. Yellepit is eight (8) miles (by rail) west of Finley. She has filed a claim for reimbursement of the $20.00 a month for living quarters, fuel and water plus seven cents (7c) a mile for the use of her automobile between Finley and Yellepit.

Employes contend that Finley, Washington is an isolated point within the meaning and intent of Rule 24(b) and Carrier is obligated to furnish Claimant with suitable living quarters and fuel, ice and water free of charge. This rule 24(b) reads as follows:

> "(b) Where living quarters cannot be secured at isolated points, the Carrier shall provide suitable quarters without charge for each employe, and in addition furnish fuel, ice and water free of charge."

The record shows that the Finley station was reopened, after more than twenty years, because "the Phillips Pacific Chemical Company located a large plant between the Columbia River and the Spokane, Portland and Seattle main line at Finley and, in order to adequately handle the business of the company . . ." On June 5, 1957, Finley was only a geographical identity. It had very few inhabitants, it was not treated "as a separate entity in the Bureau of Census Population Report" and there was no place where Claimant could have secured suitable living quarters and be provided with the necessities of living adequately and comfortably. It had only one unpaved street on which there was a combination filling station and grocery store. There was a house for the Section Foreman, and a bunk house for the maintenance of way laborers. Both were owned by the Carrier. They were furnished to the Section Foreman and the Laborers free of charge. There was also the railroad depot which was constructed at the time the Agent-Telegrapher position was established in June, 1957.

On June 10, 1957 Carrier's Superintendent wrote to the Employe's General Chairman, in part, as follows:

"As you are aware, the Phillips Pacific Chemical Corporation which industry is located in the vicinity of Finley, has started their operation, which operation will entail the employing of a considerable number of employes. At present there is considerable construction work going on at Finley, a large general merchandise store and a three-plex apartment house which will be available for rent. There are also two houses located within a mile of Finley Station which are now for sale and it is anticipated that Finley will develop into quite a community as time goes on."

Nearly five months later, November 1, 1957, Carrier's General Manager wrote to the Employe's General Chairman, in part, as follows:

"Information received since our last conference indicates that the rental unit which has been moved to Finley is not yet completed; however, there are houses for sale in that area. A new permanent station building at Finley without living quarters has been included in the 1958 budget."

It is an established fact that no living quarters within the means of Claimant were available at least for more than five months after the position was established. Certainly, Carrier cannot expect Claimant to purchase a house in order to provide herself with living quarters. And as of November 7, 1957 the rental unit was not completed. There can be no question that suitable living quarters were not available in Finley.

Was Finley an isolated point within the meaning of Rule 24(b)? We believe it was such an isolated point. The mere fact that it was only four miles from Kennewick, a community of 14,000 persons, does not alone determine whether it was or was not an isolated point for the purposes intended by the Agreement. The fact is that there was no rail or other public transportation from Kennewick to Finley, nor from Yellepit to Finley. On August 3, 1957 (Employe's General Chairman wrote to Carrier's General Manager, in part, as follows:

"The facts will show that Finley, Washington is an isolated point. The nearest point where suitable quarters can be secured is at Kennewick, Washington, which is approximately eight miles. There is no public transportation available to and from any point where proper living conditions can be found. Your attention is also called to the fact that other company employes at Finley, Wash. have living quarters furnished by the carrier."

This fact Carrier never denied on the property or in its submission to the Board.

Carrier argues that Finley is eight miles closer to Kennewick than Yellepit is to Kennewick. Yet Claimant drove from Yellepit to Kennewick, twelve miles each way, when she worked in Kennewick. Why then should she not drive from Yellepit to Finley which is only eight miles?

The answer is simple. Neither Claimant nor any other employe covered by the Agreement is required to own an automobile as a prerequisite to his right to be assigned to an advertised position. If certain positions require the use of an automobile, it is so provided for in the Agreement. If Carrier's stations are located in areas to which there is no rail service and no other public transportation, the Carrier is obliged to furnish suitable living quarters as provided in Rule 24(b). This, and not distance in mileage, is the criteria in determining

Carrier's liability. It cannot be said that a four or eight mile walk to and from work in all kinds of weather is reasonable to expect of any employe.

What if Claimant's automobile broke down? Is she required to purchase a new one immediately, rent a car, walk or lose pay because of absence while her automobile is being repaired? We think not. The purpose and intent of Rule 24(b) is clear and unambiguous. Under the circumstances at hand, Carrier is required to furnish suitable living quarters and furnish fuel, water and ice free of charge.

In its Ex parte Submission Carrier first said:

> "At no time in the history of this railroad have living quarters been provided at Finley for use of the Agent."

No such claim was made by the Carrier in the correspondence on the property. None appears in the record. Nevertheless, Carrier argues that the Employes did not deny this allegation and that the Board must accept it as a fact. This, Carrier says, is particularly true because Carrier concluded its Ex Parte Submission with the following:

> "All data in support of Respondent's position has been submitted to the Petitioner and made a part of the particular question in dispute."

What data, if any, Carrier submitted to support its position that it had never previously furnished living quarters in Finley is not shown in the record. It certainly does not appear in the correspondence on the property. It appears only as an assertion in Carrier's Ex Parte Submission. A mere assertion is not evidence.

In its Second Submission, Employes said:

> "Carrier did not, until it appeared before your Board, even attempt to say that Finley is not an isolated point. **The sum total of its argument during the handling on the property was to the effect that Finley will soon outgrow the status of an isolated point where living quarters are not available.**" (Emphasis ours.)

This is sufficient denial of Carrier's assertion. A categorical statement of denial, while preferable, is not necessary. Employes' reply as above quoted is sufficient under the circumstances.

Furthermore, it should be remembered that Carrier did not operate a station at Finley for more than twenty years prior to June 5, 1957. There was no building at that time. Carrier erected a new depot. Whatever may have been the practice at that time must be examined in the light of the Agreement. Rule 24(b) is clear and unambiguous. Employes have met the burden of proof by (1) establishing the fact that Finley was an isolated point and (2) that there were no suitable living quarters available on June 5, 1957 and for many months thereafter.

While Rule 24(b) makes no provision for payment of the use of Claimant's automobile, the fact that Carrier failed to furnish suitable living quarters as required by the Rule, it should be expected that Carrier is liable for reasonable transportation expense to Claimant in traveling to and from work. To deny this expense claim would partially approve Carrier's violation of the Agreement. The mileage claim is fair and reasonable.

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

That the parties waived oral hearing;

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.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11804
DOCKET TE-10606

This award is patently erroneous and should be considered a nullity, for it is predicated on an illegal attempt to add to the rules of the controlling agreement and an improper refusal to recognize the interpretation which the parties themselves have placed on their agreement.

The entire case turns on the interpretation of Rule 24(b). This sustaining award is expressly predicated on the unwarranted finding:

> "* * * If Carrier's stations are located in areas to which there is no rail service and no other public transportation, the Carrier is obliged to furnish suitable living quarters as provided in Rule 24 (b). * * *." (p.4 of Award)

Rule 24(b) contains no such provision. If the parties who drafted that rule had intended requiring carrier to furnish living quarters at points where there is neither rail nor public transportation to the door, they could have and should have included this very simple and easily written provision in the rule. This they did not do. What they did say in the rule is that carrier shall furnish quarters at a point if quarters are not available at such point and, in addition, the point is "isolated".

In the absence of evidence that the word "isolated" was used in other than its ordinary sense, we must attribute that sense to it in interpreting the rule. We have never seen a definition of the word "Isolated" which treats the presence or absence of public transportation as controlling. We have never seen a generally accepted definition which would label as isolated a modern railroad

junction on a surfaced public highway that leads directly to a city which is approximately four miles away and has a population of 14,000.

Before this Board could properly determine that the parties used the term "isolated" in such a restricted sense, we would have to have competent evidence before us indicating that such was the manifest intention of the parties. The Labor Member of the panel that handled this case, being a lawyer, was mindful of this fact. He was also mindful of the fact that the employes had failed to submit evidence on this important point. Therefore, in utter disregard of the Board's rules regarding submission of evidence and over the protest of the Carrier Member of the panel, he testified to the Referee at the panel hearing that in prior years when an agent-telegrapher had been assigned at this point carrier had always furnished him with living quarters at the station. He further testified repeatedly and emphatically that carrier falsified when it stated in the record:

> "At no time in the history of this railroad have living quarters been provided at Finley for use of the Agent." (R., p.18)

As authority for these gravely erroneous assertions the Labor Member quoted another member of the Board who for many years worked for this carrier and lived near Finley, the point here involved. All of this was certain to impress the Referee because of the stature of the Labor Member who was allegedly being quoted. This conduct of the Labor Member would have been improper even if he had spoken the truth, but it is most reprehensible in view of the fact that his assertions regarding past practice were false and carrier's assertion which we have just quoted is true.

If there ever could have been reasonable doubt as to whether Finley could be considered isolated under generally accepted definitions, that doubt had been conclusively resolved by the interpretation which the parties had placed on the agreement by their past conduct. The past conduct was proved by carrier's assertion and petitioner's failure to deny that assertion in the record.

Instead of recognizing this fact, an attempt is made to argue that the carrier's assertion was impliedly denied in the record. In this connection it is held that carrier's assertion of past practice was adequately denied by a statement in the employes' rebuttal that on the property carrier did not "even attempt to say that Finley is not an isolated point." Even if true, this statement could not reasonably be construed as a denial of carrier's very explicit statement regarding past conduct of the parties at Finley. Much less can it be considered such a denial when the employes' own evidence proves that this statement is obviously false. The denial letter of carrier's Superintendent (ORT's Exhibit No. 3), a portion of which is quoted out of context in the Opinion, expressly bases the Superintendent's denial on the basis that

> "I cannot agree that Finley is an isolated point, therefore, this is to advise that your claim is declined." (R., p.12)

The concluding paragraph of the General Manager's letter disallowing the claim (ORT's Exhibit No. 8) states

> "As pointed out to you in conference on September 27th Finley is not an isolated point within contemplation of Rule 24 of the Telegraphers' Agreement, and, therefore, the claim based upon that rule is declined." (R., p.16)

In view of these clear statements of carrier's reasons for disallowing the claim on the property, what effect, in good conscience, can possibly be given to the employes' obviously false assertion that on the property carrier did not even attempt to argue that Finley was not isolated but merely asserted that it would soon outgrow its status of isolation.

Certainly this false statement cannot be reasonably construed as a denial of carrier's assertions regarding past conduct of the parties at Finley. Since these assertions of carrier are not denied in the record, they must be accepted by this Board as factual, and the conduct of the parties which they reveal establishes that the parties themselves over the years interpreted the word "isolated" in Rule 24(b) as excluding Finley from its purview. Even if Rule 24(b) had ever been subject to the interpretation contended for by the employes in this case, such interpretation would now be precluded by this conduct of the parties.

The attempt in the award to make rules instead of interpreting them is further disclosed by the reference to the fact that certain classes of maintenance employes at this point are furnished living quarters. Carrier has indicated in the record that these maintenance employes are covered by different agreements. Obviously the requirements of the service, the demands upon the employes and their basis of compensation all entered into consideration of the carrier when it entered into agreements and arrangements to furnish these maintenance employes living quarters at Finley. All that is significant from our standpoint is that those maintenance employes do not claim and are not provided living quarters under a rule like 24(b) which is admittedly controlling in this case. This Board has no power to revise rule 24(b) so that it will conform to agreements with maintenance employes whose service and availability requirements, as well as compensation, are distinctly different. It is elementary that this Board has no power to make or change agreements, our function is to interpret agreements, applying the established rules of contract law.

We dissent.

G. L. Naylor

W. M. Roberts

R. E. Black

W. F. Euker

R. A. DeRossett