Award No. 6005
Docket No. 5795
2-C&O-EW-'70

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.**

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**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Electrical Workers)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Southern Region)**

DISPUTE: CLAIM OF EMPLOYES:

1. That the Chesapeake and Ohio Railway Company violated the current agreement, particularly the Memorandum of Agreement, effective April 8, 1957, covering electricians assigned to operate cranes at Pier 9 and at Pier 2, Newport News, Virginia, when they reduced the rate of pay of the electricians assigned to operate these cranes by five (5) cents per hour from $3.6998 per hour to $3.6498 per hour, effective January 27, 1968.

2. That accordingly the Chesapeake and Ohio Railway Company be ordered to restore the correct rate of pay of $3.6998, effective January 27, 1968, to all electricians assigned to operate cranes on Piers 9 and 2 on that date or subsequent thereto, and pay them the additional compensation due them for all hours worked. The names of the claimants involved in this case are listed in Appendix A, attached hereto.

EMPLOYES' STATEMENT OF FACTS: The Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, owns and operates a vast import and export terminal at Newport News, Virginia, at which are employed electricians assigned to operate cranes on Piers 2 and 9, hereinafter referred to as the claimants. Claimants hold seniority as electricians at this terminal under the provision of Rule 31 of the shop crafts agreement and are paid in excess of the prevailing rate of pay for electricians at this point for performing work as crane operator under a special agreement.

This special agreement is a memorandum of agreement, effective April 8, 1957, signed April 12, 1957, which established a basic rate of pay, as of the effective date, for electricians assigned to operate cranes on Pier 9 and 2.

class are directly, and unquestionably indirectly, engaged in the transportation of property by water. The work of this class of employe is restricted to the piers, and at no time do they perform work in or about shops. They do all things consistent with their classification as crane operators that go into the loading and unloading of ship cargo. It follows that disputes for the employes of this class can only be heard by the Fourth Division.

Employes involved in this case are of the same classification and perform the same type of work as those involved in Second Division Award No. 4953, which was dismissed account lack of jurisdiction.

From the foregoing, it is clear that the Second Division of the National Railroad Adjustment Board has no jurisdiction to hear this dispute, and accordingly, the claim should be dismissed.

## THE CLAIM IS WITHOUT MERIT

It is the further position of the carrier that the payment above the electricians' rate is a differential rate allowed to crane operators, and has been so recognized down through the years and that percentage increases are not to be applied to these differentials, the same as they were not applied to other differentials. For example, the collective bargaining agreement provides for a 6 cents per hour differential for those performing welding and burning work, also a 6 cents per hour differential for those required to sign federal inspection forms. These differentials continue in existence and the percentage increases granted in 1965, 1966, 1967 and also in 1968, were not granted to these 6 cents per hour differentials. In other words, the 6 cents per hour was subtracted from the hourly rate of pay, the percentage increase applied, and then the 6 cents per hour added back to determine the current hourly rate. The same was applicable to the crane operators at Newport News.

It is true that carrier's accounting department did, through error, apply the percentage increase to the crane operator positions; however, carrier submits that it has sufficiently paid for this error, and since it was the carrier's error, it made no attempt to deduct the overpayment from the employes involved. Carrier submits, however, that it should not be forever penalized because of a clerical error in the accounting department, and that it is entitled to take necessary corrective action when the error is discovered.

If it is determined that the Second Division does have jurisdiction, carrier then submits the claim of the employes for percentage increase to differential rates allowed crane operators at Newport News, Virginia, is without justification, and urges that your Board so find.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Patries to said dispute waived right of appearance at hearing thereon.

First, we take up the preliminary question whether, for purposes of jurisdiction, the thirteen claimants assigned as crane operators at Pier 9 and Pier 2, C&O import and export terminal, Newport News, Virginia, should be considered electrical workers, or whether on account of their specialized activity they should be considered to be employes "directly or indirectly engaged in transportation of passengers or property by water." If, as a matter of fact, the claimants are electrical workers, the Second Division is the proper forum for the adjudication of this dispute, but if they are to be slotted in the other niche, jurisdiction would lie with the Fourth Division.

Patently, Section 3, First (h) of the Railway Labor Act should be construed to avoid ambiguities of classification, if possible. The record shows that claimants are utilized as electricians in and about Carrier's premises when they are not actively engaged in crane operation. Such activity, plus the fact that claimants hold seniority as electricians at this terminal, and their pay rates are pegged to the electricians' wage scale, should serve to describe them generally as electricians, albeit electricians with exceptional duties at times.

Accordingly, we hold that jurisdiction lies most appropriately in the Second Division.

On the merits this dispute challenges the manner in which claimant's wage rates are presently computed. Effective April 8, 1957, the parties entered into a wage agreement setting a basic rate of $2.60 per hour for electricians assigned to operate cranes at Piers 9 and 2, Newport News. However, prior to that time the claimants had been paid a differential in excess to what was paid regular electricians. Initially, this differential amounted to 10 cents per hour more than the prevailing rate for electricians. Thus, while the latter were paid 85 cents per hour back in 1941, claimants received 95 cents. The last such differential was established in 1949 at 33 cents per hour over the electricians' prevailing rate.

Subsequent national wage negotiations produced across-the-board as well as percentage wage increases. The principal question at issue in these proceedings is whether or not the percentage increases are applicable to the said 33 cents per hour differential. This involves the 4% increase effective January 1, 1965; the 3½% increase effective January 1, 1966; the 6% increase effective January 1, 1967, and the 5% increase on July 1, 1968.

Carrier alleges that its Accounting Department erroneously applied the first three of the aforesaid percentage increases to the basic rate (including the 33 cents differential) during the period from January 1, 1965 through January 26, 1986. Effective January 27, 1968, Carrier sought to correct said "error", and from that time onward Carrier applied the percentage increase to the prevailing electricians' rate, and then added the 33 cents per hour differential without any percentage augmentation. (No deduction was made from the wages previously allowed.) If permitted to stand, this change in computation results in a rate 5 cents per hour less than what the claimants had been getting.

Claimants assert that the 5 cents reduction from $3.6998 per hour to $3.6498 per hour should not be upheld. They contend that a basic rate has been established which is inclusive of the differential. Therefore, they would

have the percentage increase apply to the total compensation, without regard to a designation of a portion of the wage as a differential.

In the Agreement effective April 8, 1957, a single rate of $2.60 per hour is established for electricians operating cranes at Piers 9 and 2. Nothing is stated therein to even remotely suggest that this is a composite rate arrived at by adding a differential to the Rule 140 electricians' rate. On the contrary, by referring to the rate as a "basic rate" the April 8, 1957 Agreement eliminated the distinction between the elements making up the rate. Also, until January 27, 1968, the Carrier made no attempt to break down into component parts, or to otherwise differentiate the two factors on which this rate was constructed, in applying the intervening wage increases.

Moreover, the terms of those negotiated wage settlements did not specify that the respective increments granted would not be added to all existing rates, including those containing differentials that had been incorporated over the years into the wage schedule.

To consider the differential as being outside the basic rate would require maintaining a separation of identity between the two component parts. This was not done here. That is to say "basic" being such a strong word, it was incumbent on the parties to make it clear that it was not meant to include the differential. In other words, without their doing something special about it, there is nothing to prevent the percentage increase from attaching.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September, 1970.

## CARRIER MEMBERS' DISSENT TO AWARD 6005

### (Docket No. 5795) (Referee Harold M. Gilden)

In this award the Division committed error by assuming jurisdiction over a dispute involving employes over whom it had no jurisdiction. The employes involved were regularly assigned as crane operators to load and unload commodities to and from ocean-going vessels, and what they might otherwise do on some occasions was not sufficient to vest this Division with the requisite jurisdiction.

For this and other reasons, this Award is erroneous and we dissent.

**P. R. Humphreys**
**H. F. M. Braidwood**
**W. R. Harris**
**J. R. Mathieu**
**H. S. Tansley**

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