

Award No. 2691

Docket No. MW-2719

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the monthly rate of pay for the position of No. 1 Pumper at Lake Bracken, Illinois, be increased in conformity with the provisions of Rule 39-A of the Agreement between the Chicago, Burlington & Quincy Railroad Company and the Brotherhood of Maintenance of Way Employees, effective June 1, 1938, and that J. W. Durbin, incumbent of the position, be paid for all services performed in excess of ten hours per calendar day, retroactive to June 1, 1941.

EMPLOYES' STATEMENT OF FACTS: Agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employees covers pumpers and pumping plant operators. Prior to September 15, 1939 the operation of the pumping plant at Lake Bracken was handled under contract with an outside party not covered by the agreement.

Through agreement reached between the Carrier and representatives of the Brotherhood, confirmed by letter addressed to E. J. Plondke, General Chairman, under date of September 7, 1939, by A. E. Davis, Staff Officer Executive Vice President, the operation of the pumping facilities at Lake Bracken was brought within the scope of the agreement; it being further agreed that the rate of the principal pumper assigned to day shift would be \$90.00 per calendar month on the basis of 10 hour per day assignment, and for the Assistant pumper assigned to night shift the rate be \$75.00 per calendar month predicated on 8 hour per day assignment. Copy of that Mr. Davis' letter is shown as Employees' Exhibit "A."

Later through mutual agreement the rate of pay for the pumper assigned to day service working on 10 hour assignment was increased to \$100.00 per month, and the rate for the assistant or night pumper working on an 8 hour per day assignment was increased to \$80.00 per month effective as of January 1, 1940.

J. W. Durbin, the claimant, working day shift and who is referred to as No. 1 pumper, has been since and before June 1, 1941 required to render service 14 hours per day.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: In the claim here before us the employees take the position that where an employee such as in the case of pumper J. W.

visions of Paragraph (c) of Rule 39 are ignored by the claimant and his representatives and, similarly, the settlement in conference on June 4, 1940, confirmed in Exhibits No. 2 and No. 3, is ignored. Furthermore, they ignore the fact that the condition at the time of the settlement of June 4, 1940, was that the No. 1 Pumper would remain at and protect the operation of the Plant fourteen hours per day. Note particularly the third paragraph of letter Exhibit No. 1. There was no change in the assigned hours made a part of settlement shown in Exhibits Nos. 1, 2 and 3, and consequently, the requested increase in salary rate now is beyond the provisions of Rule 39. Therefore, it is a request which may be pursued only in accordance with Section 6 of the Railway Labor Act and, as such, is not within the jurisdiction of this Board.

The services of pumpers are intermittent. The pumps are set in motion, and the pumper remains in attendance, not necessarily in the pumphouse, but sufficiently nearby to detect any interference; looking in at the plant occasionally to see that operation is in order, lubricating moving parts which otherwise might run dry, and determining the amount of water pumped and the time when pumps are to be shut off. The Plant at Lake Bracken is and has been run on a continuous basis. The capacity is increased when necessary by operating auxiliary pump. The claimant lives on the property at the Pumping Plant and has considerable inactive time during the fourteen hour spread referred to in Exhibit No. 1.

We submit that:

- (1) the conditions of employment during the period of the claim are the same as those on which the settlement of June 4, 1940, was founded;
- (2) the settlement of June 4, 1940, fixed the rate for all services rendered and all time spent on the property;
- (3) claim for adjustment under Rule 39 (a) is untenable because the hours of assignment were not changed; and
- (4) the Board lacks authority to adjust the rate inasmuch as the hours of assignment shown in letter Exhibit No. 1 were the basis of settlement of June 4, 1940, and have not since been changed.

The Board should take cognizance of the delay in the handling of this case. The claim was discussed in conference on November 18, 1941, and the Management wrote the General Chairman on November 19, 1941. The General Chairman requested that joint submission to the Board be made on August 13, 1942, which the Management declined on August 19, 1942. After elapse of more than a year and a half from that time, the case has been resurrected for consideration by the Board.

OPINION OF BOARD: On September 15, 1939, J. W. Durbin was assigned the No. 1 pumper position at Lake Bracken, Illinois, at a salary of \$90.00 per month. The assigned hours were listed 10 each day on a calendar basis. On February 9, 1940, the Organization complained that Durbin was required to work 14 hours each day with the result that an agreement was made, effective January 1, 1940, to adjust the salary rate to \$100.00 per month, such salary to compensate for all services rendered and all time spent on the property. On July 1, 1941, the General Chairman again demanded an increase in pay for Durbin based on the fact that he was required to work more than 10 hours each day. The Carrier denied the claim and it is now before us for consideration.

Subsequent general wage increases, effective December 1, 1941, and December 27, 1943, brought the basic salary rate to \$173.38, these increases being figured on a 10-hour day. However, another agreement effective December 10, 1943, providing time and one-half rate for actual time worked over

eight hours per day, caused the basic rate to be changed to \$138.70 per month for eight hours each day and overtime averaging \$78.02 per month, making a total monthly salary of approximately \$216.72.

Claimant asks an increase retroactive to June 1, 1941, for all service performed in excess of 10 hours per calendar day. The Carrier contends that the services of the position were intermittent within the meaning of Rule 39 (c) providing "No assigned hours will be designated for employees performing intermittent service, such as pumpers, required to work, wait or travel, as regulated by train service or the character of their work." The record shows that Durbin was required to be in attendance upon his work during the whole period of his assignment. His duties required him to be sufficiently close to the pump house to detect any difficulty, to look in at the plant occasionally to see that it was operating properly, to keep moving parts lubricated and to determine the amount of water pumped and the time to shut down the pumps. There was no time during his assigned hours when Durbin could be released from duty. This is not intermittent work within the contemplation of Rule 39 (c).

The Carrier contends that the Board lacks authority to adjust the rate because the hours of assignment were the basis of a settlement as of June 4, 1940, and have not been subsequently changed. It will be noted that the adjustment of June 4, 1940, effective retroactively as of January 1, 1940, was the result of a complaint on the part of the Organization that Durbin was working in excess of 10 hours. The adjustment was brought about by an offer of the Carrier to authorize a monthly rate of \$100.00, effective January 1, 1940, "with the further understanding that these monthly rates cover all services rendered and all time spent on the property based upon requirements as we now know them to be." The General Chairman acknowledged this understanding as to the new monthly rate of pay and said: "It is understood that these increases shall not cancel the request contained in our formal notice of January 19, 1940, wherein we requested increases in rates of pay for these positions." Increases were subsequently negotiated and put in effect pursuant to the request of January 19, 1940. No change in the assigned hours of the position was made until the agreement of December 10, 1943, became effective. It seems clear to us that the Organization negotiated with the Carrier relative to working Durbin more than 10 hours and that an agreement was made which disposes of the question of the hours of assignment of the position until there was a change of conditions or until the agreement was superseded by a new one. The Carrier and the Organization settled the dispute by agreement and we can see no reason why claimant should be permitted to file a new claim merely because he is now dissatisfied with the settlement made. He accepted the increased salary including the retroactive pay agreed upon. Both he and his Organization are now estopped to dispute the agreement made.

This leads us to the conclusion that the agreement of June 4, 1940, effective January 1, 1940, controls the salary rate of this position up to December 1, 1941, when the next general wage increase became effective. During that period, the basic rate was \$100.00 per month for the time actually worked which the record shows to be 14 hours each day. But when the general wage increase of December 1, 1941 became effective, we think it should have been applied on the basis of a 14-hour day, that being the daily hourly assignment of the position subsequent to the agreement of June 4, 1940. The increased rate would then be the established rate of the position until the agreement of December 10, 1943 became effective, at which time the assignment of hours was adjusted on an entirely new basis which raises no issue for our consideration in this case.

In other words, Durbin has been correctly compensated except that the general wage increase of December 1, 1941, should have been applied on a 14-hour per day basis rather than on a 10-hour per day basis.

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

That the current agreement was violated to the extent shown.

AWARD

Claim sustained to the extent shown by the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 6th day of November, 1944.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 2691
DOCKET MW-2719**

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employees

NAME OF CARRIER: Chicago, Burlington & Quincy Railroad Company

Upon application of the carrier 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:

The award in this case goes to the question of the number of hours in Durbin's assignment,—whether his assignment calls for 10 hours' work during a 14 hour period or whether he is in fact working 14 hours. The opinion holds after a consideration of the evidence adduced that the duties of the position were not intermittent within the meaning of Rule 39 (c) and that they were continuous, entitling Durbin to pay for the full 14 hours. Upon a determination of this fact there remains only a mathematical calculation of his earnings, taking into consideration subsequent wage increases and hourly assignments. This does not involve any dispute arising out of the interpretation of the National Wage Mediation Agreement made on December 1, 1941.

The effect of the award is to hold that Durbin was in fact working 14 hours per day long prior to December 1, 1941, but that he was estopped to assert the incorrectness of the application of the current agreement because of the letter agreement of June 4, 1940, effective January 1, 1940. After the agreement of December 1, 1941, became effective, it having superseded the letter agreement of June 4, 1940, Durbin was then in position to assert his right to pay for the 14 hours actually worked. Upon the determination of that question, it being the sole issue, the calculation of his pay was purely mathematical and at a basic rate that was not in dispute by the parties.

We answer Carrier's questions A (1) and A (2) in the negative. We answer Carrier's question B by stating that the award was not in error in disregarding Section 6 of the National Wage Mediation Agreement of December 1, 1941, for the reason that there was no issue raised which involved an interpretation of that agreement.

Referee Edward F. Carter participated with this Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

**ATTEST: H. A. Johnson
Secretary**

Dated at Chicago, Illinois, this 26th day of January, 1945.