Award No. 2794
Docket No. MW-2802

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of System Committee of the Brotherhood that the monthly rate of pay for the position of drawbridge tender, Ottawa, 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 Employes, effective June 1, 1938, and that C. M. Ptacek, incumbent of the position, be paid for all services performed in excess of 8 hours per calendar day, retroactive to June 25, 1942.

EMPLOYES' STATEMENT OF FACTS: The drawbridge on the Burlington Railroad across the Illinois River at Ottawa, Illinois is a lift type bridge. From the time of the claim, June 25, 1942, until August 1, 1943, when another operator was assigned, the claimant C. M. Ptacek was the only and sole operator of this drawbridge. Boats are of course subject to pass up and down the river and through the draw any time during the 24 hours, and whenever a boat appeared the draw must be lifted to permit the boat to pass through the draw. At times, however, there were no trains passing between 12:00 midnight and 4:00 A. M., in which case the operator was permitted to lift the draw and leave it in a raised position during those hours when it was known that no trains were due. Whenever the bridge was lowered to permit passage of trains, operator Ptacek was required to be in attendance. The bridge was always lowered from 4:00 A. M. until 12:00 midnight or for 20 hours during the 24 hour period. Thus, Ptacek was required to be in attendance and render service approximately 20 hours per day. For this service he was paid a monthly rate based upon an 8 hour day assignment. In addition to opening the draw to permit the passage of boats, the drawbridge operator was also required to flag all trains across the bridge.

For years past there has been question with respect to hours of assignment of drawbridge operator Ptacek. Under date of November 29, 1938 he was instructed by the Superintendent to show himself working 13 hours per day instead of 8. Later, under date of February 21, 1941 Ptacek was instructed by the Superintendent to show himself working 13 hours daily except Sunday and 7 hours on Sunday. Later, under date of April 30, 1941, Ptacek was instructed by the Superintendent to show himself working 12⅔ hours daily except Sunday and 6 hours on Sunday. Then, under date of February 10, 1942 Ptacek was instructed by the Superintendent to show himself on the payroll working 8 hours per day. Copies of instructions referred to are reproduced in "Position of Employes." During all of the time covered by these instructions drawbridge tender Ptacek was paid a monthly rate based on 8 hours per day assignment.

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

The time to be calculated and reported for purposes of the Fair Labor Standards Act would involve the time that the bridge tender was actively engaged in the performance of duty within the spread of twenty-four hours, and when it is considered that the bridge was lowered into position for operation of trains over it from 4:15 A. M. until 9:01 P. M. (or later when No. 86 was late), as indicated in the special instructions quoted in the statement of facts, and that there are only an average of about three boats per twenty-four hour day moving under the bridge that might require it to be raised, it can be seen very plainly that the duties of the position are extremely light, as all the bridge tender has to do incident to approaching trains is to signal them with yellow hand signals. According to interpretative Bulletin No. 13, the Fair Labor Standards Act would not have required any change on the bridge tender's timeroll and none should have been made, but, as stated hereinbefore, there was a misunderstanding in this respect between the bridge tender and the local office, and it is this misunderstanding that has been made the basis of the claim in this case, although the fact now is that the date of the claim has been changed from March 1, 1941, as it was originally filed and handled, to June 25, 1942. The latter date, however, does not tie into any of the changes of time reported on the timeroll.

The bridge tender lives in a Company dwelling at the bridge, as stated heretofore. His conditions of employment and active duty hours have remained stable throughout the years, with the exception of the change made by the Company on August 1, 1943, when a second shift bridge tender was assigned because of the consistent late arrival of train No. 86. The organization was willing to recognize the misunderstanding and to close the subject insofar as the rental question was concerned, but it obviously has not been willing to recognize the misunderstanding as it pertained to the reporting of duty hours, as it might be made to look like the condition afforded a basis for an increase in the monthly salary rate, despite the fact that there has been no **actual** change in the service of the bridge tender other than that explained heretofore when the second shift bridge tender was assigned. However, the appearance of a basis for increase is dissipated when the foregoing circumstances are viewed. Furthermore, acceptance of the wage increase December 1, 1941, and again December 27, 1943, on the basis that the monthly rate comprehended 243.3 hours on both dates is positive evidence that no change occurred in actual service hours.

In conclusion, it is the position of the Management

1. that the employment conditions and active service time of the bridge tender have remained substantially static;

2. that the monthly salary rate is the agreed-upon rate fixed by the agreement dated at Chicago, November 29, 1939, the general wage agreement effective December 1, 1941, and the general wage agreement effective as of December 27, 1943;

3. that the increases under the general wage agreements effective December 1, 1941, and December 27, 1943, were accepted without protest or claim. and,

4. that the claim as it appears before the Board must be dismissed in view of the provisions of Rule 35 and Award No. 2224 cited herein.

OPINION OF BOARD: The position with which we are here concerned is listed in an effective Agreement of November 29, 1939, as Bridge Engineer, Ottawa, Illinois, 8 hours per calendar day, rate $122.17 per month. Subsequent general wage increases brought the rate to $146.50 per month on December 1, 1941, and to $168.40 on December 17, 1943. These increases were calculated by applying the specified percentages to the aggregate working hours in a month, using 8 hours as a day. The contractual basis of the employment remains otherwise unchanged.

By Rule 39 (a) of the Agreement of June 1, 1938, it is provided that drawbridge tenders shall be paid a monthly rate covering all services rendered, and that if working hours "are increased or decreased, the monthly rate shall be adjusted pro rata as the hours of service in the new assignment bear to the hours of service in the present assignment, except that hours above ten (10) either in the new or present assignment shall be counted as one and one-half in making adjustments."

The factual background for the claim is revealed by the following quotation, taken from the Petitioner's original submission: "The bridge was always lowered from 4:00 A. M. until 12:00 midnight or for 20 hours during the 24 hour period. Thus, Ptacek was required to be in attendance and render service approximately 20 hours per day." By this process of reasoning the Petitioner arrives at the conclusion that the Claimant's monthly rate should be about trebled.

The Claimant lives in a company house near his place of work. His duties are, generally, to operate a draw to facilitate railroad and boat movements and to flag trains across the bridge. Formerly, it was necessary for him to be available from 4:15 A. M. until 9:00 P. M., and later if Train No. 86 was detained. During that period, on the average, something less than 12 trains and 4 boats were ordinarily accommodated. On August 1, 1943, a second bridge tender was assigned to the Ottawa crossing, after which the claimant's tour of duty was from 7:00 A. M. to 7:00 P. M.

The Claimant was first assigned to this position in April, 1937, and he occupied it when the Wage Agreement of November 29, 1939, was negotiated. It must be conclusively presumed, therefore, that as of the date of that Agreement it was contemplated by the parties thereto that the position was one normally requiring 8 hours of actual service within a spread of a 24-hour calendar day. That being true, the burden is upon the Claimant to demonstrate by the record to the satisfaction of this Board that, within the period limited by the claim, there was an increase of duties to such an extent as to require, in the performance thereof, some determinable number of hours in excess of 8 hours per day. In our opinion, the Petitioner has failed to meet that burden. The only record before us as to the time actually devoted by the Claimant to the discharge of his duties relates to October 5, 1942, and it is admitted that this may not be an average. At most, this data would only sustain a claim for additional compensation for the day or month involved. The Claimant also discloses certain letters of instruction issued by the Carrier's Superintendent, directing how the hours of service should be reported for the payroll, to meet the requirements of the Fair Labor Standards Act. The Superintendent did not profess to have any information as to the hours actually worked, nor does the Claimant assert that said instructions comported with the facts. Indeed, this data—if such it may be considered—is inconsistent with the theory of the claim. There is a total failure of proof to the effect that the Claimant was required by his assignment or by the nature of his duties to work twenty continuous hours daily, or any other definite or ascertainable number of hours, in excess of eight hours per calendar day. Likewise, there is a lack of proof that there has been any substantial increase of the Claimant's duties since the effective Wage Agreement was entered into.

We find no support for this claim in Award 2651, or in its Interpretation No. 1, Serial No. 51. The docket (No. MW-2719) upon which that Award was based discloses, as a fact, that the claimant therein was a pumper, assigned for 10 hours per day but actually required to work 14 hours per day on a continuous position.

Under the circumstances we must hold that the Petitioner has failed to establish any violation of the Agreement.

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 Employes involved in this dispute are respectively carrier and employe 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 no violation of the Agreement has been made to appear.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 8th day of February, 1945.