

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

John H. Dorsey, Referee

PARTIES TO DISPUTE:**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES****SEABOARD COAST LINE RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to compensate Bridge Tender L. A. Burney in accordance with the Call Rule (Rule 26) for the services he performed prior to and not continuous with his regular work period on September 17, 24, 25 and 27, 1968, and on all subsequent dates that he performs service under similar conditions. (System File 12-26M12-27.)

(2) Bridge Tender L. A. Burney be allowed the difference between the amount he received and the amount he should have received under the provisions of the Call Rule for the services he performed or performs on the dates referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Claimant L. A. Burney was regularly assigned to the position of Bridge Tender at Buffalo Bluff, Florida. His regularly assigned work period extends from 8:30 A. M. to 11:00 A. M. and from 12:30 P. M. through 6:00 P. M.

The claimant was called and used to operate said drawbridge outside his regularly assigned hours from 7:15 A. M. to 7:30 A. M. on September 17; from 7:50 A. M. to 8:05 A. M. on September 24; from 7:00 A. M. to 7:15 A. M. on September 25 and from 6:45 A. M. to 7:00 A. M. on September 28, 1968. After completing said overtime service, he was off duty until the beginning of his regular work period.

Reports of extra time (Form 453) were submitted for a call of two hours and forty minutes at the time and one-half rate for the service thus performed during hours outside of and not continuous with his regular work period. Compensation for such service is controlled by the clear and unambiguous provisions of Rule 26 which reads:

"Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of two (2) hours and forty (40) minutes at time and one-half rate, and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on the minute basis."

Since you desire that a conference be held to go into the matter further, this is, of course, agreeable to me and Mr. Dick will be glad to discuss it with you. It is suggested that such conference be held in Room 523, Seaboard Coast Line Building, 9:30 A. M., Tuesday, February 11th. If that is not convenient to you, please suggest another time and date that would be suitable to you. You are assured that we are always glad to discuss any such matter with you.

As to your reference to this being a continuing claim, while we would not interpret such service requirements as arising with sufficient regularity to be classified as a continuing occurrence, we would not think of being technical with you about any matter. Therefore, we are agreeable to handling it as a continuing claim."

**ASST. VICE PRESIDENT-PERSONNEL TO GEN. CHAIRMAN,
FEBRUARY 17, 1969**

"Confirming conference discussion February 11th with Mr. Dick, at which Mr. Clark, Chief Engineer, was also present, concerning claim filed in behalf of Bridge Tender L. A. Burney on October 16, 1968.

You did not present anything new in support of the claim, and we reiterated our position that Mr. Burney was correctly paid under governing Rule 27, which position was fully supported by Third Division Award 6497. Therefore, you were advised that there was no reason for changing our decision of January 13th."

The claim was handled as a continuing claim covering subsequent dates on which similar service was performed, and to complete the record Mr. Burney resigned from service in July 1969.

OPINION OF BOARD: In September 1968, Claimant was assigned as Bridge Tender at Buffalo Bluff, Florida drawbridge, with assigned hours 8:30 A. M. to 11:00 A. M. and 12:30 P. M. to 6:00 P. M., with lunch period 11:00 A. M. to 12:30 P. M., Monday through Friday. On the following dates—work days of Claimant's work week—Claimant was called to duty to open and close the drawbridge with the shown starting time and time of completion of each assignment:

September 17 — 7:15 A. M.-7:30 A. M.

September 24 — 7:50 A. M.-8:05 A. M.

September 25 — 7:00 A. M.-7:15 A. M.

September 27 — 6:45 A. M.-7:00 A. M.

Carrier paid Claimant at the overtime rate of pay from each aforesaid starting time to the starting time of his regular assignment, 8:30 A. M.

Organization filed claim on October 16, 1968, that Claimant was contractually entitled to pay for a call as prescribed in Rule 26, Call Rule of the current Agreement which was effective July 1, 1968. Further, it prays that Carrier be ordered to pay Claimant the difference between the amount he received and the amount he should have received under the Call Rule on the specified dates "and on all subsequent dates that he performs service under similar conditions."

A. PERTINENT RULES

The pertinent rules of the current Agreement read:

"RULE 26. CALL RULE

Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of two (2) hours and forty minutes at time and one-half rate, and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on the minute basis."

"RULE 27. OVERTIME

Section 1.

Time worked following and continuous with the regular eight (8) hour work period shall be computed on the actual minute basis and paid for at time and one-half rates, with double time computed on the actual minute basis after sixteen (16) continuous hours of work in any twenty-four (24) hour period computed from starting time of the employee's regular shift.

Section 2.

Time worked continuous with and in advance of the regular eight (8) hour work period: (a) if six (6) hours or less, will be paid at time and one-half rate until the beginning of the regular work period, and then at the straight-time rate during the regular eight (8) hour work period; (b) if in excess of six (6) hours, the time and one-half rate will apply until the double-time rate as provided for in Section 3 of this Rule becomes applicable, or released for eight (8) hours or more. Such release, upon completion of six (6) hours or more actual work, will not constitute a violation of Section 6 of this Rule."

These two Rules are identical to Rules in the Agreement which preceded the current Agreement.

Rule 8, Section 15, of the preceding Agreement as revised, effective December 16, 1944, is identical to Rule 26, Call Rule of the current Agreement.

Rule 8, Section 14, of the preceding Agreement as revised, effective September 1, 1949, is identical to Rule 27, Overtime, Sections 1 and 2, of the current Agreement.

B. POSITIONS OF PARTIES

1. POSITION OF CARRIER:

To avoid the risks of paraphrase we quote Carrier's position in its own words:

(1) Letter of denial of the claim from Division Engineer to the General Chairman dated November 1, 1968:

"Reference is made to your letter of October 16 concerning extra time report Form 453 submitted by Bridge Tender L. A. Burney for extra time made during the month of September, 1968.

We have approved payment of all the calls in question on a call basis (Rule 26), except those calls made between hours of 5:50 A. M. and 8:30 A. M., and my position is that these calls are for time worked continuously with and in advance of the regular work period of 8:30 A. M. to 11:00 A. M. and 12:30 P. M. to 6:00 P. M. (Rule 27, Section 2), and a claim for a call is not consistent with the current agreement. Your reference to Award 14070 by the Third Division of the National Railroad Adjustment Board is not applicable as it pertains to calls during bridge tender's lunch rest period." (Emphasis ours.)

and

(2) Letter of denial of the claim from Assistant Vice-President dated November 14, 1968:

"Your letter of November 12 appealing decision of Division Engineer T. C. Herndon in declining payment of claim filed in behalf of Bridge Tender L. A. Burney, Buffalo Bluff, Florida (St. John's River Drawbridge), for four calls, as referred to in your letter October 16 to Mr. Herndon, with copy to me:

The four calls in question are as follows:

September 17 — 7:15 A. M.-7:30 A. M.

September 24 — 7:50 A. M.-8:05 A. M.

September 25 — 7:00 A. M.-7:15 A. M.

September 27 — 6:45 A. M.-7:00 A. M.

According to my records, Mr. Burney is assigned as Bridge Tender at St. John's River Drawbridge with assigned hours 8:30 A. M. till 11:00 A. M., and 12:30 P. M. to 6:00 P. M., with lunch period between 11:00 A. M. and 12:30 P. M. We have issued instructions to all Bridge Tenders that when they are called to operate the drawbridge within 2 hours and 40 minutes of their assigned starting time they will remain on duty from the time they report until regular starting time and will be paid overtime in accordance with Rule 27, Section 2, which states in part: "Time worked continuous with and in advance of the regular eight (8) hour work period: (a) if six (6) hours or less, will be paid at time and one-half rate until the beginning of the regular work period, and then at the straight-time rate during the regular eight (8) hour work period; . . ."

It is noted that you are taking the position that Mr. Burney was called on the above referred to dates in advance of his regular starting time, and completing the specific work for which called, placed him as being in a released status under the provisions of Call Rule 26 until his regular starting time of 8:30 A. M., on his regular assigned work days. I cannot agree with you in taking this position since we have issued definite instructions to all Bridge Tenders that when they

are called two hours and forty minutes in advance of their regular starting time they will remain on duty at overtime rate until their regular starting time. It is our position that he was not released since instructions were issued as outlined above.

In your letter October 16 to Mr. Herndon, you made reference to Award No. 14070 by the Third Division of the National Railroad Adjustment Board. Apparently, you mentioned this Award with the thought that it was applicable in the above instances. This Award is not applicable as it only pertains to calls during the Bridge Tender's lunch-rest period. Actually, the Award was made in connection with a case at Lake Monroe Drawbridge and only dealt with the lunch period.

Under the circumstances outlined above and in view of the outstanding instructions that when Bridge Tenders are called two hours and forty minutes in advance of their starting time they are to continue on duty at overtime rate until their regular starting time, I see no reason why I should not uphold Mr. Herndon's decision in declining these claims. Under the circumstances outlined above, I do not see any necessity for holding a conference in connection with this matter, however, if you deem one necessary, Mr. Clark will be glad to discuss same with you at your convenience." (Emphasis ours.)

2. POSITION OF ORGANIZATION:

It is Organization's position that: (1) The calls and the period of time Claimant engaged in each assigned task, admitted by Carrier, are such, as within Rule 26, Call Rule, for which rate of pay is contractually prescribed therein; (2) no instructions had been promulgated to the employees, at times material herein, as alleged by Carrier; and (3) Award No. 14070, (1965), involving the parties herein, correctly interprets and applies the cited Rules albeit the Rules were then identically set forth in the preceding Agreement as we have established, supra.

C. RESOLUTION

At the outset we distinguish between a "Call," as generally understood in the industry, from "Overtime."

A "Call" is when a carrier, due to an unforeseeable contingency, does in fact call an employee without previous notice to perform work not within his regularly assigned hours.

"Overtime" prior to an employee's regularly assigned starting time is generally directed by a carrier before or at the termination of his preceding work day. Requirement for such overtime work is foreseeable by a carrier and the employee, having had reasonable notice, is obligated to comply. This is in contrast with a call with which the employee is obligated to comply without having reasonable notice affording him the opportunity to arrange his affairs. By a "Call" the employee is taken by surprise; "Overtime" is by plan. The contractual guarantee of minimum hours of pay at time and one-half is consideration for the disruption of the employee's scheduled free time and attendant inconveniences caused by an unexpected "Call." It is this distinction which makes Award No. 6497, cited by Carrier in support of its position, inapposite in the resolution of the instant case.

Carrier's defense of "instructions" is without merit in that: (1) Organization denied "instructions" had been issued as alleged in Carrier's declaratory statements; (2) the defense is an affirmative one which vested the burden of proof in Carrier; (3) Carrier failed to satisfy its burden of proof by a preponderance of material and relevant evidence of probative value; specifically, it failed to adduce the "instructions" and prove the date, if any, on which promulgated to the employees.

In our Award No. 14070 we interpreted the Pertinent Rules (A, supra) and found and held:

"... A careful analysis of Section 14 (Rule 27, Sections 1 and 2 of the current Agreement) discloses that the apparent intent of the parties was to provide a method for compensating employees who were required to perform work following and continuous with, or continuous with and in advance of their regular eight hour period, on the basis of actual time elapsed, at the overtime rate. Contrariwise, under Section 15 (Rule 26 of the current Agreement) compensation would be paid for a call, where the work performed was not continuous—and such payment would be for two hours and forty minutes at overtime rate.

We believe it to be extremely significant and crucial to a proper interpretation of this Rule, that Section 14 employs the words following and continuous, or continuous with and in advance of, as differentiated from Section 15, wherein the phrase not continuous is employed. It cannot be gainsaid, regardless of what future instructions the Carrier might issue relative to the two and one-half hours period, such is an authorized lunch-rest period. Presumably, the employee is at liberty to pursue his own activities, subject to being called for such an eventuality as occurred in the instant situation. Until different arrangements are negotiated by the parties, or other instructions issued, the Claimant is entitled to be compensated for a call under Section 15 of Rule 8."

We find that award dispositive of the issue herein presented in that it supports a finding that Carrier violated Rule 26—Call Rule in the instant case. We reaffirm it with one exception not here material. We find that Carrier cannot abrogate Rule 26—Call Rule, in whole or in part, by unilateral issue of "instructions." That can only be effected through the process of collective bargaining. Carrier's alleged, but not proven, "instructions" would in effect suspend the Call Rule during a period of 2 hours and 40 minutes immediately preceding an employee's regularly assigned starting time. The Rule, as agreed to, does not permit the writing into it of an exception by Carrier's unilateral action through the guise of "instructions."

Organization's prayer that Claimant be compensated "on all subsequent dates that he performs service under similar conditions" must be denied. Should we issue such an order it would not be enforced by the courts because of lack of findings of fact by this Board, supported by substantial evidence, and uncertainty. The limited statutory authority of the courts is review of our exercise of jurisdiction and findings. The courts have no authority to sit as a trial tribunal to resolve disputes concerning which this Board has exclusive primary statutory jurisdiction. Nor can this Board resolve "subsequent"

disputes by interpretation. Our jurisdiction under Section 3, First (m) of the Railway Labor Act is limited to dispelling in fact existing ambiguities in an Award — new evidence or new issues may not be adduced or raised in such proceedings. Further, the "subsequent dates" prayer in paragraph (1) of the claim is not a continuing violation within the contemplation of Article V of the August 21, 1954 National Agreement.

For the foregoing reasons we will sustain the claim as to compensation for the four dates specified in paragraph (1) of the claim; and, we will deny the claim for compensation on "subsequent dates."

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 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 Carrier violated the Agreement.

AWARD

Claim sustained in part and denied in part as set forth in the Opinion, supra.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1970.

CARRIER MEMBERS' DISSENT TO AWARD NO. 18090 DOCKET NO. MW-18521 (Referee Dorsey)

Award No. 18090 is in serious error, is not supported by the record covering the handling of the dispute on the property, does violence to the clear provisions of the applicable Agreement, and we dissent.

It is well settled that a Carrier has the prerogative of assigning work and directing its work force in any manner not prohibited by the Agreement. As stated in Award 12358 (Dorsey):

"It is axiomatic that all prerogatives inherent in management, except to the extent circumscribed by law or contract, remain vested in a carrier. Absent either of such circumscriptions, the determination of its manpower requirements is within the sole judgment of Carrier. * * *"