

Award No. 729
Docket No. MW-739

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY**

**THE CHICAGO, ROCK ISLAND AND GULF
RAILWAY COMPANY**

(Frank O. Lowden, James E. Gorman, Joseph B. Fleming, Trustees)

STATEMENT OF CLAIM: "Claim of Art Jones, B&B helper, Rock Island Division, that he be paid the difference between the rate that he received as laborer—35c per hour, and that of B&B helper—50c per hour, during the period that he rendered service in the capacity of a B&B helper from September 30 to November 5th, 1936, inclusive."

EMPLOYES' STATEMENT OF FACTS: "From September 30 to November 5th, 1936, Art Jones was employed in assisting Bridge and Building carpenters, performing such work as putting up stoves and stove-pipes, making repairs to turn-table, planking, mixing concrete by hand and by machine, and various other kinds of B&B work, for which service he was paid at laborer's rate of 35c per hour."

CARRIER'S STATEMENT OF FACTS: "Arthur Jones entered our service as a pipeman (Water Service) helper at Blue Island, Illinois, February 1, 1927. He was advanced to a pipe fitter (Water Service Mechanic) August 1, 1928, and has continued to work when opportunity offered. He was cut off in force reduction in the Water Service Department September 19, 1936, and as there was some common laborer work to do in connection with culvert work he was advised that such work would be available for him at the rate of 35c per hour, and he elected to take this work, and he, with four other laborers, was used when work was available between period September 30 and November 5, 1936.

"He was called for service as a pipefitter February 10, 1937, but indicated he had steady work elsewhere and, therefore, his record was closed, and he, therefore, ceased to be an employe.

"On February 2, 1937, claim was filed in his behalf for difference in rate of pay of 35¢ and 53¢ per hour for time worked during period September 30 and November 5, 1936. This claim was later revised in appeal of June 5, 1930, to cover 50¢ per hour, the B&B helper's rate on the Chicago Division."

organizes the force assigned for handling regular track work, and when our present agreement of January 1, 1936, was negotiated it was agreed that some mutual understanding would be worked out as to the handling of this common laborer work in our B&B and Water Service Departments. This was not finally accomplished until Memorandum of Agreement dated April 9, 1938, effective May 1, 1938, when the following was adopted:

'Add to Rule 1, following under Group 1 as paragraph (f), and under Group 3 as paragraph (d):

"Laborers may be employed, as required, to do excavating or back filling and similar miscellaneous pick and shovel work."

"The work performed by Mr. Jones on the dates listed below consisted only of ordinary pick and shovel or similar work and there is nothing in our agreement that provided for B&B helpers' rate for such common laborer work:

1936	Location	Work performed
9/30	New Lenox	Mixing concrete with shovel
10/ 1	" "	" " " "
10/ 5	" "	" " " "
10/ 6	" "	Cleaning mud out of culvert
10/ 7	" "	" " " "
10/ 8	" "	" " " "
10/ 9	" "	" " " "
10/15	" "	Cleaning and ditching around Culvert
10/26	" "	Handling concrete material for Culvert
10/27	" "	" " " "
10/28	" "	" " " "
10/29	" "	" " " "
10/30	" "	" " " "
10/31	" "	" " " "
11/ 2	" "	" " " "
11/ 3	" "	" " " "
11/ 4	" "	" " " "
11/ 5	" "	" " " "

Handling concrete material for culvert means that he was shoveling sand and stone into wheelbarrow and wheeling it to the mixer, and wheeling the mixed concrete to the forms.

"While Mr. Jones was in the gang the foreman found it convenient to use him on B&B helper's work on October 2, 12, 13, 14, 16, 19 and 20, 1936, and the carrier considers that as the maximum that could be claimed for Mr. Jones."

OPINION OF BOARD: The question in dispute in this case is the same as that presented in Docket SG-567, Award 565. Here, as there, the agreement, as it pertained to the Bridge & Building Department, contained no classification of "Labor" and no wage rate for such a class.

The carrier contends, as it did in that case, that the agreement permits the employment of laborers in the Bridge and Building Department since no definite prohibition of their employment is set forth therein; that the work performed by the employe, or most of it at least, is generally recognized as laborers' work; and that it had been the long continued practice of the carrier to use laborers to do such work.

On the other hand the employe denies that the contract permitted the employment of laborers or that there had been a long continued practice in that respect as to amount to an understanding permitting such employment.

The record shows that when the contract of January 1, 1936, was negotiated there was a dispute as to whether the class "Laborers" should be included therein. While the record indicates that the dispute involved more the question of the character of work that should be performed by the class than whether such class of labor should be permitted under the agreement to this Board it evidences an intention to exclude this class from the agreement until this question could be settled.

An understanding was reached upon the question early in 1938, evidenced by the Memorandum of Agreement effective May 1, 1938. That agreement provides:

"Laborers may be employed, as required, to do excavating or back filling and similar miscellaneous pick and shovel work."

Both parties to this dispute list different items of work as having been performed by this employe during the period in question. Carrier admits it was not all of the class covered by the agreement of May 1, 1938 and the character of the work performed by this employe illustrated the difficulty confronting the parties in coming to an agreement as to the character of work that should be performed by common laborers. In Award 565 this Division held that the Carrier violated the agreement by employing laborers to perform signal work where the contract made no provision for the use of such class of employees. There are no facts in this case that take it out of the rule laid down in that case.

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 employe 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 the rules of the agreement sustain the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of September, 1938.