

Award No. 1602

Docket No. MW-1376

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY

STATEMENT OF CLAIM: "Claim of H. J. Wortz and K. W. Webb, welders, Cedar Rapids Division, that they be paid eight hours per day, each, for November 13th and 14th, 1939."

EMPLOYEES' STATEMENT OF FACTS: "H. J. Wortz and K. W. Webb were working as welders in welding gang No. 2, Cedar Rapids Division. On November 13th and 14th, 1939, each of them were permitted to work only three hours each day on account of that the gas supply used in the performance of welding had been exhausted."

POSITION OF EMPLOYEES: "Rule No. 22 of current Agreement reads:

'Except as otherwise provided in these rules, eight (8) consecutive hours' work, exclusive of meal period, shall constitute a day.'

"We maintain that under the application of that rule, regularly assigned employes must be given an opportunity to work and earn a full eight hour day wage, unless work is prevented by inclement weather, or until after the work is completed they are laid off under the application of force reduction rules. In the instant case the employes were laid off part of the day and not permitted to earn the contemplated day's wage for the reason that the Carrier did not have material available to carry on the work.

"We maintain that it is the Carrier's responsibility to see to it that the necessary material is available to carry on the work program on which the employes are engaged. Certainly it is not the responsibility of the employes. In fact, they would have no voice in connection therewith. That being so, the employes should not suffer loss of time because of a condition that lies entirely within the control of the Carrier. Therefore, we maintain that the claim is just and reasonable, and respectfully request that it be allowed."

CARRIER'S STATEMENT OF FACTS: "In November, 1939, Welding Gang No. 2 was engaged in work on the Cedar Rapids Division. On Saturday, November 11, 1939, all gas on hand was used and it was expected that by Monday, November 13, 1939, gas would be received from the manufacturers with which to continue the work of welding. The men in question reported on Monday, November 13, 1939, at the regular time but the gas had not arrived. They were released after being held on duty three hours. They likewise reported on Tuesday, November 14, 1939, and, again, the gas had not arrived and similarly they were released after being on duty three hours. They were paid three hours' time each for the time on duty on November 13 and 14, 1939, in accordance with the provisions of Rule 35 of the current agreement of May 1, 1938."

POSITION OF CARRIER: "The second paragraph of Rule 35 of the Maintenance of Way agreement of May 1, 1938, reads as follows:

'Hourly rated employees assigned to regular employment and required to report at regular starting time and place for a day's work and when conditions prevent full day's work being performed, will receive actual time with minimum of three (3) hours at pro rata rate.'

"Messrs. Wortz and Webb were hourly rated employees.

"On each day, November 13 and 14, 1939, it was expected that the gas for welding, which was on order, would be received to permit these hourly paid welders to perform their work as assigned. Through no fault of the management—the management does not manufacture this gas—the gas did not arrive on either November 13 or 14, 1939, but the men in question—H. J. Wortz and K. W. Webb—were retained on duty for three hours each of these dates, it being hoped that the gas would arrive to permit them to continue their regular welding work. As it did not arrive within a reasonable time on the days in question, the men were released for the days and paid three hours' time each at pro rata rate for the three hours they were held on duty. This was strictly in accordance with the second paragraph of Rule 35 as quoted above.

"The employees may contend that the management was lax in its duty in not having sufficient gas on hand for the work to be performed. On October 27, 1939, Requisition No. 1836 was prepared and submitted to cover 75 tanks acetylene and 60 tanks oxygen to be used on the Cedar Rapids Division in the vicinity of Ely and Solon. These were shipped October 30, 1939 from the Air Reduction Sales Company from their plant at Bettendorf, Iowa. On November 6, 1939, another Requisition, No. 1848, was issued and submitted to cover shipment of 75 tanks of acetylene and 75 tanks of oxygen. Not being received on Saturday, November 11, 1939, the Superintendent traced by wire for this acetylene and oxygen gas and asked that it be rushed. A wire tracer was again sent Monday, November 13. If it could have been delivered by the manufacturer on Saturday, the 11th, or Sunday, the 12th, the Superintendent intended to place shipment on a through train. The office of the Chief Engineer at Chicago also was tracing this shipment of gas and ascertained the manufacturer was short of gas drums, but was successful in getting shipment made on the night of November 14, 1939, and the gas was given special handling so that it arrived at Ely, Iowa the morning of November 15.

"We mention the above to indicate that the management did make every effort to get a supply of acetylene and oxygen in time for the welding gang.

"We submit that there was no violation of Rule 35 or any other rule in the agreement, the employees in question were properly paid under the agreement, and the management was not negligent in not having the gas on hand. Conditions did prevent a full day's work being performed by this welding gang on the two dates in question and the conditions could not be remedied by the management as it had taken adequate and reasonable action to have this material on hand.

"The claim, therefore, has no merit and should be declined."

OPINION OF BOARD: In November 1939, H. J. Wortz and K. W. Webb were working as welders, engaged in work on Cedar Rapids Division. On November 11th, which was Saturday, all gas on hand was used. The employees were ordered back to work on Monday, November 13, 1939, but the gas necessary to continue the work had not arrived. They worked for three hours picking up tanks and were then released, being ordered back to work on November 14th. The gas necessary to continue the work having not arrived on the 14th, the men were employed for three hours picking up tanks and then released.

It is the contention of the Organization that Rule 22 applies while the Carrier contends that Rule 35 of the current Agreement applies. The record shows that there was more than three hours' work for these complainants to perform on November 13th for they were worked on similar work for three hours on the following day, November 14th. When the Carrier saw fit to withhold some of the work and require the employees to report again the next day and then only allow them to work three hours, there was a violation of Rule 22.

The language of Rule 35 clearly shows that it was never intended to deprive an employe of a full day's work as long as there was work to perform and conditions permitted the performance of same.

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 employes 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 Carrier violated Rule 22 of the current Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1941.

DISSENT TO AWARD NO. 1602, DOCKET MW-1376

The error of this Award appears in two misconceptions therein. First, in the reason given for finding a condition which was not one of the conditions to "prevent full day's work being performed" covered by the second paragraph of Rule 35. Second, in the penalty exacted after finding that the condition here was not such a condition as covered by Rule 35.

As to the first, the record clearly showed that the lack of material which prevented work by these two welders was a condition uncontrollable by the Carrier and that the work assigned to them for the three hours of minimum pay which the rule specified was fill-in work that it was possible for the Carrier to provide.

As to the second, Rule 35 certainly contemplated some condition upon occasion might prevent "full day's work being performed." Assuming that one such condition had existed for any number of hours less than eight,—say two hours during a violent rainstorm,—on each of the two days here involved, it cannot be gainsaid that the rule provided for payment of the actual hours worked or held on duty which in such instance would have been the remaining six hours of the regularly constituted eight-hour day.

This Award implies that when the condition, as in this case found by the Award, was one which did not prevent work it is necessary to go to another rule to find the penalty to be applied, viz., Rule 22. This rule,

if it had such virtue, would nullify and make unnecessary in the Agreement at all the second paragraph of Rule 35, providing under proper circumstances for payment of less than eight hours.

Rule 35 thus within itself provides the method of payment for less than eight hours when conditions prevent full day's work being performed, and is of itself the measure of proper payment under the situation here in dispute where the Opinion found, though impractically and unsoundly, the work furnished as a fill-in to be indication that conditions did not prevent full day's work being performed. To the extent that the Opinion thus found that the three hours' work on November 14th was indicative of the fact that three hours more could have been worked on the 13th, proper and equitable imposition of additional payment upon the Carrier would have gone but to the extent of the three additional hours allowable for November 13th thus found by the Opinion to be the only evidence of the condition that did not "prevent full day's work being performed," as covered by Rule 35.

(s) C. C. Cook
(s) R. H. Allison
(s) A. H. Jones
(s) C. P. Dugan
(s) R. F. Ray