Award No. 1706
Docket No. CL-1739

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carl B. Stiger, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the provisions and intent of Clerks' Agreement by improperly compensating Messengers W. S. Wright and J. S. Rankin in September and October, 1940, and that they shall now be reimbursed for such wage loss as was sustained by each of them by reason of such violation.

JOINT STATEMENT OF FACTS: W. S. Wright and J. S. Rankin are regularly employed as messengers in the freight station at Jackson, Mississippi. The method of payment applied to both messengers is identical.

The details of the claim, amounts claimed and amounts actually paid to Messenger Wright for the month of September, 1940, are as follows:

Date	Position Worked	Wages Claimed		Wages Allowed	
Sept. 3, 1940	Messenger	$2.40		$2.12	
Sept. 4	Messenger	2.40		2.12	
Sept. 5	Messenger	2.40		2.12	
Sept. 6	Messenger	2.40		2.12	
Sept. 7	Clerk	4.70½		4.70½	
Sept. 9	Clerk	4.49½		4.49½	
Sept. 10	Clerk	4.49½		4.49½	
Sept. 11	Messenger	2.40		2.12	
Sept. 12	Messenger	2.40		2.12	
Sept. 13	Messenger	2.40		2.12	
Sept. 14	Messenger	2.40	$32.90	2.12	$30.66
Sept. 16	Messenger	2.40		2.12	
Sept. 17	Messenger	2.40		2.12	
Sept. 18	Messenger	2.40		2.12	
Sept. 19	Messenger	2.40		2.12	
Sept. 20	Clerk	4.60		4.60	
Sept. 21	Clerk	4.60		4.60	
Sept. 23	Clerk	4.49½		4.49½	
Sept. 24	Clerk	4.70½		4.70½	
Sept. 25	Messenger	2.40		2.12	
Sept. 26	Messenger	2.40		2.12	
Sept. 27	Messenger	2.40		2.12	
Sept. 28	Messenger	2.40		2.12	
Sept. 30	Clerk	4.49½	$42.10	4.49½	$39.86

The difference in wages claimed and wages allowed is $4.48.

by legal enactment, when it applies $2.12 per day, nor the rate of Warehouse Clerk when the Carrier takes money from that position and applies it to the Messenger's position.

This claim involves no request to interpret or apply the Fair Labor Standards Act. It is limited solely to the interpretation and application of the Brotherhood's agreement as to a specific set of facts involving the transaction which has actually taken place. In interpreting the agreement the Board is merely called upon to take cognizance of the existence of a Federal Law which has changed the basic rates and the Board has in many instances taken cognizance of State and Federal statutes.

POSITION OF CARRIER: In Joint Statement of Facts, petitioner admits respondent has applied negotiated and agreed upon rate of $2.12 per day, as required by the current effective schedule revised September 1, 1927. This being an admitted fact, there can be no dispute or grievance under the provisions of the existing agreement or Sections 2 and 3 of the Railway Labor Act, as amended.

Attention is directed to Opinion of this Board in Award 1228 regarding Fair Labor Standards Act of 1938, reading in part:

> ". . . this Board has no concern regarding the compliance with or violation of that Act. The contract between the Petitioner and Respondent must be interpreted independently of this act . . ."

This clearly sustains the above position.

Rule 64 of the current agreement reads:

> "Term of Agreement
>
> "This agreement shall be effective as of September 1, 1927, and shall continue in effect until it is changed as provided herein or under the provisions of the Transportation Act, 1920.
>
> "Should either of the parties to this agreement desire to revise or modify these rules, 30 days' written advance notice, containing the proposed changes, shall be given and conferences shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

The carrier contends that any modification or revision of the schedule rules must be made in conformity with the provisions of Rule 64 thereof, or in manner prescribed in Section 6 of the Railway Labor Act, as amended. Petitioner has cited no violation of any rule, and can produce no evidence to show that the agreement or rates have been changed in the manner outlined herein.

There is attached Carrier's Exhibit No. 1 showing actual earnings of Mr. J. S. Rankin during months of September and October 1940.

As the carrier has fully complied with all provisions of the existing schedule agreement, the claim is without merit and should be denied without qualification.

OPINION OF BOARD: The provisions of Section 6—(2) of the Fair Labor Standards Act of 1938, requiring every employer to pay each of his employes wages at the rate of not less than 30¢ per hour, are applicable to the employes involved in this dispute.

When the employes worked the entire work-week as messengers the Carrier paid them the minimum wage fixed by the Federal Act of 30¢ per hour, or $2.40 per work-day. However, when the employes were assigned for a part of the work-week to the higher rated position of clerks—$4.49½ per

work-day—the Carrier paid the employes for work as messengers during the week at the contract rate in force prior to the Federal Act of 26½¢ per hour, or $2.12 a day.

The Carrier's position is that the payment of 26½¢ per hour to the messengers, under such circumstances, does not violate the Act because it claims, the Act permits it to divide the total earnings of the employe from both positions for each work-week by the total hours worked to determine whether it had paid the minimum hourly rate and the earnings of each messenger in the two positions for the work-week averaged not less than 30¢ per hour. The following is an example of the method used by the Carrier to determine whether it had paid the messengers the minimum wage:

> If the employe worked 4 work-days at 26½¢ per hour, or $2.12 per work-day as messenger, and one day at $4.49½ as clerk, the amount due him under the prior wage contract at the end of the work-week would be $13.19. In view is that the amount due the employe under the Federal Act would be 40 hours' work in the two positions at 30¢ per hour or $12.00. Therefore, argues the Carrier, the employe earned by working in both positions under the prior wage agreement more than the minimum required by the Federal Act and thus the Act has not been violated.

This Division cannot agree with the contention of the Carrier that the Federal Act did not affect the contract wage of 26½¢ per hour for messengers and only required it to pay them at the end of the week at the rate of 30¢ per hour for the total number of hours worked in the two positions.

The position of clerk was not affected by the Federal Act because its rate exceeds the minimum wage fixed by Section 6.

The Federal Act, applied to this dispute, requires the Carrier to pay its messengers not less than 30¢ per hour, the minimum hourly wage necessary, in the opinion of the Congress, for the health, efficiency, and general well being of workers filling positions within the scope of the Act.

The passage of the Act automatically raised the contract hourly wage of the low rate position of messengers from 26½¢ to 30¢ per hour, or from $2.12 to $2.40 per day.

Rule 43 provides that the employes be paid on a daily basis. Under the wage agreement, as modified by the Federal Act, at the end of each work-day messengers earned $2.40 and were entitled to be paid on this daily basis. The employes when assigned to the position of clerk earned each work-day $4.49½ and were entitled to be paid on that daily basis. Rule 48 provides that positions, not employes, shall be rated, and Rule 50 states that employes assigned to higher rated positions shall receive the higher rates while occupying such positions.

The Federal Act changed the contract rate for the position of messengers from 26½¢ to 30¢ per hour and the Carrier was obligated at the end of the work-week to pay the employes the proper rate for both positions.

The Carrier concedes the employes are entitled to $2.40 per day or $14.40 for the work-week as messengers if they work the entire week in that position. That the employe is assigned to the higher rated position of clerk on some of the work days does not affect his right to his minimum wage as messenger.

The Act fixes a minimum hourly rate for low rated positions and the Carrier cannot violate the Federal Act by paying the employe while serving as messenger 26½¢ per hour over a period of 5 days and cure or avoid the violation by assigning the employe to a higher rated position on the sixth day so that the total work-week earnings will average 30¢ or more per hour.

The payments made to the employes which caused this claim to be filed deprived them of the very benefits bestowed upon the position of messengers

by the minimum wage law and constituted a violation of the agreement as modified by the Act.

The Carrier rests its construction of the Act primarily on a regulation entitled "Workweek taken as Unit in Wage-Hour Calculation" and a statement of the Administrator's legal staff at a conference with the Carriers' Standing Territorial Committees that the work-week basis was applicable to Carriers.

The regulation is not before the Board nor is it advised of an application or interpretation of the regulation that tends to sustain the Carrier's position.

This Division is of the opinion that on this record and the particular situation before it the work-week unit rule did not justify the payment of 26½¢ per hour to the messengers.

Interpretative bulletin No. 8 tends to sustain the conclusion reached by the Board. It reads in part:

"* * * if a provision in such a collective agreement fixes an hourly rate of less than 30 cents (25 cents for the period from October 24 1938 to October 24, 1939) or a piece-work rate which for any employe employed on the basis of that rate will not yield the equivalent of 30 cents an hour, or any other method of payment which does not yield the equivalent of 30 cents an hour, it will not be controlling. The employes, in accordance with the minimum wage provisions of Section 6, will be entitled to be paid at a rate of not less than 30 cents an hour.

"It must be remembered that the Act merely sets certain minimum standards. Thus, collective bargaining agreements, entered into prior to the effective date of the Act, which set standards higher than those set in the Act; * * * are in no way affected by the Act. Nothing in the Act will relieve the parties of the obligations they assumed under such a contract."

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 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 the current agreement.

AWARD

That Messengers Wright and Rankin be reimbursed for such wage loss as was sustained by each of them by reason of such violation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division.

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of February, 1942.