Award No. 2852
Docket No. MW-2763

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

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

(a) That the Carrier violated provisions of Agreement in effect by assigning pumper S. A. Cook, Marathon, Texas, to 12 hours per day service but paying him for only 8 hours;

(b) That under the application of Rule 8, Paragraph 5, of Agreement in effect the monthly rate of pay of pumper S. A. Cook shall be adjusted on the basis of the number of hours he is held on duty 12 hours per day;

(c) That S. A. Cook, pumper, shall be paid for 4 hours per day for each day he rendered service in addition to what he has received, retroactive to April 3, 1942.

EMPLOYES' STATEMENT OF FACTS: The nature of the service of Pumper S. A. Cook, Marathon, Texas was such that it was necessary for him to remain on duty from 7:00 A. M. to 7:00 P. M. each day including Sundays and Holidays. For this service S. A. Cook was paid on the basis of 8 hours per day.

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

POSITION OF EMPLOYES: Rule 8, Article V, of Agreement in effect reads:

"Positions not requiring continuous manual labor such as camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lamp men, pumpers, steam shovel, pile driver, crane and ditcher watchmen, will be paid a monthly rate to cover all service rendered. For new positions this monthly rate shall be based on the hours and compensation for positions of a similar kind. If assigned 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. The hours of employes covered by this rule shall not be reduced below eight (8) hours per day for six days per week.

Exceptions to the foregoing paragraph shall be made for individual positions at busy crossings or other places requiring continuous alertness and application, when agreed to between the management and the committee of employes. For such excepted positions the foregoing paragraph shall not apply."

tract and should not permit an employer to continue in the belief that the agreement has been complied with, and then after a long lapse of time, enter a claim for accumulations of pay. The following on that point is quoted from the findings of this Board in its Awards 1806 and 2137:

1806

"The committee has called our attention to numerous awards which hold that repeated violations of a rule do not change it. There is no doubt of this principle. But repeated violations acquiesced in by employes may bring into operation the doctrine of estoppel or there may be a bar because of laches. Awards 1289, 1606, 1640, 1645. It seems to us that this is particularly true where the controversy concerns simply the rates of pay. Employes do not ordinarily accept wages over a period of a year and a half or longer without protest if they believe they are not receiving what is due them according to terms of their contract. They should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay."

2137

"It is true that repeated violations of a rule do not change it. But repeated violations acquiesced in by employes may bring into operation the doctrine of estoppel. This is particularly true where the controversy concerns simply rates of pay. Wages are not accepted over a long period of time without protest if an employe believes that he is not receiving what is due him. Employes should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay. Awards 1289, 1806, 1811."

The Board is also referred to its Award 2507.

CONCLUSION: It is the position of the Carrier that any claim S. A. Cook may have had abated upon his death, March 15, 1944. Without waiving but insisting upon its plea of abatement, the Carrier has shown that contrary to the allegation of the Organization that the late S. A. Cook was assigned as pumper at Marathon 12 hours per day, that he applied for and was assigned to intermittent service as a water softener attendant and instructed not to put in more than 8 hours service on any day; that he was neither permitted, required nor authorized as provided in the rules to work more than 8 hours on any day; that he came under the provisions of Rule 9, Article V, and was paid a monthly rate that fully compensated him for all service rendered, which actually amounted to considerably less than 8 hours per day; that Water Softener Attendant Cook was paid for each hour and each day service was rendered by him, in strict accord with the established rule and practice.

OPINION OF BOARD: This case involves the compensation of a water softener attendant at Marathon, Texas. S. A. Cook, during his lifetime, applied for a vacancy at Marathon, Texas. The position referred to by the Employes is that of Pumper, while the Carrier maintains that the position is that of Water Softener Attendant and that the bulletin upon which S. A. Cook was the successful bidder so stated.

The first question with which we are confronted is the contention of the Carrier that the claim was abated because of the death of S. A. Cook three months prior to the time that it was submitted to this Board. With this contention we cannot agree. The Carrier cites and relies upon Award 246 of the Fourth Division. This Referee cannot agree with the reasoning set out in that award, but does agree with awards of this Division covering this question which will be cited later in this Opinion. However, Award 246 of the Fourth Division is distinguishable from the case that confronts us as in that case the claim was made on behalf of the individual that had died, while in the case now before this Board claim is prosecuted by the System Committee of the Brotherhood.

This Division, in Award No. 1521, speaking through Judge Shaw as Referee said:

> "As indicated in the foregoing statement of claim, the Committee has pressed this matter on behalf of his widow without any proof that she is the person entitled to claim the benefits of an award, if one is made. It is instantly apparent that in a strictly legal proceeding in a court of law, it would be necessary for technical reasons to substitute an executor or administrator for a deceased party, but we do not believe that the technical rules of pleading and procedure in a court of law can reasonably be applied to the administrative procedure outlined by the Railway Labor Act. This act is intended to be remedial and should therefore be liberally construed. It provides for administrative rather than technical legal procedure and should be viewed from that angle. In this case, as in most others, the procedure on behalf of the claimant is through representation by his Brotherhood rather than his individual appearance through his own counsel. We do not believe it to have been the intention of congress that any other construction be given to this remedial act than such a one as will produce a harmonious relationship between Labor and Capital, which was the very basic object intended to be attained. Viewed in its most technical aspect, nothing more could be required in this case than the appointment of an administrator or executor for the estate of Mr. Belt, and the substitution of that personal representative in this case in place of Mrs. Belt and the only necessity for such a substitution of parties would arise in the event of an award to be sued upon or paid in cash to that personal representative."

See also Award 2667.

The claim before this Division asks for an interpretation of the Agreement under which S. A. Cook was employed. The System Committee is a proper party and this Board is of the opinion that the rights to have this Division pass upon the question involved did not abate by reason of the death of Cook.

The Petitioner relies upon Article 5, Rule 8, which reads:

> "Positions not requiring continuous manual labor such as camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lamp men, pumpers, steam shovel, pile driver, crane and ditcher watchmen, will be paid a monthly rate to cover all service rendered. For new positions this monthly rate shall be based on the hours and compensation for positions of a similar kind. If assigned 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. The hours of employes covered by this rule shall not be reduced below eight (8) hours per day for six days per week.
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> Exceptions to the foregoing paragraph shall be made for individual positions at busy crossings or other places requiring continuous alertness and application, when agreed to between the management and the committee of employes. For such excepted positions the foregoing paragraph shall not apply."

The Carrier relies upon Article V, Rule 8, and Rule 9, the latter reading:

> "No assigned hours will be designated for employes performing intermittent service requiring them to work, wait or travel, as regulated by train service and the character of their work, and where hours cannot be definitely regulated."

The Employes contend that Cook comes within the purview and application of Rule 8, Article V, and that his services at Marathon, Texas, were such that it was necessary for him to be on the job from 7:00 A. M. to 7:00 P. M., yet for that service he was paid only on the basis of eight hours per day; that adjustments should have been made in Cook's monthly salary on the

basis of a 12-hour per day assignment rather than an 8-hour per day assignment. The Carrier relies upon Rule 8, which provides for a monthly rate to cover all services rendered by employes on positions such as this Water Softener Attendant, and also cites Rule 9.

The Employes contend that Rule 9 does not apply because it contemplates only where an employe has to travel over territory and perform his work between trains. This Board was confronted in Award 2691, a very recent award, with an almost identical rule. Speaking through Judge Carter as Referee, this Division said:

> "The Carrier contends that the services of the position were intermittent within the meaning of Rule 39 (c) providing 'No assigned hours will be designated for employes performing intermittent service, such as pumpers, required to work, wait or travel, as regulated by train service or the character of their work.' The record shows that Durbin was required to be in attendance upon his work during the whole period of his assignment. His duties required him to be sufficiently close to the pump house to detect any difficulty, to look in at the plant occasionally to see that it was operating properly, to keep moving parts lubricated and to determine the amount of water pumped and the time to shut down the pumps. There was no time during his assigned hours when Durbin could be released from duty. This is not intermittent work within the contemplation of Rule 39 (c)."

The Division is of the opinion that Rule 9 applies in this case provided the work is intermittent. In Award No. 2691, this Board allowed compensation as the record there showed that the employe was required to be on duty the entire 12 hours and that it was not intermittent work.

In the record before us the facts are in conflict. It is the contention of the Employes that Cook was required to be on duty, due to the nature of the job that he held, during the entire period of twelve hours, while the Carrier offers evidence to show that it was not necessary and that the work was intermittent. This Board is unable to determine from the record before us which contention is correct and the case must be referred back to the property to ascertain whether or not the job Cook held required of him continuous service for the 12-hour period.

If the evidence sustains the Employes' contention, the claim should be allowed from April 26, 1942, the day the claim was made to the Carrier, otherwise denied.

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 case be referred back to the property to ascertain the facts and for settlement in accordance with this Opinion.

AWARD

Case referred back to the property in accordance with this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of March, 1945.