Award No. 3774
Docket No. MW-3757

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the provisions of its agreement with the Employes, effective November 27, 1943, when it arbitrarily established on or about July 1, 1945, a rate for dragline operator other than that contained in the agreement;

(2) The Carrier continues to violate the agreement effective December 27, 1943, as revised December 1, 1946, when it continues to pay dragline operators a rate other than that established under both agreements;

(3) That all employes who have been paid on the above basis be paid the difference between what they did receive and what they would have received had they been paid the rate for dragline operator as contained in the Table of Rates of Pay signed by both parties December 27, 1943, and amended December 1, 1946.

EMPLOYES' STATEMENT OF FACTS: On or about July 1, 1945, the Carrier put into operation several machines known as "one-half yard drag lines". There was in effect an agreement dated December 27, 1943, providing for a rate of $223.96 per month for dragline operators. When the above referred to machines were put into operation, the Carrier, by unilateral action, established a rate of $193.96 per month, which was paid to the operators of such draglines.

Subsequent to December 27, 1943, certain wage increases were negotiated between the representatives of the Chicago, Burlington and Quincy Railroad Company and the Brotherhood of Maintenance of Way Employes, and such wage increases were added to the arbitrarily established rate of $193.96 per month, eventually creating a rate of $231.70 per month, which is the rate now being paid the operators of one-half yard drag lines.

Agreement dated June 1, 1938, Wage Agreement dated December 27, 1943, Agreement dated October 18, 1946, and agreement dated December 1, 1946, are, by reference, made a part of this Statement of Facts.

POSITION OF EMPLOYES: On or about July 1, 1945, the Carrier put into operation several "one-half yard draglines", and, by unilateral action, established a rate of pay of $193.96 per month for the operators of these draglines.

In further support of its argument in the premises, the Carrier encloses herewith, and by this reference makes a part hereof, correspondence labeled Exhibit 2, covering prior negotiations in instances where it was necessary to negotiate rates of pay when machines of a type not theretofore operated on the property were purchased and placed in operation.

SUMMARY OF ARGUMENT AND EVIDENCE

Numerous court decisions have been rendered, including E.J.E. 1. Burley, 325 U.S. 711, which, in effect, draw the line of demarkation defining the jurisdiction of appellate tribunals such as the Adjustment Board, and tribunals having mediatory jurisdiction, such as the National Mediation Board. The line of demarkation thus established has become a settled principle of law. The evidence herein and herewith submitted proves beyond a question of reasonable doubt that the instant dispute is a negotiable matter and one not susceptible to an Adjustment Board decision.

In respect of the foregoing, the respondent carrier desires to make a matter of record this significant fact: it does not question the Board's right to assume jurisdiction and decide the issue on the basis of such rule or rules as may be relied upon by petitioner. Stated in another way, no rules have been cited—and the respondent avers that no rule can be cited—which will support petitioner's contentions, which leaves no alternative to the Board, if jurisdiction is accepted other than to deny the claim because of the absence of merit. On the other hand, the Board, if it so pleases, may remand the dispute to the parties for further negotiation under the act. The Carrier respectfully urges that no other alternative exists.

Exhibits not reproduced.

OPINION OF BOARD: The Brotherhood contends the Carrier violated their agreement in establishing a rate of pay for the operator of a dragline other than as provided therein. It asks that all employes, who have been paid the rate as established by the Carrier, be paid the difference between the rate and the rate for dragline operators as provided by the parties' agreed Table of Rates.

The record establishes that shortly after July 1, 1945, the Carrier purchased and put in operation several one-half yard draglines. At that time the parties had in effect an agreed Table of Rates of Pay which provided that a "Dragline Operator" should receive $223.96 per month. When the Carrier put these machines in operation it established a rate of $193.96 per month for the operators thereof. It appears that when the parties agreed to the established rate of $223.96 per month for a "Dragline Operator" Carrier was using one yard draglines powered with gasoline engines. Those put in operation shortly after July 1, 1945 were one-half yard draglines powered with diesel engines. The table of rates as to dragline operators made no distinction as to either the size of the machine or the nature of the power. Consequently there is no reason why we should. Both are draglines and their operation is the same. We think the parties' agreed rate of pay for dragline operators applied thereto.

There appears to have been several raises in the wages of employes since the machines were put in operation. They applied equally to all employes and as a consequence the difference between the proper rate and that fixed by the Carrier has constantly remained at $30.00 per month. The claim is made and allowed for this difference.

With the Carrier's contention that this dispute is not properly referable to this Board but one for the National Mediation Board, after negotiations have failed, we cannot agree.

While it is true, as stated in Award 2682, "* * * that this Board cannot fix rates of pay, it can only interpret the agreement as made and apply the rates which the parties themselves have fixed." But, as stated in Award 3224: "* * * this Board is powerless to fix rates of pay unless the standard

The evidence is replete with statements from both parties indicating their belief that the character of the machine was such as to warrant one of certain various rates of pay suggested respectively by them during their negotiations which, with the exception of the rate here claimed, were rates relating to machines of other titles in the list or compromise proposals of approximate averages of such lower rates.

Nothing could be more clearly indicative of the error of proceeding in neglect of such probative information to a disposition of the case without substantive data, other than a title, evidencing similarity of the position here involved to the maximum-rated position or positions listed in the agreement, which maximum rate is here awarded.

/s/ C. P. Dugan
/s/ C. C. Cook
/s/ A. H. Jones
/s/ R. H. Allison
/s/ R. F. Fay