AWARD NO. 1
Case No. 1

BEFORE THE ARBITRATION COMMITTEE
PURSUANT TO SECTION 9 OF THE
GREAT NORTHERN PACIFIC AND BURLINGTON LINES
MERGER PROTECTION AGREEMENT

In the Matter of the Arbitration Between BURLINGTON NORTHERN, INC. -and- BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	OPINION AND AWARD

QUESTIONS AT ISSUE:

(1) Is drawbridge tender R. J. Brawley's claim for merger guaranty pay, initiated by the Organization on his behalf on April 4, 1972, retroactive to May 1, 1971, subject to the time limit provisions of Rule 42 of the Agreement between Burlington Northern, Inc. and Brotherhood of Maintenance of Way Employees, effective May 1, 1971 and therefore barred?

(2) If his claim is not so barred, is the Carrier required under Section 1(b)(1) and Appendix D of the parties' merger protection agreement, effective January 2, 1966, to include in claimant Brawley's compensation guaranty, as adjusted by subsequent general wage increases, compensation paid to him for overtime regularly worked on the position to which he was regularly assigned on January 2, 1966?

Background

On January 2, 1966, Claimant was regularly assigned as a Bridge Operator on Bridge 3.2 in Hoquiam, Washington. The bridge is normally kept open for river traffic and is closed when a train approaches. Claimant regularly worked 9-3/4 hours per day, with the hours above 8 paid at overtime. His straight-time duty period was from 6:45 A.M. to 2:45 P.M. However, at varying times after 2:45 P.M., up to as late as 4:30 P.M., a Northern Pacific switch engine passed over the bridge, and it was for this reason that the overtime had been attached to the usual workday.

Although the Organization did not have the original bulletin of the position, it asserted that the job had been bulletined for 9-3/4 hours. This allegation is substantiated by the vacation relief bulletin dated April 12, 1965, which listed the assignment on Bridge 3.2 as 6:45 A.M. to 4:30 P.M. Carrier contends that the Organization has not thereby proved its contention about the original bulletin, but the evidence appears adequately conclusive, especially in light of other undisputed evidence about the job on Bridge 3.2.

During this period, Claimant received his usual pay of 8 straight time hours and 1-3/4 overtime hours when he

went on vacation. Indeed, he was paid for 9-3/4 hours every single day, no matter how long after 2:45 P.M. he remained on duty. For he was permitted to leave the bridge once the switch engine had passed, whether shortly before 4:30 P.M. or much earlier.

The Organization argues that Claimant's normal rate of compensation at which he was protected included his overtime hours. Carrier contends that the normal rate of compensation was 8-hours' pay and that the overtime hours were separate and apart, not includable in protected compensation.

This issue arose because in 1971 Claimant, who after September, 1966, had been working on another position also carrying overtime pay, went to one working only 8 hours. Consequently, it must be determined whether Claimant's protected rate, based upon the position he occupied on January 2, 1966, included the overtime hours. In addition, Carrier makes the preliminary argument that the claim was not handled in accordance with the time limit rules in the schedule agreement, and must be dismissed on that ground.

Time Limits

In the February 7, 1965 National Agreement, for example, time limits were unmentioned. As a result, the parties found it necessary to include in the agreed-upon Interpretations of November, 1965, a provision which defined how claims and grievances would be handled, depending upon whether they applied to requests for interpretation alone or to claims for compensation as well. Although the Merger Protection Agreement involved in this case was executed long after 1965, similar specificity on time limits was not included in it.

Thus there is no established guide to whether 1) all the time limit rules in the schedule agreement were meant to apply, as Carrier asserts, or 2) there was to be a distinction between grievances involving solely interpretations of the Merger Agreement and claims for compensation, or 3) there were to be no time limits at all on any grievance or claim, as the Organization contends.

In a letter in connection with Case No. 2 before this Board, the Local Chairman stated that his appeal was being made "as per Rule 42B," which is the time limit rule in the schedule agreement. According to Carrier, such a reference shows that both parties expected time limit rules

to govern Merger Protection Agreement claims. The Organization points out that this is a boiler-plate phrase used automatically and can be given no special significance.

Carrier also points to letters sent to the various General Chairmen shortly before merger date, and countersigned by them. The letters modified schedule agreement time limit rules in handling claims for a period following the merger. They showed that the Merger Protection Agreement was to be governed by the schedule agreement's time limit rules, it was said.

But the letters do not mention the Merger Protection Agreement, other than to point out the advisability of not enforcing time limits because of the problems created by the merger and "the complexity of the Merger Protection Agreement." The letters appear to apply in the first instance to all claims under the schedule agreement, since they altered the usual requirements in appeals to "the National Railroad Adjustment Board or other tribunal." No direct reference to claims under the Merger Protection Agreement was made, and the tenor of the letters suggests that Carrier was particularly concerned with permitting a breathing space in handling the usual run of claims, because of the parties absorption with merger problems.

If the Merger Agreement contained no time limits at all, Carrier's contention about the applicability of Rule 42 of the Schedule Agreement would have more weight. But where a separate agreement contains some time limits and not others, the absence of the others is significant. Section 9 of the Merger Protection Agreement contains various specifications about when a dispute ripens for arbitration, when partisan members of an arbitration committee are to be selected, when a neutral is to be designated and how, when the committee is to meet, and when it is to render its award.

Given such explicit features, did the parties intend that the initial filing of the claim was to be governed by Rule 42? The Merger Protection Agreement certainly could have said so if that had been intended, especially in light of the experience under the February 7, 1965 Agreement. Yet it would have required no more than a phrase to make the schedule agreement's time limits obligatory, except with respect to arbitration. Thus it would be inappropriate to impose unstated requirements about filing claims, where the parties themselves neither did so nor clearly showed any intention to apply existing rules to this special Agreement.

Time limits, like all contractual conditions, must be observed by the parties and by their neutrals. But the

predominant view in labor relations -- for understandable reason -- is that disputes should be decided on their merits unless a clear procedural barrier blocks the way. None was shown here. Consequently, it is held that the grievance was not filed untimely. Even if it had been, it is a continuing claim and could have been filed at any time, merely with a limitation on retroactive compensation.

With respect to the allegedly improper delay in proceeding to arbitration, the Organization did wait two years after the denial by Carrier's highest officer. However, the Agreement does not contain a mandatory limit on when arbitration must be sought. As it is couched, an issue may not be submitted to arbitration until efforts to settle have been made for 30 days. After that, either party may invoke arbitration, but no statute of limitations is specified. The Agreement is silent on whether this must be done on the 31st day or the 61st day or at any time thereafter.

Here, too, it would have been a simple matter for the parties to have put an outside limit on when arbitration could be invoked, as is true in the schedule agreement. Yet they did not, although they encouraged expedition, considering that very brief time periods are set forth once arbitration is invoked. While a contractual provision fixing a

time limit for invoking arbitration cannot be written for the parties, where they chose not to do so, weight can appropriately be given to Carrier's costs which flow directly from an undue delay in the prosecution of a claim.

The Merits

The Organization cited the terms of a compromise offer made by Carrier during handling on the property. Carrier objects to disclosure of and reliance on such a proposal as evidence of its position on the merits. The objection is well-taken. It would frustrate all bona fide efforts to resolve grievances -- the very aim and purpose of the grievance procedure -- if each offer made by one of the parties in an effort to resolve a dispute were subsequently cited to prove an admission of liability. Common sense, the law and Third Division Awards all find such citations repugnant. Consequently, reference to the proposed settlement may not be used in evaluating the merits, and it has been altogether disregarded.

It is well-established, at least in cases under the February 7, 1965 Agreement, that irregular, casual overtime, granted or withdrawn on a day-by-day basis, is not part of the normal rate of compensation. Such overtime, even if

enjoyed by an employee for prolonged periods, is not comprehended in the normal rate.

On the other hand, Award 47 of SBA 605, held that regular overtime, "paid whether or not he worked," was included in the normal rate of compensation. That is precisely the situation here. As a matter of routine Claimant received his 1-3/4 hours of overtime pay whether he remained on duty the entire time or left before 4:30 P.M. Thus, he did not work occasional, irregular, fluctuating, or voluntary overtime, but he was receiving a fixed, regular, unvarying rate of pay for his assigned 9-3/4 hour position on January 2, 1966. It therefore constituted his protected rate.

Remedy

Despite the absence of time limits on filing and on moving to arbitration under the Merger Protection Agreement, a rule of reasonableness must be applied in determining how to compensate a claimant where a claim is processed with undue and inexcusable sluggishness. An employee cannot expect to wait indefinitely, as Carrier's liability grows, and obtain redress despite his dilatory approach. Nor can the Organization indefinitely defer initiating arbitration and then seek to recover large sums.

Although the merits of the claim are sustained, back pay to the date of occurrence is unjustified and unwarranted. Otherwise, even in the absence of formal time limits which would bar a claim not expeditiously handled, a full back-pay award would smack of the punitive rather than the compensatory. The reasoning (with regard to limiting recovery) was soundly expressed in the argument made by Carrier in its submission:

> On the other hand, had the Organization followed the expedited arbitration requirement in Section 9 with ultimate sustention of its claim, the Carrier could then have either arranged to utilize bridgetender Brawley more hours in each month or abolished his job and rebulletined it to incorporate the additional time. In such a way the issue could have been determined without needless penalty to either party. But at this late date there is no good reason why the Carrier should now face large retroactive payments involving a stale, two year old claim. After all, it was the union, not the Carrier, who failed to follow the existing administrative procedure.

The Organization notes that settlement efforts continued after the declination by Carrier's highest officer. Some consideration should be given to this as a reason why there was a delay in seeking more expeditious arbitration, for efforts to settle should be encouraged so long as both

parties are willing. The very fact that a compromise offer was made by Carrier in January, 1973, six months after the final declination, indicates the mutual willingness of the parties to try to settle the issue. Moreover, the Merger Agreement permits either party to invoke arbitration, once the 30-day period fails to produce a settlement. Carrier itself could have aborted the delay, since the Organization obviously was not yielding on the claim.

Thus, some flexibility in fixing the effective date of compensation of this continuing claim is necessary, to take in both the Claimant's failure to move expeditiously, and the delay involved in settlement efforts. The latter may well have led the Organization to believe that a mutually satisfactory course of action was being followed.

Giving weight to the fact that the claim was filed about nine months after the occurrence, and that the request for arbitration was filed about two years after the final declination, it would be inappropriate to award compensation back to May, 1971, as sought by the Organization. Back pay accordingly is made effective January 1, 1973. Even under the schedule agreement's rules, had they been applicable, back pay in such an amount could well have accrued during the discussions and arbitration of the claim.

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(1) The Answer to Question No. 1 is No.

(2) The Answer to Question No. 2 is Yes, but the effective date of back pay due Claimant shall be January 1, 1973.

Milton Friedman, Neutral Member

C. L. Melberg, Carrier Member (Dissenting)

O. M. Berge, Organization Member

Dated: New York, N. Y.
February 26, 1975

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(1) The Answer to Question No. 1 is No.

(2) The Answer to Question No. 2 is Yes, but the effective date of back pay due Claimant shall be January 1, 1973.

Milton Friedman, Neutral Member

C. L. Melberg, Carrier Member

O. M. Berge, Organization Member

Dated: New York, N. Y.
January , 1975