

Award No. 1658

Docket No. MW-1714

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Richard F. Mitchell, Referee

**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

**STATEMENT OF CLAIM:** "Claim of the System Committee of the Brotherhood that Messrs. H. Stefiuk, W. L. Robertson and J. W. Rogers, classified as Assistant Bridge and Building Foremen in charge of Bridge and Building gangs, Chicago Division,

First; be classified and paid as Bridge and Building Foremen. And,

Second; be paid the difference between what they earned under the classification of Assistant Bridge and Building Foremen and what they would have earned if classified as Bridge and Building Foremen, retroactive to November 1st, 1939."

**EMPLOYES' STATEMENT OF FACTS:** "The Carrier maintains a Bridge and Building gang in the Chicago Terminal territory which is a part of the Chicago Division Seniority District. This gang is composed of a foreman and three assistant foremen who are listed in the Employees' Statement of Claim.

"In addition to a foreman and three assistant foremen, carpenters and helpers are employed which brings the total of this gang to twenty men. This gang is not working as a single unit, but is divided into four separate units. The foreman of the gang is in charge of one unit and the three assistant foremen are each in charge of one of the other three separate units. Each gang works independently of the other gangs and at a point separate and apart from the other gangs.

"For this reason, the three assistant foremen are performing the same identical service as the foreman; that is, supervising employes, keeping time, making distribution of material and labor and assuming full responsibility for the men in their charge. They also receive instructions directly from the Master Carpenter in the same manner as does the foreman of the gang."

**POSITION OF EMPLOYES:** "This claim is made under the provisions of Rule 52 (h) of the current agreement between the Carrier and the Brotherhood and which reads as follows:

'Bridge and Building gangs will be composed of Foremen, Mechanics, Helpers and Laborers.'

In assigning the claimants as they have, the Carrier has erred and has violated the above rule.

"The agreement in effect between the Carrier and the Brotherhood provides that employes rendering immediate supervision over mechanics, helpers and laborers should be classified and paid B. & B. foreman's rate of \$185.20 per month.

ment of a second position of foreman, and the acceptance by the Management of the General Chairman's recommendation that Assistant Foreman Till be promoted to B. & B. Foreman.

"The carrier's assertion with respect to the obvious breach of faith that is involved in this dispute is not mere conjecture. It is conclusively proved by record of fact. In this connection, correspondence identified as Exhibits 1 (a), 1 (b), and 1 (c) is attached hereto. Attention is directed to the offer of the carrier as expressed in letter dated February 7, 1941 (Exhibit 1 (a)) to establish position for another foreman, contingent upon withdrawal of the monetary claim. In letter dated February 24, 1941 (Exhibit 1 (b)) the question of assigning an employe to the recently established position for a foreman, wherein it is indicated that the suggested manner of handling was concurred in by General Chairman Plondke, was discussed with the officer in charge of the Chicago Terminal. In letter dated February 26, 1941 (Exhibit 1 (c)) General Chairman Plondke recommended the employe he thought should be promoted to fill the vacancy created as a result of the compromise settlement and his recommendation was accepted and the vacancy was thus filled. From this it will be seen in an unmistakable manner, that a compromise settlement was effected based upon (1) the carrier reclassifying position of one Assistant Foreman to that of Foreman, and (2) withdrawal of the monetary claim. The carrier carried out its part of the agreement in good faith and the conduct of the General Chairman in accepting that part of said agreement beneficial to the employes he represents, which is evidenced by his cooperation in arranging the details incidental thereto, all of which is a matter of record, obligated him to accept the whole agreement and not just that part of it which he considers favorable to his interests. The carrier, in its dealings with representatives of the employes, has endeavored to follow literally the provisions of Section 2, First, of the Railway Labor Act, as amended, in an effort to dispose of all disputes on the property. Such action undoubtedly should be encouraged and in this instance a dispute not supported by schedule rules was settled by compromise, the concession there involved reacting entirely to the advantage of the employes. In spite of the carrier's efforts and in seeming disregard of all the concepts attendant with ethical relationship, the carrier was advised in letter dated April 11, 1941 (Exhibit 2) that, 'assignment of the additional B. & B. Foreman . . . will not affect settlement of the claim.' This, as will be noted, was more than two months after the dispute had apparently been disposed of. It is not only an elementary principle of contract law, but a recognized principle of common equity, that when the conduct of one party to an agreement leads the other party to believe that such contract means a certain thing and to that extent influences the future course of said party, the acquiescence by acceptance as indicated by conduct becomes an integral part of the whole agreement. Thus premised and evidenced by documentary record of fact, the dispute now before the Third Division has been forever disposed of and the Board should so decide."

**OPINION OF BOARD:** It is the contention of the Employes that the Carrier required the men for whom the claim is made to perform the duties of a foreman of a bridge and building gang and only paid them the rate of pay provided for an assistant foreman. Carrier contends that the duties these men were performing were those of assistant foremen and were paid the rate provided in the current agreement for that position. We are confronted with a case in which there is a dispute as to the nature of the work these men were performing. The parties have agreed that a settlement of this question to govern future performance has been made effective as of March 1, 1941. Our consideration, therefore, involves only the period from November 1, 1939 to March 1, 1941.

Employes also admit that assistant foremen are permissible and desirable where it is necessary to divide a crew to perform work at different places, but the Employes insist that, in order so to do, the duties performed must be those of an assistant foreman.

A fair reading of this record shows that the men for whom claim is made in this case worked at different places with different gangs under their supervision. Each kept the time and made all reports covering the work performed. They did not receive instructions from the foreman or report to him but received their orders and reported to the master carpenter. The Board is of the opinion that under this particular record these men performed the duties of a foreman and under the current agreement are entitled to the rate of pay specified therein for a foreman. The Carrier also contends that during the negotiations with the General Chairman in consideration of establishing the position of a second foreman, the Employees agreed to withdraw the claim for the money claimed to be due; that the Carrier did establish the position of a second foreman and therefore the employees are not entitled to the wages claimed. This is emphatically denied by the Employees and nowhere in the correspondence do we find a waiver of the claim for pay by the employees during the period involved in this case.

**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 employees involved in this dispute are respectively carrier and employees 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 claimants were required to perform the duties of B. & B. foremen and are entitled to be paid at the rate of pay provided in the current agreement for a foreman for the period November 1, 1939 to March 1, 1941.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: H. A. Johnson  
Secretary

Dated at Chicago, Illinois, this 18th day of December, 1941.