

Award No. 5208
Docket No. MW-5125

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

THE TEXAS AND PACIFIC RAILWAY COMPANY

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

(1) That the Carrier violated the effective agreement when it assigned Track Laborers D. Mendez, A. Carranza, F. Lopez, J. Arrendo, C. Plouche and H. Jenkins to perform B&B Mechanic's duties while working with Pile Driver No. 1 on May 21, 1949 and compensated them for this service at the Section Laborers rate of pay.

(2) That the section laborers listed above be paid the difference between what they did receive at their regular rate of pay and what they should have received at the B&B Mechanic's rate of pay while so assigned.

EMPLOYEES' STATEMENT OF FACTS: On May 21, 1949, Pile Driver No. 1, was used to drive piling at Mile Post No. 236. Track Laborers, D. Mendez, A. Carranza, F. Lopez, J. Arrendo, C. Plouche and H. Jenkins, assisted the Pile Driver crew in the performance of this work.

The Section Laborers were required to trim the heads of the sliding piles, and cut off the piles to the proper length, being thus engaged for a period of eight hours.

For this service, they were paid at the Section Laborers rate of pay.

Claim was filed requesting that the Section Laborers be paid the difference between what they received at the Section Laborers rate of pay and what they would have received had they been paid the Bridge and Building Mechanic's rate of pay.

Claim was declined.

The agreement in effect between the two parties to this dispute dated April 1, 1945 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Article 25 of the effective agreement reads as follows:

"COMPOSITE SERVICE

An employe assigned to work on a higher rated position thirty (30) minutes or more, but less than one (1) hour, will be

section gang in protecting and maintaining the roadbed embankment at a slide and threatened washout. The work of maintaining and protecting roadbed embankment is one of the duties of section gangs. The work in question was performed during a period of floods and washouts and a main track in the vicinity of MP 236 was out of service due to slides and washouts. It is the duty of B&B men to maintain and protect bridges and trestles that are a part of the roadway. None of the work performed by the claimants was in connection with bridges and trestles but, on the other hand, the work forming the basis of claim herein set up was all in connection with the driving of slide piles or poles outside the track and ballast section for the stabilization of roadbed embankment. The work performed in the instant case has been performed in the past by section forces along with their other duties.

In appealing this claim the Assistant General Chairman based the claim on Article 25 of the current agreement. That Article reads as follows:

"An employe assigned to work on a higher rated position thirty (30) minutes or more, but less than one (1) hour, will be allowed the higher rate for the full hour, and thereafter will be paid the higher rate on the minute basis for the fulltime worked on the higher rated position."

In the case here at issue the employees in question were not assigned to work on a higher rated position. Neither were they taking the place of B&B men. They were merely performing the duties which are a regular part of their work, that is, maintaining the roadbed. They were assisted in this work by the use of the pile driver in driving the poles in the roadbed outside the track and in no sense of the word could this be considered B&B work.

We wish to call the Board's attention to Award No. 584 of this Division in a claim which involves a similar rule. In its opinion and findings the Board stated:

"The parties are in disagreement as to the application of Rule 51 to the work performed. At least some of the work described has been performed in the past by section forces along with their other duties, including repairing tracks at derailments. In the judgment of the Division there was no violation of Rule 51."

The claim was denied.

Award 1230 covers a similar case which is based on an identical rule to Rule 25 in our Agreement above quoted. In that case a Water Service Helper performed service for which the Organization claimed he should be paid the Water Service Repairman's rate instead of the helper's rate. The Board in its decision denied the claim.

A similar case is covered by Award No. 1050, which denied the claim.

We submit that the claim herein is wholly unfounded and without merit, and respectfully request that it be denied.

OPINION OF BOARD: These are claims by Track Laborers for the Bridge and Building Mechanic's rate of pay for work performed by them on one day while helping a Pile Driver gang. The claims are based on a Composite Service Rule (Article 25) which reads as follows:

"An employe assigned to work on a higher rated position thirty (30) minutes or more, but less than one (1) hour, will be allowed the higher rate for the full hour, and thereafter will be paid the higher rate on the minute basis for the full time worked on the higher rated position."

May 21, 1949 certain main tracks of the Carrier were put out of service due to floods and slides. In this emergency all available Bridge and Building

forces and track forces were being used to restore traffic. Slides had developed on a high embankment in a section to which claimants were regularly assigned. A pile driver, operated by a regular pile driver engineer and fireman in charge of a Bridge and Building lead man, was furnished to drive piles along the shoulder of the embankment in order to prevent further sliding and to make the main track safe for the passage of trains. The Section Foreman with his gang was used with the driver to assist in the work for 8 hours. No bridge or trestle work as such was involved, but the piling was driven to act as a retaining wall. Among other things, the Section Laborers were required to trim the heads of sliding piles and to saw off the piles to the proper length, some before they were driven and some after; and they worked under the supervision of the Bridge and Building leadman.

The claimants were paid the Section Laborers' rate of pay for this work and the only claim made here is for the Bridge and Building Mechanics' rate of pay for the one day.

The work of maintaining and protecting roadbed is one of the general duties of Track Laborers, and included within those general duties would be the maintenance and protection of an embankment such as this one.

A line of awards in this Division are cited on behalf of the Carrier to the proposition that the primary purpose for which the work was performed determines whose work it is. The following are examples of Track Laborers' work: Award 4797 (unloading and stacking lumber for carpenters in accordance with an established practice said not to be inconsistent with the agreement) and Award 4872 (removing debris left on roadbed by electricians). And the following are examples of work for which Track Laborers have been paid the rate of another craft: Award 2337 (laying track on a turntable), Award 3638 (cutting brush and trimming trees to protect telephone and telegraph wires), Award 4077 (removing and cutting up debris under a bridge to protect it), Award 4553 (opening and closing a ditch under the tracks to enable water service forces to repair a pipe) and Award 4795 (digging and back-filling a trench paralleling and crossing a housetrack and assisting water service forces in lowering pipe into trench).

The primary purpose of the disputed work here was maintenance and protection of the embankment in order to protect the roadbed. If the work had consisted of restoring the embankment whether with earth, rock or timber, it would have doubtless been Track Laborers' work. On the other hand, if the work had consisted of restoring the embankment by the erection of structure such as a retaining wall or abutment, it would have doubtless been Bridge and Building work. What happened here lies in between.

The primary purpose test is not all-controlling. It swings the balance when the work performed is common to both crafts involved, such as digging and filling. Here no doubt in conjunction with the pile driving, the claimants dug and filled; and, if their assistance had been confined to common work of this general character for the purpose of maintaining the embankment, it would have been their work (Award 4872). However, the work performed more closely resembled Bridge and Building work than Track Laborers' normal and usual work on roadbeds and embankments; Bridge and Building equipment was used; the claimants used the tools of another trade; and they worked under the supervision of a Bridge and Building leadman instead of their own foreman. While none of these facts is controlling, in combination they lead to the conclusion that the work in dispute was Bridge and Building work. (Awards 1251, 2095, 2169, 4511, 4528, 4757 and 4800.)

The Carrier produced payroll records which show the performance by Track Laborers of assistance in "slide pile driving" without payment of overtime on 24 days during the years 1945, 1946, 1948 and 1949. These records do not establish a practice contrary to the conclusion we reach. The entries under the heading "Description of Work" are these: "Watching slide", "surfacing track at slide", "assisting unload slide piling" and "assist-

ing in driving slide piling" without any further specification of the exact nature of the assistance rendered. All of these entries are consistent with the non-performance of Bridge and Building work as defined in this opinion.

It is a fair intendment from the record that the work on the piling satisfied the time requirements of the Rule (Awards 565, 1600, 4548 and 4795).

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 Carrier violated the Agreement as contended by the claimants.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of February, 1951.