

Award No. 5633

Docket No. MW-5583

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Hubert Wyckoff, Referee

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD  
COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood, that:

(1) The Carrier violated the effective agreement on January 16, 17, 18 and 19, 1950, when it assigned a Trackman instead of a Bridge & Building Department employe, to observe and safeguard the condition of a bridge that was under construction;

(2) Bridge & Building Carpenter C. Cassidy be paid at his respective time and one-half rate of pay for twelve (12) hours on each day referred to in part (1) above, because of this improper assignment.

**EMPLOYES' STATEMENT OF FACTS:** During January of 1950, the Carrier was reconstructing Bridge I-740 of the Kansas City Division.

On January 16, 17, 18 and 19, it became necessary to watch or protect the bridge during the hours 6:00 P. M. to 6:00 A. M. This service was necessary because the ballast had not been placed on the deck of the bridge.

The Carrier assigned a Trackman to observe and protect the bridge on the four nights in question.

The Employes contended that a Bridge and Building employe should have been assigned to perform the work, and filed claim accordingly.

Claim was declined.

The Agreement in effect, dated November 1, 1940, between the two parties to this dispute, and subsequent amendments and interpretations are by reference made a part of this Statement of Fact.

**CARRIER'S STATEMENT OF FACTS:** During the period of October 25, 1949 through January 26, 1950, project of renewing Bridge I-740 located on the Kansas City Division was accomplished. The new bridge consisted of seven 16 ft. long spans of ballast deck pile trestle, replacing an existing open deck pile trestle.

Piles were driven during the period October 25, 1949 to October 31, 1949. Starting January 9, 1950 piles were capped and braces applied to bents.

Bridge watchmen are not regularly assigned and are used only when necessary under similar circumstances for short periods and their rate of pay is less than that of a B&B Carpenter. Section Laborers have been used on most occasions to act as bridge watchmen, when necessary, in connection with bridges undergoing major repairs. On some occasions an employe has been hired to fill a temporary position of bridge watchman.

The Carrier again asserts there is no schedule rule, custom or practice which would in any way support the claim which the Employes have presented, however, if the Employes' contention is correct—and we do not concede it is—then attention is directed to the principle found in many of the Third Division Awards to the effect that only the straight time rate is allowable.

It is a well-known rule of the common law applicable to relationship between an employer and his employes and their union that an employer may operate his establishment as he deems advisable except for such limitations as are imposed by statute or are agreed upon as a part of a collective bargaining agreement. Thus, the rights, privileges and prerogatives of an employer under the common law are reserved to him except as limited by law or surrendered in the collective bargaining agreement. The law does not require and the carrier did not surrender in the collective agreement its right, privilege and prerogative to assign watchmen as it sees fit without regard to seniority rights or classification of employes so used, in fact Rule 2-(e), which we have cited, specifically outlines the right of the carrier to fill positions of bridge watchmen as it did in this case.

The claim of B&B Carpenter Cassidy is not supported by schedule rule, agreement or interpretation, is without merit, and for these reasons is not proper and should be denied.

All data contained herein in support of the Carrier's position has been presented to the Employes.

**OPINION OF BOARD:** This case presents the question whether a Bridge and Building Sub-department employe should have been used, instead of a Track Department Sub-department employe, to watch a bridge at night while it was undergoing reconstruction.

The facts as stated in the Joint Submission are not in dispute.

Rule 4 (Departmental Limits) provides:

"Except as otherwise provided, the seniority rights of employes are confined to the sub-department in which employed."

Rule 4 goes on to enumerate the positions comprised within the various Sub-departments, but neither Watchmen nor Bridge Watchmen are mentioned.

Rule 2-(e) (Seniority Datum) provides:

"The general rule of promotion and seniority will not apply to positions of track, bridge and highway crossing watchmen and signalmen at railway (non-interlocked) crossings, but when practicable, such positions will be filled by incapacitated employes from any department, and preference in filling and retaining these positions will be determined by the degree to which incapacitated for other work, seniority in the service of the Railroad and ability to perform the work."

Rule 46-(d) (Classification) provides:

"An employe assigned to constructing, repairing, maintaining or dismantling bridges, buildings or other structures . . . or who is

assigned to perform miscellaneous mechanic's work of this nature, will be designated as a bridge and building carpenter and/or mechanic."

**FIRST:** Rule 4 expressly confines the seniority rights of employees to the Sub-department in which employed and does not list watchmen among the positions comprised within the Bridge and Building Sub-department. Moreover, in describing the work of the Bridge and Building Carpenter, Rule 46-(d) does not list watchmen's work and inferentially excludes it by characterizing the Bridge and Building Carpenter's work as "mechanic's work." Finally, Rule 2-(e) deals specifically with watchmen, including bridge watchmen.

Thus, the work in question is governed by express provisions in the rules. The work was watchman's work (see Award 5209). But it does not appear that a watchman was available, either incapacitated or able-bodied; and no claim is made on behalf of watchmen.

**SECOND.** The work in question being watchman's work, employees in the Bridge and Building Sub-department have no better claim to it than the employees in the Track Sub-department.

However, it is urged by the Brotherhood that the sole purpose of the work was maintenance of the bridge in furtherance of the undoubted Bridge and Building project of reconstruction. Awards are cited to the effect that, when the work is of an unskilled nature common to two or more crafts and not the exclusive work of any craft, the purpose for which it is performed determines how it should be classified (see Awards 3638, 4077, 4553, 4795; 3206, 4637, 4776 and 5304).

But the work in question here was not common to the Track and Bridge and Building Sub-departments. It was the exclusive work of watchmen. On the completion of each day's work it was the responsibility of the Bridge and Building forces to leave the bridge in safe condition for the passage of trains. We are unable to find that the watchman's duties were an integral part of the repair, maintenance or reconstruction of the bridge.

**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 Agreement was not violated.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Acting Secretary

Dated at Chicago, Illinois, this 1st day of February, 1952.