

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

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

(1) That the Carrier violated the agreement when they permitted a junior pile driver mechanic to perform overtime service in preference to pile driver mechanic H. C. Exum on December 27, 1950;

(2) That pile driver mechanic H. C. Exum be allowed pay at his overtime rate for an equal number of hours as were allowed the junior pile driver mechanic who was used to pilot the pile driver on December 27, 1950.

EMPLOYES' STATEMENT OF FACTS: Mr. H. C. Exum is employed as a Bridge and Building Pile Driver Mechanic assigned to Pile Driver Gang No. X-1013, and holds seniority in such rank as of April 9, 1949.

Mr. C. R. Settlemyer is similarly employed by the Carrier, but is nine days junior in service to Mr. Exum, holding seniority as a Bridge and Building Pile Driver Mechanic as of April 18, 1949.

Mr. Exum's duties in connection with the operation of a Pile Driver is that of a signal man, which requires his presence with the pile driver during its operations, and in connection therewith he is required to service the machine, such as keeping the leads lubricated and the hammer well oiled.

Mr. Settlemyer's duties on the gang require him to be on the bridge deck during the time piles are being driven.

When pile drivers on this property are moved from one location to another by Carrier train, a "pilot" is always assigned to accompany the machine for the purpose of observing whether the leads of the pile driver remain in their proper position in the racks and if the hammer remains correctly spotted in the leads, during the time the machine is in transit. Should either the leads or the hammer move from their proper position during transit, the pile driver is thrown out of safe transit balance, and the pilot is then required to operate an air valve which is provided for the purpose of stopping the train and to subsequently restore the leads or hammer to their correct position.

The Foreman of the pile driver gang is responsible for the proper care and handling of this machine to prevent damage and has always exercised his judgment as to employees qualified for any such service. The use of Mr. Settlemyer instead of Mr. Exum was upon his instructions based on his opinion that Mr. Exum was not qualified to properly perform this service. The action of the Foreman was not challenged by the claimant and his representative on the basis of qualifications but on the basis of seniority only. The action of the Foreman, therefore, was entirely proper and justified and was not in violation of the agreement as alleged by claimant and his representative.

The claim is, therefore, not supported by the agreement as previously interpreted by the Third Division in Award Nos. 3585 and 4432 on this property, and the Division will observe that in Award No. 4432 the claim was sustained at the prorata instead of punitive rate as claimed.

The Carrier respectfully requests that the board deny the claim.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of the Petitioner's claim, original submission and any and all subsequent pleadings.

All data submitted in support of Carrier's position as herein set forth have been heretofore submitted to the employees or their duly authorized representatives.

(Exhibits not reproduced).

OPINION OF BOARD: It appears from the record that the claimant, H. C. Exum, and C. R. Settlemyer are bridge and building pile driver mechanics in the service of the Carrier, both assigned to bridge and building pile driver gang No. X-1013. The claimant holds seniority as of April 9, 1949. C. R. Settlemyer holds seniority as of April 18, 1949. The claimant is a pile driver signalman. C. R. Settlemyer was assigned as a deck worker. On December 27, 1950, it became necessary to move the pile driving machine from Tulsa, Oklahoma, to Osage, Oklahoma. Settlemyer was considered qualified as pilot to accompany the machine, and the claimant was not so considered. The moving of the machine required three hours, from midnight to 3:00 A. M., the next morning. The claimant filed claim for overtime rate of pay for an equal number of hours allowed the junior pile driver mechanic used to pilot the pile driver on the date above mentioned.

The Employees make reference to Rule 8 of Article 5, which reads as follows:

"Rule 8. Employees awarded bulletined positions and failing to qualify within thirty (30) days may return to their former positions without loss of seniority. If, in the meantime, their former position is abolished they may exercise their seniority."

The Employees assert both the claimant and Settlemyer were awarded bulletined positions of bridge and building pile driver mechanics, both positions contemplating the same type, class and nature of work. After thirty days service in such positions, both of said employees were considered to be, and were recognized as, qualified bridge and building pile driver mechanics.

One of the duties attached to all bridge and building mechanics' positions is to accompany and convoy a pile driver machine while in transit.

The Employees point out a pile driver crew consists of a foreman, a lead mechanic, which is synonymous to an assistant foreman, and eight mechanics. The pile driving crew are distributed in and around the job as follows: 1 mechanic assigned as fireman; 1 mechanic assigned as signalman; 1 mechanic assigned as engineer; 1 mechanic assigned as pile setter; 2 or more mechanics

assigned as deck workers; and 2 or more mechanics assigned to pile yards. The assignments to the various types of mechanics work are not made on the basis of seniority.

The Carrier directs attention to the Employees' statement to the effect that the assignments to the various types of mechanics' work are not made on the basis of seniority, therefore the Employees themselves do not consider seniority in the assignment of men to the various jobs heretofore set out.

In addition, the Carrier contends the work of piloting the pile driver, as shown in the instant case, is not a bulletined position and there is no contention that it should have been bulletined. Therefore, Rule 8, cited by the Employees, is not applicable.

According to the record, when a pile driver is transported by train from one location to another a pilot rides with the machine to observe whether the leads of the pile driver remain in proper position in the racks and if the hammer remains correctly in the proper position when the machine is in transit to insure safe movement and avoid accidents. Also, during cold weather the pilot is required to keep steam in the boiler of the driver at all times. The night in question the temperature was seven above zero.

Much appears in the record about the work of a pile driver signalman which we deem unnecessary to relate. In addition, much is related with reference to the defense interposed by the Carrier respecting the qualifications of Settlemyer to perform the work in question as against the qualifications of the claimant, i.e., that the claimant is inexperienced in this type of work and there is nothing to show he is qualified to perform it.

"The Carrier has the right to assign the work, but with this right goes the corollary duty to tender the work in connection with seniority rules of this agreement."

Whether or not the claimant, H. C. Exum, was qualified (the Employees contend he was, the Carrier denies or disclaims any knowledge of his qualifications) is not controlling. The Board has held many times that it is the work assigned in controversies of this kind which governs, and not the qualifications of the employee chosen by the Carrier to do the work. See Award 5092.

The Carrier, in referring to award 5092, directs attention to the language "the senior qualified mason helper" (emphasis supplied). The word "qualified" is stressed.

We conclude, under the evidence adduced, the claimant, holding seniority over and above that held by Settlemyer, was qualified and entitled to perform the work heretofore indicated. In addition, under awards of this Division, the claimant should receive the pro rata pay, the principle announced being that employees who do not work should not receive overtime rates of pay, seems applicable here. See Awards 4196-4244.

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 claim should be sustained, as set forth in the opinion.

AWARD

That Item (1) of the claim be sustained; Item (2) of the claim sustained to the extent shown in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1952.