

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that B. & B. Foreman, G. M. Bridges, be paid the difference between what he received as a B. & B. Foreman and that which he should have received as a Pile Driver Foreman during the period from December 16th to December 31, 1943, inclusive.

EMPLOYES' STATEMENT OF FACTS: G. M. Bridges is a regularly assigned Bridge & Building Foreman. During the period December 16th to 31st, 1943 inclusive a pile driver was assigned or added to the equipment of his crew and he, Bridges, was required to assume charge of the work in connection with the operation of such pile driver.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Schedule of rates of pay contained in Agreement effective December 1, 1937 reads in part:

"Bridge and Building Department
B. & B. and Painter Foreman.....\$175.20 mo.
Pile Driver Foreman..... 185.20 mo."

Schedule Rule 24, Article V, reads:

"An employe working on more than one class of work four (4) hours or more on any day will be allowed the higher rate of pay for the entire day. When temporarily assigned by the proper officer to a lower-rated position, his rate of pay will not be reduced."

As stated, the rates of pay for Bridge & Building Foremen and for Pile Driver Foremen were the rates in effect on December 1, 1937. Those rates have since been increased on December 1, 1941 and on December 27, 1943, yet the differential of \$10.00 per month in favor of the Pile Driver Foremen is retained.

For obvious and good reasons it had been agreed between the Carrier and Employes' Committee that a Bridge & Building Foreman in charge of pile driver operation should receive \$10.00 per month more than the regular Bridge & Building and Painter Foremen. In the claim here before us, Bridge & Building Foreman G. M. Bridges was in charge of pile driver operation during the latter half of December, 1943. Accordingly, and in conformity with Schedule Rule 24, Article V, quoted above, he is entitled to the rate of pay applicable to a pile driver foreman during the period he was actually in charge of pile driver operation.

they are not receiving what is due them according to terms of their contract. They should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay."

213

"Ordinarily, established practices and failure to prosecute claims have no bearing upon the interpretation of written agreement where the agreements are so clear and explicit on their face as to leave no doubt of their meaning. To the Referee, at least, the agreement in this case is not so clear and explicit on its face as to leave no doubt of its meaning, and it is, therefore, permissible to consider established practices and failure to prosecute claims as bearing upon what the parties had in mind when they negotiated and wrote the agreement. Here it is established that one of the four representatives who negotiated the agreement knew, at least in his own case, of the practice of combination assignments, and his failure for three years to raise the question after he had signed the agreement is evidence, in absence of any contrary showing, that at the time he signed the agreement he understood it to mean what the carrier contends it means. And, in the absence of any contrary showing as to the intention of the parties, his knowledge of the practice and his acquiescence in the method of it seems fair to presume that his associates who participated with him in the negotiation of the pumpers' wage scale understood also what was involved, for otherwise they could not have negotiated intelligently."

8145

"It appears that the practice of the carrier complained of began over twelve years ago. The claims were not filed until 1941. Such a delay indicates concurrence in construction of agreement made by carrier."

CONCLUSION: The Carrier has shown that this case has not been handled in the manner prescribed by the amended Railway Labor Act, is not properly referable to this Board under the provisions of that Act, and should be dismissed, and without waiving but insisting upon its jurisdictional objections, has shown, as to the merits of the case, that the contention of the Organization is not supported by rule and practice.

OPINION OF BOARD: The claim is on behalf of the Committee that B. & B. Foreman G. M. Bridges be paid the difference between what he received as B. & B. Foreman and that which he should have received as Pile Driver Foreman during the period December 16 to December 31, 1943, inclusive.

Bridges' regular assignment is that of B. & B. Foreman. During the period December 16 to 31, 1943, the Bridge Gang under his supervision was engaged in the construction of a 289 foot pack chord trestle. His labor distribution report for that period shows that the B. & B. Gang opened up the deck of bridge for driving piling, cut out old bridge, raised bridge for driving, unloaded materials, installed ties, and from December 27 to 31, inclusive, drove piling.

It is the contention of the Employes that Bridges was required to assume charge of the work in connection with the operation of such pile driver and that he should be paid the rate specified in the current Agreement for Pile Driver Foreman, in accordance with Schedule Rule 24, Article V, which reads as follows:

"An employe working on more than one class of work four (4) hours or more on any day will be allowed the higher rate of pay for the entire day. When temporarily assigned by the proper officer to a lower-rated position, his rate of pay will not be reduced."

The Carrier alleges that the rate of Pile Driver Foreman shown in the Agreement is the rate that was paid the Pile Driver Foreman of the System Pile Driver Gang employed exclusively for pile driving work. The System Pile Driver Gang was abolished December 31, 1931, and since that time pile driving which is done incident to bridge work is done by a pile driver in charge of Pile Driver Engineer and Fireman, under supervision of the B. & B. Foreman who is assigned to the Bridge and Building Gang engaged on the particular job. The record shows that for better than twelve years, when a pile driver has been used in a gang such as Bridges was in charge of, it has been under the supervision of the B. & B. Foreman who was assigned to that particular job. No complaint or claim was filed during that long period of time.

The Employees are claiming under Rule 24, Article V, where an employee works on more than one class of work four hours or more, he shall be paid the higher rate, but in the record before us Bridges worked throughout the entire period on his regular assignment as B. & B. Foreman. The fact that the pile driver was used in connection with the bridge work that he was in charge of did not change the nature of the work he was doing. Here we have a case where a period of twelve years has gone by, during which time the employees, such as Bridges, who have been in charge of gangs where pile drivers have been used, such as in this case, have made no claim. Not only that, but during this twelve-year period a new Agreement was entered into between the Employees and this Carrier. This record does not show that it was contended during the negotiations for the new Agreement that the use of pile drivers for short intervals in connection with their bridge work should change the position of B. & B. Foreman to that of Pile Driver Foreman.

In Award 2137, speaking through Judge Thaxter as Referee, this Division said:

"It is true that repeated violations of a rule do not change it. But repeated violations acquiesced in by employees may bring into operation the doctrine of estoppel. This is particularly true where the controversy concerns simply rates of pay. Wages are not accepted over a long period of time without protest if an employee believes that he is not receiving what is due him. Employees should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay. Awards 1289, 1806, 1811."

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 there is no violation of the current Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of March, 1945.