Award No. 2857
Docket No. MW-2781

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:

(a) That Rule 5, Article V, of agreement in effect applies to drawbridge tenders;

(b) That drawbridge tenders who have rendered overtime service shall, under the application of Rule 5, Article V, be paid the difference between what they have received at pro rata rate and that which they should have received at time and one-half rate, retroactive to November 1, 1943.

EMPLOYES' STATEMENT OF FACTS: The principle question in dispute is which of the two rules, Article V, Rule 5, or Article V, Rule 8, apply to bridge tenders. The two rules in question read:

> **"ARTICLE V, RULE 5.** Except as otherwise provided in these rules, time worked continuous with the regular eight (8) hour work period shall be paid for at the rate of time and one-half, computed on actual minute basis. Employes required to work continuously from one regular work period to another shall receive time and one-half after the expiration of the first regular work period until relieved."

The above rule was revised by Special Memorandum of Agreement under date of November 3, 1943. Copy of that Special Memorandum is submitted as Employes' Exhibit "A."

> **"ARTICLE V, RULE 8.** Positions not requiring continuous manual labor such as camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lamp men, pumpers, steam shovel, pile driver, crane and ditcher watchmen, will be paid a monthly rate to cover all service rendered. For new positions this monthly rate shall be based on the hours and compensation for positions of a similar kind. If assigned hours are increased or decreased the monthly rate shall be adjusted pro rata as the hours of service in the new assignment bear to the hours of service in the present assignment. The hours of employes covered by this rule shall not be reduced below eight (8) hours per day for six days per week.
>
> Exceptions to the foregoing paragraph shall be made for individual positions at busy crossings or other places requiring continuous alertness and application, when agreed to between the management and the committee of employes. For such excepted positions the foregoing paragraph shall not apply."

The above quoted rule appears in the regular agreement effective December 1, 1937.

that the claim was declined and no appeal was taken; that nothing further was done until September 24, 1941, during which time the parties had had many conferences about other matters and in fact had negotiated a new agreement effective November 1, 1939, in which this particular position was put on a daily basis; that when that agreement was executed a joint statement was signed by the parties which contained the following: 'All questions concerning the rates of pay have been satisfied and there are not at this time any pending disputes of this character between us.'

"The present claim was not filed until September 24, 1941, and covers not only the month of December, 1938, but the period back to January 1, 1938, and down to November 1, 1939, the effective date of the new agreement.

"We think that this claimant has slept on his rights and is barred both by laches and estoppel. The Carrier had every right to assume by the acceptance of the pay by the claimant without protest that the amount was satisfactory. Settlement was then made with the regular incumbent on the same basis. It is true that repeated violations do not change the rule; but repeated violations acquiesced in may bring into operation the doctrine of estoppel and render it inequitable that the Carrier should be called to account."

CONCLUSION: The Carrier has demonstrated that the purported claim of the Brotherhood has not been handled in the usual and prescribed manner; that it involves a request for change of agreement and is embraced within a formal notice served upon the Carrier and now in the process of handling under the provisions of Section 6 of the Railway Labor Act, and for these reasons the case is not properly referable to this Board; that the claim is entirely without basis on the merits, and even if there was, which is not admitted but expressly denied, grounds for such a claim, the claimants have slept on their rights and are barred by laches and stale demands, and estopped at this late date from claiming that the rule which has been agreed upon, accepted, and its application acquiesced in from the time of its adoption, spreading over a period of more than 20 years, now means something else, that its application is wrong and should be changed, and reparations allowed; that the position of the Brotherhood in any and all events is untenable.

OPINION OF BOARD: The question in dispute is whether bridge tenders properly come under and are entitled to overtime pay for services rendered in excess of eight hours under the application of Article V, Rule 5, or whether they come under Rule 8 of Article V.

Rule 5 of Article V is as follows:

"Overtime—Rule 5. The ninth and tenth hours, when worked continuous with regular work period, shall be paid for at pro rata hourly rate; beyond the tenth hour shall be paid for at the rate of time and one-half on the minute basis."

Rule 8 of Article V is as follows:

"Watchmen—Rule 8. Positions not requiring continuous manual labor such as camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lamp men, pumpers, steam shovel, pile driver, crane and ditcher watchmen, will be paid a monthly rate to cover all service rendered. For new positions this monthly rate shall be based on the hours and compensation for positions of a similar kind. If assigned hours are increased or decreased the monthly rate shall be adjusted pro rata as the hours of service in the new assignment bear to the hours of service in the present assignment. The hours of employes covered by this rule shall not be reduced below eight (8) hours per day for six days per week.

Exceptions to the foregoing paragraph shall be made for individual positions at busy crossings or other places requiring continuous alertness and application, when agreed to between the management and the committee of employes. For such excepted positions the foregoing paragraph shall not apply."

The Employes contend that as the specific designation of "Bridge Tenders" is not included in the modifying phrase of Rule 8 of Article V following the words "such as," these bridge tenders do not come under the provisions of Rule 8 of Article V.

The phrase "such as" has been before this Division previously and in Award No. 1251, speaking through Judge Tipton, the Division said:

"Giving effect to the above rule of construction, in defining subdivision (g) of this rule we must not lose sight of the word 'regularly,' and the phrase, 'such as.' 'Regularly,' when given its ordinary meaning, is synonymous with 'constantly' or 'uniformly,' and the phrase, 'such as' means 'for example'."

For better than twenty years and under agreements including those preceding the current agreement effective December 1, 1937, both the Employes and the Carrier have considered that drawbridge tenders were employes occupying positions governed by the provisions of Rule 8 of Article V. During this period of time various wage increase agreements were applied and accepted without protest. In fact, no claim of any kind was made until the one involved in this dispute which originated on April 5, 1944. One cannot read this record and come to any other conclusion than that it was considered by both parties to the Agreement that bridge tenders were employes governed by the provisions of Rule 8 of Article V. An affirmative award is not justified.

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 Employe 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 was no violation of the 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.