

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42904
Docket No. MW-40932
18-3-NRAB-00003-090035 (Old)
18-3-NRAB-00003-170286 (New)**

The Third Division consisted of the regular members and in addition Referee Randall M. Kelly when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to properly compensate Bridge Tenders S. Rush and J. Heider for their overtime service in connection with being required to provide twenty-four (24) hour per day protection work and service at Bridge 38.3 at Marysville, Washington (System File S-P-1108-G/11-04-0233 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants S. Rush and J. Heider shall now be compensated for ‘... five point three (5.3) hours overtime at the rate of time and one-half and eight (8.0) hours overtime at the rate of double time for each day claimed, plus the same (5.3) hours overtime at the rate of time and one-half and eight (8.0) hours at the rate of double time for each day worked on a continuing basis after June 11, 2004 all at their current rates of pay.’”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimants, S. Rush and J. Heider are Bridge Tenders. On the dates in question, they were regularly assigned to operate and protect Bridge 38.3 on Ebey Slough on the south side of Marysville, Washington. The parties stipulated that this is a moveable bridge, i.e., a bridge that can be moved to allow for river traffic to pass, and are manned and operated by MOW B&B bridge tenders.

Typically, moveable bridges are in operation seven days a week. To ensure coverage of the work, a primary bridge tender position typically works specified hours five days a week and a relief bridge tender works specified hours on the remaining two days, which are rest days for the primary bridge tender. Any overtime work required is subject to the applicable call and overtime payment rules. The Organization offered bulletins advertising permanent bridge tender positions to show typical schedules.

According to the Organization, this means that bridge tenders should be paid overtime for all hours that they are on call. The Claimants were paid eight hours straight time and 2 hours and 40 minutes at overtime for each day of service.

Bridge 38.3 is located near a small private marina on Ebey Slough, on the south side of Marysville, Washington. The Bridge Tender's primary duty is to open the bridge when required, although he has ancillary duties—some of which are described in Rule 55T—that primarily involve preventative maintenance. At one time, the Carrier owned a house immediately adjacent to the marina, which was occupied by the regular Bridge Tender and his family. The Carrier has since sold the house, and placed a mobile home near the bridge, which is occupied by the regularly assigned Bridge Tender from Saturday through Wednesday, and by the relief Bridge Tender on Thursday and Friday. The mobile home contains a kitchen, bedroom, full bathroom, and a living room/office with a computer and internet connection.

Bridge 38.3 is opened infrequently, so according to the Carrier, it has never bulletined the job to require three separate Bridge Tenders to work three eight-hour shifts, as it does at many other bridges. Instead, the Carrier has always bulletined the job as requiring one Bridge Tender to cover—or "protect"—the bridge from Saturday through Wednesday, and bulletined a relief Bridge Tender to do the same on Thursday and Friday. The Bridge Tenders are compensated eight hours straight time for the regular workday, as well as an additional overtime call to protect the bridge overnight. This overtime call is paid regardless of whether the Bridge Tender is actually required to open the bridge. Once the Bridge Tender has completed any required preventative maintenance duties, his only requirement is to be available to open the bridge.

The Carrier provided evidence of the disputed custom and practice of paying the bridge tenders 2 hours and 40 minutes overtime daily back to at least 1994 at Bridge 14.2, although according to the Carrier, there is further evidence that the practice has been in effect since the 1950s. As far as the Carrier can determine, until 2003, the Organization never complained about the practice. But in a letter dated July 16, 2003, the Organization's General Chairman objected to the pay regime at Bridge 14.2—and to a similar regime at Bridge 38.3 in Marysville, Washington—and implied that he was unaware of the practice at these bridges until shortly before he wrote the letter.

The Carrier has taken the position that the claim is barred by the Organization's acquiescence to the long-standing practice at Bridge 14.2 which equates to an implied-in-fact contract amendment and/or the Organization's claim is time-barred by the doctrine of laches.

The Carrier has maintained since the beginning of the on-property handling of this dispute that the practice of paying the Bridge 14.2 Bridge Tenders eight hours and a call for 24-hour coverage has been in effect since at least 1959. The practice—as the Organization has noted in its correspondence—was established when the Bridge Tenders actually resided full time in Carrier-owned houses at certain bridges in the Pacific Northwest. Although the Bridge Tenders no longer live in the houses—except when they are protecting the bridges—the practice and pay regime have survived to this day on Bridge 14.2, and on the aforementioned Bridge 38.3 in Marysville, Washington. While there is no record of a written agreement regarding these two bridges, the practice was enshrined in a 1972 agreement

pertaining to the bridge at the Burlington Northern Car Barge Facility in Vancouver, British Columbia, signed by the Organization's then-General Chairman Edward J. Bos:

“The successful applicant for this position will make himself available for work on a twenty-four (24) hour per day basis and compensated at the Bridge Tender's daily rate plus one (1) two (2) hour and forty (40) minute overtime call per day.” [Emphasis in original]

The fact that the Organization explicitly assented to this pay regime shows that not only did it not find it objectionable for its membership, it actually bargained for it.

But the Carrier's evidence of the practice—though scant, because the Organization waited so long to file its claims—goes back 20 years earlier, to 1952. In a bulletin dated January 23rd of that year—pertaining to Bridge 38.3 in Marysville—the Carrier stated that the current Bridge Tender was retiring and that the prospective Bridge Tender would be paid a monthly rate of \$230.90, working 8 am to 4 pm, Monday through Friday. It stated further, “At present time bridge operator is working 7 days per week accepting calls when he is off duty.” While it is not clear whether he was paid for each call or just one call each day, what is clear is that he was not paid eight hours straight time, eight hours overtime, and eight hours double time, as the Organization would have one believe. Notably, this bulletin shows that this was an established practice even before the date of the bulletin—January 23, 1952. Further, it shows that a copy was furnished to Mr. Edward J. Bos—the same Mr. Edward J. Bos who signed the 1972 agreement at the Vancouver Bridge—who was then Vice-General Chairman in Everett, Washington, impeaching the Organization's assertion that it was unaware of—and did not assent to—the practice.

In further support of the foregoing, the Carrier provided a statement to the Organization from Structures Supervisor Scott Kipperberg. Kipperberg recounts a 1959 conversation with Clarence Gordon, who was the Bridge Tender at the Marysville Bridge (then called Bridge 12). Gordon stated that he protected the bridge 24 hours a day, seven days a week, and was paid eight hours straight time, and one overtime call—the equivalent of 12 hours straight time per day.

While the Organization has attacked Kipperberg's statement in its on-property handling, his statement comports completely with the 1952 bulletin. Kipperberg also alludes to the same practice since 1955 at Bridge 14.2, when he states, "We have a similar bridge on the former NP that has been the same way, that I am aware of, since 1955."

We turn now to documentary evidence of the practice at Bridge 14.2—the subject of the instant dispute. Unfortunately for the Carrier, it is difficult to obtain bulletins from before 1996, the year of the merger between the Burlington Northern Railroad and the Atchison, Topeka and Santa Fe Railway; with the consolidation of the two data-keeping systems, many records were simply lost. In fact, the 1952 bulletin referred to above was obtained from Clarence Gordon, and not from Carrier records. Nevertheless, with great effort, the Carrier was able to locate a May 30, 1994, bulletin pertaining to Bridge 14.2. It shows that the Bridge Tender's hours of service were 7 am to 3:30 pm, with a call to protect. A manpower clerk's notes, written to the side, state the unstated—the Bridge Tender would be required to protect 24 hours a day.

The Organization offers a May 30, 2002, letter from former Bridge Tender Donald A. Williams as dispositive evidence that there were “no ‘side agreements’ allowing all night service for one call per day.” The Carrier does not dispute this; besides anecdote, the Carrier can find no evidence of formal side agreements either. *But this does not obviate the fact that the Organization had knowledge of and acquiesced to the practice for at least 10 years, and probably 50 years—before it filed a claim.*”

Professor Matthew A. Kelly defines *laches* in his book, Labor and Industrial Relations: Terms, Court Decisions and Arbitration Standards (The Johns Hopkins University Press, 1987) 50 as follows:

“A legal doctrine which holds that long-neglected rights cannot be enforced, that there has been negligence in the failure to exercise these rights promptly, and that the conditions have so changed since the initial failure to act that it would be inequitable if the rights were now exercised. In arbitration, as in law, where there is laches the matter is dismissed. [For example] This precludes a senior employee who in the past failed to bid for a posted opening from exercising his right a year later to displace the successful bidder, who is junior to him terms of seniority.”

This is, in fact, a case for the application of the doctrine of laches or equitable estoppel. The Carrier showed that there was a practice in effect at the bridge in question for some 50 years to pay Bridge Tenders an additional 2 hour and 40-minute overtime call. The practice is a reasonable approach to the situation at the bridge where the Carrier provides housing during the course of the Bridge Tender's shift and the bridge rarely has to be opened. This is not a busy bridge where the parties recognize the need for three shifts and 24-hour coverage. It is a reasonable compromise that has been acceptable to the Organization at other, similar, bridges and one that the Bridge Tenders found no need to challenge for some 50 years. The Carrier came to rely on the compromise and staffed and budgeted the Bridge Tenders accordingly. The Claimants cannot now come forward to challenge an arrangement that they and their peers have found acceptable for so many years. The time to complain that their right to be paid for all hours on call was when the Bridge Tender positions were first bulletined and the Bridge Tenders first paid for the single call. Accordingly, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of February 2018