Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12122
Docket No. 11905
91-2-90-2-20

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ Division of TCU
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

1. That The Atchison, Topeka and Santa Fe Railway Company violated the September 1, 1974 Agreement, as amended, specifically Rule 20; and Article IV, Section 1(b) and Letter No. 3 of the November 19, 1986 National Agreement, by requiring the Carmen listed below to perform work on non-intermodal equipment/cars and only compensating them at the intermodal rate of pay.

2. That accordingly, The Atchison, Topeka and Santa Fe Railway Company be ordered to additionally compensate Carman Clyde Barela, et al., the difference between the intermodal hourly rate of pay ($13.29) and the non-intermodal hourly rate of pay ($14.10), which is eighty-one cents (81¢) per hour for a total of two hundred ninety (290) hours that they were required to perform work on non-intermodal equipment/cars, in the manner set forth below:

Clyde Barela	25 hours x 81¢ =	$20.25
Tony Sanchez	24 hours x 81¢ =	19.44
Vern Fenton	10 hours x 81¢ =	8.10
Dick Heimlich	10 hours x 81¢ =	8.10
A. G. Grow	28 hours x 81¢ =	22.68
M. Manzaneres	28 hours x 81¢ =	22.68
Bruno Silva	80 hours x 81¢ -	64.80
Frank Ayala	40 hours x 81¢ =	32.40
J J. Chavez	8 hours x 81¢ =	6.48
Robert Perez	8 hours x 81¢ =	6.48
Joe Garcia	8 hours x 81¢ =	6.48
Jess Vega	8 hours x 81¢ -	6.48
Tony Sanchez	13 hours x 81¢ =	10.53

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimants are Carmen regularly assigned to intermodal positions at Carrier's yard at Barstow, California. On dates of Claim, Claimants spent most, if not all, of their time on duty repairing cars which are not in intermodal service. For this reason, they claim the differential between the rate for intermodal service and the rate for non-intermodal service for the hours so worked. The Organization bases its Claim on Article IV of the November 19, 1986 National Agreement, which established a lower rate of pay for employees engaged in intermodal service. Section 1(b) defines the coverage of Article IV as follows:

> "With respect to intermodal service, this Article shall be applicable to positions preponderantly engaged in work in connection with the operation of intermodal facilities, such as, but not limited to, inspection, repair and any other work in connection with intermodal equipment or intermodal facilities."

The Organization also relies upon Side Letter #3, dated November 19, 1986, which reads as follows:

> "This refers to our discussions during negotiation of the Agreement of this date in connection with intermodal service.
>
> It was explained that intermodal facilities are perhaps better described as intermodal terminals or hubs that are operated independently of rail yards. The majority of intermodal traffic today moves in solid trains consisting of dedicated equipment that is rarely switched. The trains shuttle between hub pairs and upon arrival at a hub, inbound containers and trailers are removed and the train is reloaded with outbound containers and trailers for the return trip. Trucks are used to gather trailers from the area served by the terminals, in some cases perhaps ranging up to a radius of 250 miles. Once delivered, the trailers are lifted on to rail cars and shipped intact to their destination, where the trailers are then lifted off the rail cars and dispatched to their ultimate destination by truck. Facilities for the loading and unloading of motor vehicles are also considered intermodal facilities.

> Among the services performed at these locations in addition to the inbound and outbound truck movements are supervisory, clerical, ramp, hostling, on and off loading and unloading, inspection, damage control, tie-down and any other work in connection with the handling of trailers, containers, autos and other intermodal shipments.
>
> It is not the intent to transfer rolling stock repair and maintenance to an intermodal location for the purpose of applying intermodal pay rates with respect to non-intermodal equipment.
>
> If a carrier proposes to expand the types of work presently being performed at intermodal facilities by employees represented by your organization, it shall give 10 days advance notice thereof to the General Chairman. A meeting shall be set promptly at which carrier representatives will particularize for the General Chairman the changes contemplated and the reasons therefor. The purpose will be to insure that the carrier is not proposing a change to take advantage of the lower pay rate by circumventing the Intermodal Service Article of the Agreement or this letter and if it is concluded that this is the case the carrier will not proceed with the proposed change."

The Organzation first asserts Claimants' positions should not come under the coverage of Article IV of the Agreement because Barstow does not fit the definition of an intermodal facility as set forth in Letter #3. The Carrier acknowledges that Barstow does not handle intermodal trains, but asserts that railcars for such service are funneled into the Barstow repair facililty from all over the system for the purpose of repair, rebuilding and modifications. It is evident from the record that these cars are repaired, etc., on two specific tracks where Claimants are assigned. According to the Organization, Barstow is not an intermodal terminal or hub, operated independently of rail yards.

The Carrier submits the question as to whether or not it may apply the intermodal rate of pay at Barstow is not properly before this Board. It notes the issue was never raised during the handling of the dispute on the property. Furthermore, it argues such a position is inconsistent with the Organization's Claim, which seeks the differential only when Claimants worked on non-intermodal cars more than four (4) hours per day.

We agree with the Carrier that we cannot consider the status of Barstow as an issue in the instant dispute. The Carrier is in error in asserting

this is a new issue. The record does show the Organization had challenged the appropriateness of establishing intermodal positions at Barstow during the handling of this dispute on the property. However, as there is no Claim for the full Carmen rate except when non-intermodal work is performed for more than four (4) hours per day, it is evident the Claim is limited to this single issue. Accordingly, and solely for the purposes of this dispute, we will consider the intermodal positions at Barstow to be properly bulletined.

The gravamen of the Organization's Claim is that the Carrier is not privileged to require Claimants to perform non-intermodal work without some restriction. The Organizations submits the sole intent and purpose of the establishment of the intermodal rate of pay was to allow the railroads to be competitive with trucks and other modes of transportation in connection with intermodal equipment. It was not the intent, the Organization continues, to allow a Carrier to work an intermodal employee on non-intermodal equipment, thereby giving that Carrier an unfair advantage over other railroads which pay the higher rate.

The Organization relies upon Rule 20 of the September 1, 1974 Agreement, as amended, which reads as follows:

> "Where an employe, except apprentices, is required to perform work carrying a higher rate of pay, he shall receive the higher rate of pay, but if required temporarily to perform work carrying a lower rate, his rate will not be changed."

The Organization, noting that work on non-intermodal equipment is of a higher pay rate, asserts this Rule requires the payment of the higher rate when Claimants were required to perform work on non-intermodal cars. The Organization derives its standard of four (4) hours from various provisions in the Agreement which refers to four (4) hours or more in one day being the basis for deciding the pay of an employee for that day. They cite Rule 38(c) of the September 1, 1974 Agreement, which reads as follows, as an example:

> "Employes not regularly assigned to perform welding work but performing such work for four (4) hours or less on any one day will be paid the welder's rate of pay on the hours basis with a minimum of one (1) hourly; for more than four (4) hours in any one day, welder's rate will apply for that day."

Carrier argues the Agreement permits the payment of the intermodal rate when employees assigned to positions bearing that rate perform work on non-intermodal cars. It notes the rate governs positions, the incumbents of which are preponderanly engaged in intermodal work. The use of the term "preponderantly engaged" implies there would be some time spent on non-intermodal work. The rate of pay for the position, the Carrier continues, is fixed for all service performed. The Carrier notes the parties did not negotiate separate pay provisions based upon the nature of the work where a position is not exclusively intermodal.

The Carrier also refers to the last two paragraphs of Letter #3, which prohibit Carriers from bringing in more non-intermodal work and taking advantage of the lower rate. If the Agreement intended to ban non-intermodal work at the intermodal rate of pay, the Carrier insists this provision would have been unnecessary.

The Carrier rejects the Organization's argument regarding the application of Rule 20. First, the Carrier suggests the Organization has allowed this practice to continue for almost two years without protest, thus constituting acquiescence on the part of the Organization. Secondly, the Carrier submits intermodal workers are not performing work carrying a higher rate of pay when they perform the non-intermodal work within the context of their intermodal positions. Finally, the Carrier argues Rule 20 is superseded by the November 19, 1986 National Agreement.

Whether or not Carmen on intermodal positions may perform non-intermodal work is not at issue. The issue in dispute is at what point is the Carman no longer working on a position "preponderantly engaged in work in connection with the operation of intermodal facilities." At this point, arguably, the Carman is working a position other than his own, and is entitled to the appropriate compensation for such service. The Agreement gives us no guidance as to how the parties intended to define the above quoted phrase. All we know from the Agreement and Letter #3 is that it obviously was not the intent of the parties to limit employees such as Claimants to work exclusively in connection with intermodal service. The Organization urges we examine the volume of work on a daily basis, and refers the Board to other examples for such a measurement. The Carrier denies such an intent can be found in the Agreement. Instead, the Carrier argues Claimants can perform any Carman work at the intermodal rate as long as they are assigned to positions which are preponderantly engaged in intermodal work. Carrier submits it would be required to rebulletin the job if it was no longer preponderantly engaged in intermodal work. This, the Carrier asserts, is the only remedy available.

Historically, this Board has examined the nature of an employee's work on a daily basis. Claims are made for individual, specified dates. When we find that an Agreement has been violated, the remedy is generally compensation for specific dates. There is nothing in either the Agreement or Letter #3 which would cause us to examine this Claim in any different manner. Accordingly, we reach the following conclusions.

Unless it is demonstrated the work on a particular intermodal position is not somewhat consistent from day to day, it will be presumed that an employee is working on an intermodal position when more than half the work day, i.e., a prepondrance, is spent in connection with intermodal service. The Board recognizes that there may be circumstances, due to factors such as traffic patterns, when it is appropriate to measure the work over a somewhat longer period of time, e.g., a work week. There is no evidence, however, that this is the case with the positions involved in this Claim.

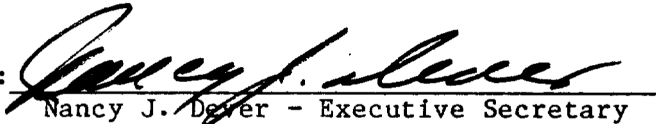
When, however, an employee assigned to an intermodal position is required to perform non-intermodal service for more than half the work day, we find the employee to have been moved de facto to another position for that day. This is a violation of the Agreement, which requires positions which are paid at the intermodal rate to work preponderantly in intermodal service.

As the underlying facts in this case are not in dispute, we find the Agreement was violated on each date of Claim. Rule 20 establishes the appropriate method of compensation. We will, therefore, sustain the Claim as presented.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1991.

CARRIER MEMBERS' DISSENT
TO
AWARDS 12122 - 12130, DOCKETS 11905, 11913, 11914,
11934, 11936, 11990, 12037, 12116, 12117
(Referee Fletcher)

In 1986, the Contracting Parties entered into a National Agreement providing for a specific rate of pay for those involved in Intermodal Service. The purpose for negotiating such a provision was to enable the railroads to compete with trucks and other modes of transportation handling Intermodal traffic. It was never the intent of the contracting parties that such ability to compete with other modes of transportation would fluctuate on a day to day basis but was to provide a level and stable platform from which the railroads could confront the other transportation modes.

In these cases, the Majority has correctly found that Barstow, California, one of nine locations on this railroad performing Intermodal work, was covered by Section 1(b) of Article IV of the November 19, 1986 Agreement. All of the Claimants held positions that were engaged in work in connection with Intermodal equipment and they had been compensated in accordance with Section 2 of Article IV almost two years prior to the filing of the first case here involving December, 1988. The Majority also properly concluded that the language, "preponderantly engaged" does not, "limit employees such as Claimants to work exclusively in connection with intermodal service."

The only issue in these cases was:

> "...at what point is the Carman no longer working on a position 'preponderantly engaged in work in connection with the operation of intermodal facilities.'"

While the Majority states as a fact that:

"The Agreement gives us no guidance..."

as to how to evaluate "preponderantly engaged" it has nevertheless concluded that such is to be done on a daily basis. This conclusion is wrong for the following reasons.

First, as noted above, there is NO CONTRACTUAL BASIS for such a conclusion. The positions involved were bulletined and were awarded as INTERMODAL POSITIONS having a regular five day work week. As the Majority has noted, "Unless it is demonstrated the work on a particular intermodal position is not somewhat consistent..." (Emphasis added), said position is an intermodal position compensated at the intermodal rate. Therefore, in order to assert entitlement to other than the intermodal rate, it must be demonstrated that the work of a position is sufficiently erratic to warrant it NOT being included under the rubric of "preponderantly engaged." In these cases there is no evidence of any position being shown as being such an erratic position that it was not entitled to be identified as an intermodal position.

Furthermore, the Majority's conclusion that, "when more than half the work day...is spent in connection with intermodal service," identifies an intermodal position, does severe violence to the concept of assigning positions by bulletin in this industry. One example will prove the point. An intermodal worker who spends 3 1/2 hours each work day of his assignment in other than intermodal service is an intermodal worker since, "more than half the work day" is in intermodal service. However, an individual who

spends the same amount of time on non-intermodal work but only on Monday and Tuesday of the work week is not an intermodal worker on two days of his work week. The same time, effort and work is expended, yet there are two different results. Such is not what the Parties intended and such action certainly does not provide a stable means to compete against the other modes of transportation.

Secondly, on the assumption that these nine claims represent the actual incidence of intermodal workers performing non-intermodal work at this location, we have a total of 51 dates consuming 587 hours, 40 minutes in just over 48 weeks (December 12, 1988 - November 14, 1989 - 240 work days). If just one Carman worked 3 1/2 hours each work day during these same 48 weeks in non-intermodal work he would have expended 840 hours in non-intermodal work for which he would be compensated only at the intermodal rate. It just does not make any rational sense that an individual could work 43% more than the total represented in these nine claims on non-intermodal work and be within the guidelines of these Awards. Yet, these multiple Claimants working far less hours in non-intermodal work are found here to be entitled to the other than intermodal rate.

In Award 12122, involving the largest number of Claimants (13), the largest number of dates claimed (18) and the most time (290 hours) over a six week period (December 12, 1988 - January 20, 1989) we find that the 290 hours claimed is less that 16% of the time worked by these Claimants (13 Claimants x 8 hours x 18 dates = 1872 hours). If we look at the time worked by these same 13

Claimants over the six week claim period (13 Claimants x 8 hours x 5 days/week x 6 weeks = 3120 hours) the total claimed is less than 10% of the time worked. By any calculation, other than on a daily basis, it is self-evident that Claimants were "preponderantly engaged" in intermodal work and were so engaged not just the majority of the time but the vast majority of time employed. Had the Parties desired to require that the determination of the status of the position being intermodal or not to be made on a daily basis it would have been a simple matter to have so stipulated. However, as the Majority has properly noted, there is no Agreement provision that supports such a conclusion.

Third, the Majority itself has noted the lack of contractual basis for making daily determinations when it acknowledges the need to provide an exception:

> "The Board recognizes that there may be circumstances, due to factors such as traffic patterns, when it is appropriate to measure the work over a somewhat longer period of time, e.g., a work week."

Obviously, the recognition, "that there may be circumstances" in which a daily determination would not apply, upholds and confirms the fact that there is no contractual provision to support the conclusion reached in these Awards. Furthermore, what are the traffic patterns that would entitle the Carrier to, "measure the work over a somewhat longer period of time..."? What other circumstances might be "appropriate"? To acknowledge the need for exceptions warrants the conclusion that an evaluation on a daily basis was not the intent of the Parties in negotiating Article IV.

The result made in this matter is a disposition made on perceived equity and not on any contractual support.

In Award 16 of PLB 4170, involving the application of the intermodal rate, we find the following:

> "If Claimants' positions are not primarily in intermodal service, they are not subject to Article IV. In resolving this dispute, we can consider only the evidence presented to us. The Carrier has furnished a computer generated report <u>for the fourth quarter of 1988</u> which shows the number of man hours charged to various functions for each intermodal employee at Inman Yard. According to this report, Claimant Bailey worked 479.7 hours in intermodal equipment repair and 28.3 hours in shop maintenance. Claimant Tatum worked 388.7 hours in intermodal equipment repair and 8.8 hours in ship maintenance....The Organization, on the other hand, has submitted bulletins describing the jobs in question. Because maintaining pig cranes is only one of three duties listed on the bulletin, the Organization concludes this work constitutes only one-third of the job. In light of the Carrier's more precise time records, we cannot accept the Organizations's conclusion. Based upon the Carrier's records, it is evident that Claimants' jobs are primarily in intermodal service." (Emphasis added)

Here, the review was over a thirteen week period; not daily.

Again, there is no support either in Article IV of the November 19, 1986 Agreement or in Letter No. 3 for the conclusion that <u>bulletined and assigned Intermodal positions are to be reevaluated and reclassified on a daily basis.</u>

The Majority, in support of its conclusion has noted that this Board historically, "...has examined the nature of an employee's work on a daily basis" and that there is nothing in the 1986 Agreement that would change that view. However, such a conclusion can only be reached if the basic purpose of the Intermodal provisions are ignored. No railroad can compete with other less

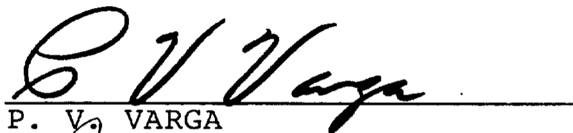
costly transportation modes when its ability to compete is restricted by an artificially imposed barrier.

The Majority also relies on rules 20 and 38 to support its position of daily review. However, Rule 20 applies to the rate of pay for the filling of vacancies and there is no dispute that these cases DO NOT INVOLVE THE FILLING OF A VACANCY. It is a fact of record that the Claimants were assigned at the time to intermodal positions by bulletin and assignment. There was no issue raised concerning the filling of vacancies. And certainly there is no dispute that Claimants properly could be required to perform non-intermodal work so long as they were "preponderantly engaged" in intermodal work. Thus, there were no other positions nor were there any vacancies to be filled. Concerning Rule 38, it was NEVER raised on the property but was first raised by the Organization in their Submission to this Board. Even though such argument should have been excluded as being in violation of this Board's Circular No. 1, the fact is that the parties by agreement in that rule did make a specific contract provision, detailing when and how there would be a change in the rate paid for welding. The Majority has noted the fact here that there is NO SUCH RULE PROVISION in Article IV.

Finally, it was the Organization that asserted a violation of Article IV on the property. Thus, it was the Organization's burden to prove with substantial evidence that the National Agreement adopted on November 19, 1986, DID PROVIDE for the application of the intermodal rate to be made on a daily basis. The Majority has

correctly concluded that the National Agreement DOES NOT contain such a provision and in fact, the Agreement provides NO GUIDANCE in this regard. The Organization's claims should have been denied on their failure to support their claims with evidence. Whatever the Parties meant by the term "preponderantly engaged" it is clear on these records that Claimants, at all times relevant, were "preponderantly engaged" in intermodal service and it was contractually proper to compensate them at the intermodal rate.

We dissent.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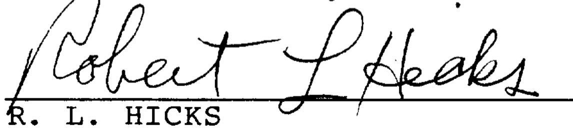
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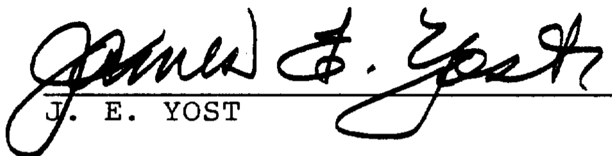
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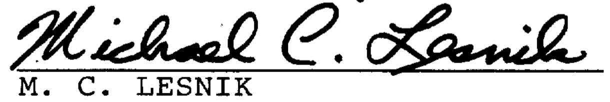
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