Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13277
Docket No. 13230
98-2-96-2-143

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen, Division of
(Transportation Communications International Union
(
(CSX Transportation, Inc. (former Chesapeake &
(Ohio Railway Company)

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Chesapeake and Ohio Railroad (sic) Company (CSX Transportation, Inc., (hereinafter referred to as 'Carrier') violated the controlling Shop Crafts Agreement specifically Rule 1(a) and 7(a), when on October 28, 1995, the Carrier worked the carman (sic) on the third shift nine hours and only paid them for 8 hours at straight time rate.

2. Accordingly, the Carrier be instructed to pay carmen W.F. Anderson, ID #321093, G.S. Sayre, ID #321398, G.D. Banton ID #606928, L.E. Grayson, ID #201585, and I. Bukta ID #321139 (hereinafter referred to as 'Claimant's) one hour each at the applicable overtime rate for said violation."

FINDINGS:

The Second 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.

At first blush it would appear that the Carrier was not applying the Agreement when it worked five Claimants nine hours on October 28, 1995 but only paid them eight hours. However, after reviewing all material exchanged between the parties during the on-property handling (any and all new arguments appearing for the first time before this Board have been ignored), it is readily apparent that the dispute is more far reaching than simply resolving the issue for a particular day. Had the alleged infraction occurred on October 27 or October 29, 1995, the claim would have merit. But in this instance it involves the last Sunday in October when, by ordinance, a normal 24 hour day is increased to a 25 hour day by setting the clocks back one hour at 2:00 A.M.

All five Claimants were assigned to the third shift on the claim date. It is unrefuted in the record that they were also assigned in April when, again by ordinance, the normal 24 hour day was reduced to a 23 hour day by advancing clocks one hour at 2:00 A.M.

The Organization not only argues a violation of Rule 7(a) but also alludes to a past practice of the Carrier always paying the ninth hour at the time and one-half rate when the time changed in the Fall.

The Carrier denied the Organization's past practice contention. To the contrary, the Carrier argued it had never adjusted pay either at the beginning of the time change when third shift personnel only work seven hours or in the Fall when they work nine hours.

Since Daylight Savings Time has been in effect since World War II, it is obvious some understanding evolved concerning both days of the time change, but to the astonishment of the Board, neither side component furnished any Awards involving any of the crafts on any of the component carriers that now make up CSX Transportation, Inc. Truly then we either have a situation where the Carrier had been paying the ninth hour, as alleged by the Organization, or not paying the ninth hour because it does not adjust pay for the seven hour shift, on the basis it equals out.

Obviously, the Board is confronted with a conflict of facts regarding the parties' past practice, which the Board, by a long line of precedent, will not resolve. However, the burden of proof is forever upon the shoulders of the petitioning party in Rules cases, and in this instance, it failed to meet this burden.

At this juncture, the Board will not resolve the issue of the appropriate pay for third shift employees when the time is changed back. Rule 7(a), on any other day, would be applicable, but on the last Sunday in October it has to be considered in conjunction with a time change mandated by ordinance. (See Fourth Division Award 3459 and Award 37 of Public Law Board No. 369).

Regarding the Carrier's quid pro quo treatment of the time change, the parties developed that in the Spring, when third shift personnel worked only seven hours but were paid for eight hours, three of the Claimants actually worked seven hours but were paid eight hours. Two others were off on paid leave (vacation or personal leave) for which they were paid eight hours even though their regular assignment, had they worked, was only for seven hours.

Under these circumstances, there is no money due any of the Claimants.

Fourth Division Award 3459 held, in relevant part, as follows:

> "This Award for reasons stated above did not decide and resolve all the contentions of the parties. This matter is a most appropriate subject for a negotiated agreement."

The Board is in full accord with the aforequoted excerpt from Fourth Division Award 3459 and incorporates that advice as written.

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 Second Division

Dated at Chicago, Illinois, this 18th day of May 1998.