

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26070

Docket Number MW-25719

Marty E. Zusman, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company (former St. Louis-
(San Francisco Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to maintain the required ratio of B&B helpers on B&B Gangs 40 and 41.

2. As a consequence thereof:

(a) B&B Helper J. Corum shall be compensated for all wage loss suffered beginning sixty (60) days retroactive from September 10, 1982 and continuing until the violation is corrected (System File B-1919/MWC 82-3-17A).

(b) B&B Helper S. D. Land shall be compensated for all wage loss suffered beginning sixty (60) days retroactive from November 17, 1982 and continuing until the violation is corrected (System File B-2163/MWC 83-3-17C).

(c) B&B Helper J. W. Bolin shall be compensated for all wage loss suffered beginning sixty (60) days retroactive from December 1, 1982 and continuing until the violation is corrected (System File B-2166/ MWC 83-3-17D)."

OPINION OF BOARD: The question presented to the Board in the instant case is whether Claimants Corum, Land and Bolin were improperly furloughed. The Rule herein disputed with regards to its proper application is Rule 30 which reads as follows:

"Rule 30. Ratio of B&B Mechanics

(a) Except as provided in paragraph (b), the ratio of first class, second class, and third class mechanics or helpers in a B&B gang will be one-third of the total number at each rate. Where the number of employees in a gang will not permit of maintaining this ratio in individual gangs, it will be maintained for gangs as a whole on a seniority district.

(b) Where the preponderance of work requires, the ratio of first class mechanics to either second class or helpers may be exceeded".

Claimants were all Helpers in the Bridge and Building Subdepartment and were furloughed at different times. The Organization argued Carrier violation of Rule 30(a) and in each separate instance tallied by name the first, second and third class Mechanics as probative evidence of a Rule violation wherein it was alleged that Carrier maintained a disproportionate number of first and second class Mechanics while furloughing Helpers. In defense of its action, the Carrier maintained that it did not violate Rule 30(a) inasmuch as Rule 30(b) allowed for such disproportionate assignment "where the preponderance of work requires" as it did in the instant case. This was the basic Carrier argument of rebuttal in this unadjusted dispute until the final conference letter ten (10) months after the Organization first raised the issue of a Rule violation.

In its final letter of July 19, 1983, the Carrier notes for the first time new issues including (a) that the Claim was untimely filed, (b) was not a continuing Claim and that (c) restitution was a fatal variance with the initial Claim and without Rule support. The General Chairman did not rebut what was raised in final conference. Prior correspondence takes no exception to any of these issues. Organization letters of October 28th, November 29th, and December 14, 1982, for example are not challenged by the Carrier acknowledging that such disputes are "concerning a continuous claim . . ." These procedural issues nevertheless challenge the right to consider the substantive Rule before the Board. With respect to the procedural issues this Board does not find such arguments as persuasive when set against the merits of the case. In particular, a careful review finds no evidence that a modified Claim either misled the Carrier or resulted in a new Claim. As such, this Board turns to the merits of the case.

The issue before this Board in the instant case is whether Rule 30(a) or 30(b) is controlling and whether the evidence of record substantiates the alleged violation. The Organization maintained that Rule 30(a) was controlling in that the "type of work being performed was just routine B&B work". The record as established on property and not disputed by the Carrier, shows that the ratio of first, second and third class Mechanics in Gangs 40 and 41 when the Claimants were furloughed was as follows: five (5) first, six (6) second and one (1) helper (and subsequently none when Bolin was furloughed). As such, the language of the Agreement Rule and the probative evidence substantiate the Organization's Claim.

In support of Carrier's action, it is maintained that Paragraph (b) of Rule 30 allows the prescribed ratio of first-class Mechanics to either second-class or Helpers to be exceeded "where the preponderance of work requires". Carrier argues that "this requirement existed" and as such no violation occurred. It further maintains that it cannot and need not reduce forces proportionately.

This Board takes note that the probative evidence and controlling Rule establish a violation by the Carrier. Rule 30 clearly fixes Carrier's rights to establish crew size and restricts Carrier to the language of the Agreement. This Board notes that there is no evidence of record that Rule

30(b) was the controlling and applicable Rule. Even if it was work as contemplated by the Agreement in Paragraph (b), that section of the Rule does not support the ratios existing in the case at bar. Rule 30(b) is clear as to increasing the number of first class Mechanics. The evidence before this Board shows more second class than first class Mechanics. As such, Rule 30(b) which the Carrier maintains as controlling would also be violated. This Board must hold for the Organization in that Rule 30 does not permit Carrier to have proceeded in the manner herein determined. Claimants are due compensation for that period of time as indicated in the Claim as presented to this Board, when they were improperly in furloughed status.

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

That the parties waived oral hearing;

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 the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of July 1986.

CH

DISSENT OF CARRIER MEMBERS
TO
AWARD 26070, DOCKET MW-25719
(Referee Zusman)

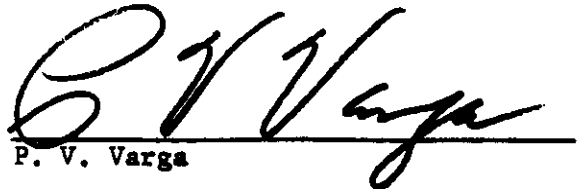
The Award in this case ignored the Carrier's timeliness argument which should have caused the Board to dismiss the claim, as improperly handled on the property, without addressing the merits.

Claimants were furloughed on February 22 and September 24, 1982. Claims concerning the February 22 furloughs were initially made on September 10 and November 17, 1982 - some 7-9 months after the occurrence. Claim concerning the September 24, 1982 furlough was made on December 1, 1982. The date furloughed is the date of occurrence required by Rule 90(a)(1); note Pages 1 and 3 of the Award in this regard. The furloughs only occurred once and as such are not continuing violations. Third Division Awards 14430, 23953, 23543, 21376, 21322, 20821, 20655, 19341, 15798, 14355, 12984, 12045. This argument was recognized as being properly raised at Page 2 of the Award, yet such was not found to be "as persuasive" in the desire to address the perceived merits of the case.

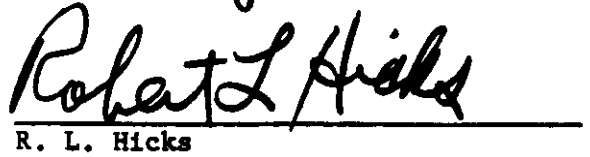
Further, even on the merits, the first phrase of Rule 30(a):

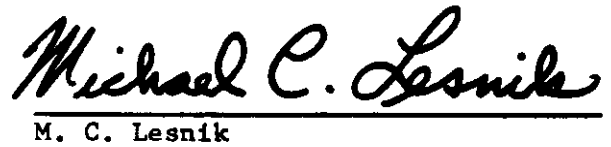
"....except as provided in paragraph (b)...."

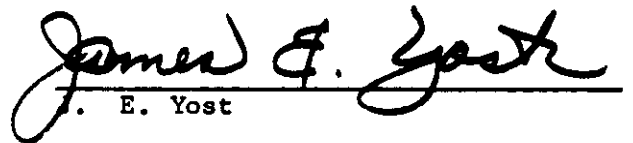
provides an exception. Carrier, on the property, detailed the specific work to be performed demonstrating that the "preponderance of the work required" substantiated the need for the higher classification. Such was never rebutted on the property, and as such the appropriate rule to apply was 30(b) and not 30(a).


P. V. Varga


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


J. E. Yost

