

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation (Amtrak)
(- Northeast Corridor

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

(1) The Carrier violated the Agreement when, effective November 13, 1983, it changed the working hours and days of Gang G-082 from 7:00 A.M. to 3:00 P.M., Monday through Friday to 10:00 P.M. to 6:00 A.M., Sunday through Thursday (System File NEC-BMWE-SD-878).

(2) The Agreement was also violated when the Carrier failed and refused to allow the employees assigned to Gang G-082 to exercise their seniority when their starting times were changed.

(3) As a consequence of the aforesaid violations, Messrs. P. J. Wilson, T. M. Ricks and P. L. Herder shall be compensated as follows:

(a) Mr. P. J. Wilson shall be compensated at the pro rata rate for:

November 14-18, 1983: 8 hours per day
November 21-23, 25, 1983: 8 hours per day
November 29-30, 1983: 8 hours per day
December 2, 1983: 8 hours per day
December 5-6, 1983: 8 hours per day
December 8-9, 1983: 8 hours per day
December 12, 1983 and all continuing violations:
8 hours per day

and he shall be compensated at the overtime rate for:

November 13-16, 1983: 8 hours per day
November 20, 1983: 4 hours
November 22, 1983: 8 hours
November 23, 1983: 2 hours
December 5, 1983: 5 hours
December 6, 1983: 8 hours
December 8, 1983: 6 1/2 hours
December 11-12, 1983: 8 hours and any continuing violations.

- (b) Mr. T. M. Ricks shall be compensated at the pro rata rate for:

November 14-18, 1983: 8 hours per day
November 21-23, 25, 1983: 8 hours per day
November 29-30, 1983: 8 hours per day
December 1-2, 1983: 8 hours per day
December 6-9, 1983: 8 hours per day
December 12, 1983 and all continuing violations:
8 hours per day

and he shall be compensated at the overtime rate for:

November 13-16, 1983: 8 hours per day
November 20, 1983: 4 hours
November 22, 1983: 8 hours
November 23, 1983: 3 1/2 hours
November 29, 1983: 8 hours
November 30, 1983: 8 hours
December 1, 1983: 8 hours
December 6-7, 1983: 8 hours
December 8, 1983: 6 1/2 hours
December 11, 1983: 8 hours
December 12, 1983: 8 hours and any continuing violations.

- (c) Mr. P. L. Herder shall be compensated at the pro rata rate for:

November 14-18, 1983: 8 hours per day
November 21-23, 25, 1983: 8 hours per day
November 28-30, 1983: 8 hours per day
December 1-2, 1983: 8 hours per day
December 12, 1983 and all continuing violations:
8 hours per day

and he shall be compensated at the overtime rate for:

November 13-16, 1983: 8 hours per day
November 20, 1983: 4 hours
November 22, 1983: 8 hours
November 23, 1983: 5 hours
November 27, 1983: 8 hours
November 28, 1983: 5 1/2 hours
November 29, 1983: 8 hours
November 30, 1983: 6 hours
December 11, 1983: 8 hours
December 12, 1983: 8 hours and any continuing violations.

(4) In addition, Messrs. Wilson, Ricks and Herder shall each be allowed the opportunity to exercise seniority pursuant to Rule 18 if they so desire."

FINDINGS:

The Third 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.

Separate Claims were filed by the General Chairman of the Organization for the three Claimants with the Carrier's Division Engineer, Philadelphia. These Claims have been combined under one Docket and are now before the Board. At the time the Claims were filed, the Claimants were working on Gang G-082. Effective November 13, 1983, the Gang's hours were changed to 10:00 PM - 6:00 AM, Sunday-Thursday workweek. The previous hours of the gang had been 7:00 AM - 3:00 PM, Monday-Friday. According to the Organization, Rule 42(b) mandates that when less "than three shifts are employed, the starting time of the employees must be between 6:00 and 8:00 AM." The Claims also allege that the Carrier was in violation of the Agreement when the Claimants were not allowed to exercise seniority as provided by Rule 42(e). Pay requests filed with the three Claims stated that the Claimants had not been compensated at the straight time rate for the 40 hour week of their regular shifts (7:00 AM-3:00 PM, Monday-Friday), and for the overtime they had worked outside their (former) regularly assigned hours for the dates in question. Although all of the Claimants held trackman assignments on the same gang, relief requested differed because of individual variances in vacation time and absences from service. These variable requests for relief are outlined in the Statement of Claim.

The first part of the Claim was denied by the Carrier on grounds that the gang in question was not protected by Rule 42(b), but rather fell under Rule 42(c)(5) which, according to the Carrier, "supercedes the starting work hours of Rule 42(b)." Secondly, that part of the Claim dealing with the exercise of seniority was denied on grounds that the Claimants lost their bumping rights under Rule 42(e) because they had accepted work on the new shift per Rule 42(c).

Pertinent provisions of that Rule read as follows:

"(a) When three (3) shifts are employed, the starting time of the first shift shall not be earlier than 6 a.m. nor later than 8 a.m. The second shift will start immediately following the first shift and the third shift will start immediately following the second shift.

(b) Except as provided in paragraphs (c), (f) and (g) of this Rule 42, when less than three (3) shifts are employed, the starting time of employees shall be between the hours of 6 a.m. and 8 a.m. (Track Production Gangs may be required to start between 5 a.m. and 8 a.m. from May 1 through September 30).

(c) Starting times other than those set forth in paragraphs (a) and (b) of this Rule 42 may be established for the following assignments:

1. Surfacing Gangs, when paid the district rate of pay.
2. Welding/Joint Elimination Gangs, when paid the district rate of pay.
3. Switch and Rail Renewal Gangs, when paid the district rate of pay. The term 'Switch and Rail Renewal Gangs' refers to gangs engaged in the renewal of frogs, switch points, stock rails and leads or the transposition of rail. (Emphasis in original)
4. Electric Traction Wire Train Gangs.
5. Inspections, Watchmen and ET 'Class A' men when assigned for protection purposes.

Employees filling assignments in any of the gangs established pursuant to this paragraph (c) shall be paid an incentive allowance of 25 cents per hour for all straight time hours worked. The incentive allowance shall be considered separate and apart from the basic rate of pay and shall not be subject to cost-of-living or general wage increases.

(d) The starting and ending time of tour of duty will be shown on advertisements.

(e) Starting times will not be changed without first giving employees affected thirty-six (36) hours posted notice and then not more often than every seven (7) days. Changes in starting times made under the provisions of this Rule 42 shall not require readvertisement; however, employees whose starting times are changed more than one (1) hour may elect to exercise their seniority to other positions in accordance with Rule 18.

(f) The provisions of this Rule 42 do not apply to:

1. Special Construction Gangs established in accordance with the provisions of the Agreement dated November 3, 1976.

2. Track gangs whose tour of duty is changed temporarily for two (2) or more consecutive days to conform to the working hours of Corridor Gangs in conjunction with which they are working.

3. Track Gangs when assigned temporarily to perform work in tunnels at night which on account of the density of traffic cannot be performed during normal working hours.

4. Drawbridge Operators, Drawbridge Tenders, Camp Overseers, Camp Car Attendants and Cooks, except that the provisions of paragraph (a) shall apply where three (3) shifts are employed.

5. New Haven Rail Welding Plant.

(g) Except as provided in paragraphs (c) and (f) of this Rule 42, starting times outside the hours specified in paragraphs (a) and (b) of this Rule 42 may not be established except by agreement, in writing, between the Director of Labor Relations and the General Chairman."

The Organization argues that the Claimants held seniority as Trackmen, were assigned to Trackmen positions when the dispute arose, and at that time were performing flagging work in conjunction with right-of-way repairs as members of Gang G-082. As such, according to the Organization, the Claimants held assignments in a classification different than any of those outlined in Rule 42(c). This is clear, according to this line of reasoning, if one examines the various classifications found in the Agreement's Work Classification Rule (Article I). This Article reads, in pertinent part, as follows:

"The description of each position title outlined in this Article is intended to cover the primary duties of that position and, in addition, it is understood that each title comprehends other work generally recognized as work of that particular classification.

* * *

33. Fire Inspector - except Northern District - Inspects structures and fire fighting equipment for fire safety.

34. Watchman-Highway Crossing - Protects traffic at grade crossings.

35. Watchman-Bridge - Patrols and protects bridges.

36. Watchman-Tunnel - Patrols and protects tunnels, including the approaches.

37. Watchman-Cut - Patrols and protects cuts.

38. Drawbridge Operator - Operates, lubricates and adjusts movable railroad bridges.

39. Drawbridge Tender - Assists Drawbridge Operator.

40. Trackman - Constructs, maintains, repairs, inspects, and dismantles track and appurtenances thereto, including right-of-way maintenance.

41. Stationary Engineer - except Northern District - Operates and makes minor repairs to stationary steam engines."

The Carrier, on the other hand, argues that the Claimants were not covered by Rule 42(b), but rather by Rule 42(c)(5) because they were, in fact, receiving a "...25¢ per hour incentive allowance." The Carrier further argues that the positions in Contractor Protection Gang G-082 consisted of duties whereby this gang was to provide Watchmen protection for contractor forces working on or near live track. Therefore, according to the Carrier, they were Watchmen.

First of all, the Board must observe that the language of the Agreement in Rule 42 does not say that the work classifications found therein receive substance, definition or content because of the 25¢ incentive allowance, and that this alone permits conclusions that any classification receiving the allowance ought to be included, by that fact, under 42(c)(5), or 42(c)(1) through (4) for that matter. On logical grounds, the argument by the Carrier does not support the point it is attempting to make with respect to this issue. Secondly, the Carrier argues that Gang G-082 was really a gang of Watchmen, not Trackmen. As proof of that the Carrier cites the fact that they were given the required 36 hour notice of a change in their starting times commencing November 13, 1983. The language of the Rule, as written, does not provide that such notice leads to the conclusion which the Carrier is attempting to establish. The Carrier further argues that Gang G-082 members were really Watchmen because its members provided protection for contractor forces working near or on live track. The Board must observe, however, that as a matter of general practice in the industry, Classification of Work Rules generally serve as a guidepost to other Rules of the Agreement when distinctions of the type found in Rule 42 are used. If such not be the case, the parties outline those exceptions in the Agreement itself, by means of a special Agreement, or Letter

of Understanding. The record is devoid of such evidence. The Carrier contends that during the 1981 negotiations and the resultant amendment to Rule 42 the negotiators never intended that the term "Watchman as it appears in Rule 42 was the Watchman as listed in Article I of the Scope and Work Classifications Rule." A review of the full record before it warrants the conclusion by the Board, however, that it is precisely this contention which the Organization objects to in the instant Claim.

The record supports the conclusion, on the merits, that the Organization has met its burden of proof and the Claims dealing with Rule 42(b) violations are sustained.

The second part of the Claim deals with the Carrier's alleged violation of Rule 42(e) because it did not permit the Claimants under this Rule, and under Rule 18(a), to exercise their seniority to other positions when the work schedule change was made by the Carrier on November 13, 1983. There is no dispute that the Carrier fulfilled the 36 hour notice requirement found in Rule 42(e). Rule 18 on the other hand reads, in pertinent part, as follows:

"(a) When force is reduced, employees affected shall have the right, within ten (10) days after the effective date of such reduction, to elect to take furlough or to exercise seniority to displace junior employees in accordance with the following provisions of this Rule."

The Carrier argues that the Claimants had forfeited displacement rights under Rule 42(e) by accepting the changed schedule and by working it for five days. The Organization argues that displacement rights under Rule 42(e) can take place under a ten day window period as stipulated by Rule 18(a).

Rule 18 deals with reduction in force. However, Rule 42(e) makes it clear, and its language is unambiguous, that "...employees whose starting times are changed more than one (1) hour may elect to exercise their seniority to other positions in accordance with Rule 18." In other words, such changes in starting time shall be interpreted in the same manner as reduction in force. Rule 18 clearly mandates that such employees, whose hours are changed, "...shall have the right, within ten (10) days after the effective date of such reduction (or in this instance, change in hours), to elect....to exercise seniority to displace junior employees...." The language and intent of these two Rules support the position of the Organization and this part of the Claim must also be sustained on the merits.

The Board must now address the question of remedy. The Organization seeks relief for 40 hours per week of the regular shifts the Claimants would have worked had the Rule at bar not been violated. Such relief is granted and is consistent with policy on this property of paying pro rata for days not worked in the event of settling Claims prior to their reaching this or some other forum of adjudication. Since the Claimants, in fact, worked other hours

than those they should have, because of the Rule violation, these can reasonably be interpreted as overtime hours, or as those in addition to the 40 hours the Claimants should have worked. Payment for the hours actually worked shall be, therefore, at the difference between pro rata rate received by the Claimants and overtime rate they would have earned for such work. Such conclusion is consistent with reasoning found in Third Division Award 25601, although that case dealt not with wrong hours worked, but with assignment of hours, in violation of the Agreement, to the wrong employee. That Award reviews precedent on this question, which need not be repeated here, and it concludes:

"Better reasoned opinions remedy an overtime violation with a make whole payment. Here the evidence shows that Claimant, if he had worked, would have earned 8 hours and 20 minutes at time-and-one-half. There is no element of retribution or punishment in such a remedy. Carrier and Claimant are placed in the same position they would have been had not Carrier violated the Agreement. Payment would have been made at the overtime rates. It is Claimant who would be penalized if he were reimbursed at straight time or only for actual hours worked."

See also Third Division Awards 13738, 19947, 21767 and 26508 inter alia. The Carrier cites various Awards addressing payment of overtime rate when Claims are sustained but the Awards it cites specifically deal with "punitive rates (which) are not (to be) awarded for work not actually performed" (Third Division Award 7110; See also Third Division Awards 7242, 9748, 10990 inter alia cited by Carrier). These Awards are not on point with the instant Claim. The Carrier also "takes exception" on the property because the relief requested in the Claims is "factually incorrect and excessive." In its correspondence with the Organization on the property the Carrier goes on to say, with respect to this point, that "...on some of the dates cited...the Claimants did not work due to voluntary absences and/or early departures." Absent additional information, however, by the Carrier on this issue, on the property, the Board is unable to honor its objections which it must view as pro forma. The Claimants shall be paid, therefore, pro rata, and overtime, relief as requested in the Statement of Claim, only on the dates therein requested. Contention by the Organization of continuing Claim is denied. Relief requested with respect to the Rule 42(e) violation shall be granted if the Claimants so desire.

A W A R D

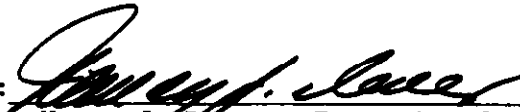
Claims sustained in accordance with the Findings.

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Award No. 27848
Docket No. MW-26596
89-3-85-3-335

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 27848, DOCKET MW-26596
(Referee Suntrup)

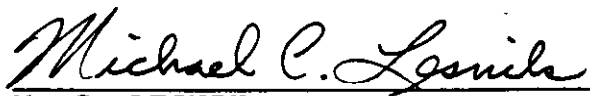
The Majority in this matter, with complete disregard of the record of the intent of Rule 42(c)(5) as negotiated by the parties in 1981, the undisputed and accepted payments to Claimants of the incentive allowance, and the method of change in operation of Gang G-082, went beyond the Rules involved to find a "guidepost" to nullify in arbitration a Rule bought and paid for in negotiations.

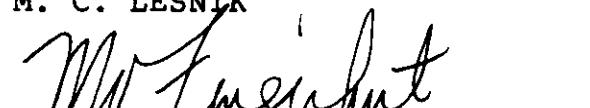
The Organization in this matter violated the clear intent and application of Rule 42(c)(5) causing the Majority to stretch to make the Organization's case. The Organization is well aware that the work classifications of "Watchman-Highway Crossing," "Watchman-Bridge," "Watchman-Tunnel" and "Watchman-Cut" are virtually never used job classifications. Similarly, the Organization is well aware of the daily use of Trackmen assigned out of contractor protection gangs, such as Gang G-082, who perform watchmen duties for contractors at other than regular starting times and receive the incentive allowance for such. These positions were especially prevalent during the NECIP Project when this Rule was negotiated. The record is devoid of any evidence that the "Watchmen" in Rule 42(c)(5), which term in that form is not in the Work Classification Rules, was intended to be those virtually never used classifications as the Organization asserted.

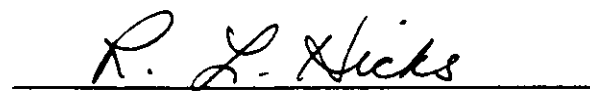
The Majority invoked a capriciously harsh penalty on the Carrier by awarding eight hours pay at the pro rata rate for each

day the Claimants would have allegedly performed work outside the hours they actually worked, as well as a premium payment for the hours they did work allegedly outside of what their tour of duty may have been. Therefore, for eight hours work on a day for which they were paid the Majority has awarded Claimants 20 hours pay. This is clearly more than a "make whole payment" and constitutes nothing short of punishment. The precedent used by the Majority in an attempt to rationalize such punishment is distinguishable from the instant case for the very reasons given by the Majority.

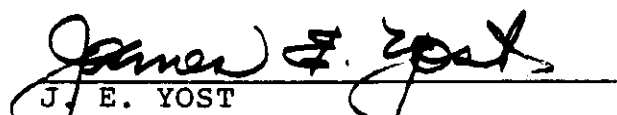
We vigorously dissent.


M. C. LESNIK


M. W. FINGERHUT


R. L. HICKS


P. V. VARGA


J. E. YOST