

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31529
Docket No. MW-31365
96-3-93-3-226**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Baltimore
(and Ohio Railroad Company)

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

- (1) The Carrier violated the Agreement when it failed and refused to pay Foreman L. J. Ohtola for the service performed (flagging trains) during his assigned lunch periods beginning May 10 through 31, 1991, while working and responsible for 707 Conditional Stop Orders [System File B-TC-8186/12(91-1406) BOR].
- (2) As a consequence of the violation referred to in Part (1) above, Foreman L. J. Ohtola shall be compensated for seven and one-half (7 ½) hours' pay at his time and one-half rate, for the time he performed service during his lunch period on the dates cited."

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 waived right of appearance at hearing thereon.

Claimant, a Section Foreman, timely filed a claim with the proper Carrier Officer contending that because he had a 707 Conditional Stop Order on a daily basis from May 10, through and including May 31, 1991 (which required his presence to protect train movements through the area of repair) he was requesting 7 ½ hours at the overtime rate for working through his lunch hours.

The Carrier denied the claim on the basis the Claimant failed to provide any specifics regarding work done during his lunch hours.

The Organization responded that the 707 Conditional Stop Order was in effect throughout Claimant's lunch hour and when in effect, the responsible party must remain in the immediate vicinity to protect the track, employees and traffic, and that should he leave the protected area, he would be subject to disciplinary action.

This is the nature of the dispute as this Board perceives it, although there exists other charges and countercharges which must be dealt with before the basics can be adjudicated.

When the claim was appealed, the Organization representative went off on a tangent concerning Foremen flagging for contractors, and then proceeded to link Claimant's performance with that of protecting a contractor. The Carrier stated that Claimant did not provide flag protection for a contractor. The Board finds that this issue is a nullity as Claimant, who filed his own claim, did not state he was flagging for a contractor. He simply stated he had 707 Conditional Stop Orders to protect work on various tracks within specific mile post areas on specific dates. This basic assertion was never refuted and is, therefore, accepted as fact.

The Carrier raised a historical practice defense contending no other employee had sought compensation for working through the lunch hour because of an existing 707 Conditional Stop Order. The Organization responded, without rebuttal, that up to about one year prior to the claim dates, before the dispatching offices were consolidated, the 707 Conditional Stop Order protection excluded the lunch hour. As an example, the Orders protected workers from 8:00 AM to 12:00 Noon, and then from 12:30 PM to 4:30 PM. Since the consolidation, however, they protected workers from 8:00 AM through to 4:30 PM.

The Carrier challenged the Organization to explain how the cited Rules were violated. The Organization did not respond adequately to explain how the cited Rules were violated, particularly Rules 20, 22 and 24 (a) and (b). Thus, these Rules and any arguments raised in connection therewith have not been considered. Rule 21, however, remains and is the center piece of this dispute. The Organization demonstrated how this Rule was violated.

The real question for this Board to resolve is whether stand-by time should be treated as time worked.

The Organization repeatedly stated that with a 707 Conditional Stop Order in effect, the responsible employee is tied to the specific area he is obligated to protect and that he cannot leave the area or even relax his vigilance.

The Carrier never denied this assertion, but countered that this is a lunch box industry and if he actually performed any work, such as flagging during his assigned lunch hour, it would allow compensation, but just because the Claimant was standing by and required to protect against train movements, it argued that Rule 21 is inapplicable.

The Organization cited Third Division Award 18153 as precedent setting. In deciding a dispute on all fours with this dispute, that Award held:

"We believe that when a U Train Order is in effect, as in this instance, Claimant was required to remain on hand at all times in order to avoid any unnecessary train delays and work with the dispatcher and engineer of any through trains so as to insure the safe passage of said trains through the work area. Claimant was thus required to perform service of a standby nature and in effect did perform service regardless of the fact that no trains passed through his work area on the dates in question during his noon lunch hour period.

As was said by this Board in Award No. 1675:

'.... Thus we find that Ashford was required to be ready for service during this period of time. It was stand-by service. It was of value to the Carrier or otherwise it would not have required Ashford to have been subject to call during this period of time. As someone has said, "They also serve who only stand and wait."

Claimant, having performed said work during his noon lunch hour period, is therefore entitled to compensation under the terms of Rule 23 of the Agreement, and thus we must sustain the claim."

It is the opinion of this Board that the instant claim must be sustained, however, the compensation cannot exceed that as provided in Rule 21 of the Agreement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of July 1996.