Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33854
Docket No. MS-32279
99-3-95-3-107

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

(Jeffrey J. Bainter
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

"On July 8, 1993 for seven (7) hours overtime Carrier violated the provisions of our effective working agreement (Nickel Plate Road) dated February 1, 1951 when it used Assistant Section Foreman R.A. Hicks assigned as such to Campbellstown Section in Campbellstown, Ohio to perform the work of Section Truck Driver-Laborer in driving a Section Truck to Seven Mile, Ohio, where he worked to repair a sun kink utilizing tools from the Section Truck and then returned to his assigned headquarters location at Campbellstown, Ohio. Carrier failed and refused to allow Section Truck Driver-Laborer J. J. Bainter who is qualified, available and entitled to operate the truck in question during normally assigned hours to perform the above mentioned work on overtime in accordance with established seniority.

'Seniority begins at the time the employee's pay starts when last entering service. Seniority will be restricted to the seniority districts, as hereinafter provided, on which seniority has been established. Rights accruing to employees under their seniority entitled them to consideration for positions in accordance with their relative length of service on their respective seniority districts.' Rules 1-(A) and 1-(B). Hence the agreement was violated when the Carrier chose to utilize assigned Assistant Section Foreman R.A. Hicks to perform the work of Section Truck Driver-Laborer and failed and refused to use Section Truck Driver-Laborer J. J. Bainter to perform the above mentioned work in accordance with my established seniority rights. I therefore request that I be paid seven (7) hours at my respective time and one half-rate of pay."

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 were given due notice of hearing thereon.

At all material times herein the Claimant was assigned as a Section Laborer-Truck Driver to the Campbellstown Section track maintenance gang with responsibility for the area in the vicinity of New Castle, Indiana, to Mill (Cincinnati), Ohio. On July 8, 1993 at Seven Mile, Ohio (Milepost 37.2), located in that territory, there was a sun kink, or an expansion of a section of rail due to excessive heat. Assistant Section Foreman Hicks, who resided at Eaton, Ohio, (Milepost 59.8) was called to inspect and repair the defect. Claimant, who resided at Muncie, Indiana, (Milepost 122) was not called to do so.

The Claimant contends that the work in question was within the scope of his position and that he therefore should have been assigned to complete the task. Because he was not, and therefore did not work the overtime that he would have worked if he had been assigned the task, he makes this claim for the overtime in question.

The Carrier on the other hand raises several different arguments. First, it contends that the work in question was not within the scope of the Claimant's position. This argument must be rejected however for Rule 52(c) states that "(a)ll work of . . . maintaining, . . and other work incidental thereto shall be performed by employes in the Track Department . . . ." The Carrier's second argument is that the defect in the section of rail created an emergency condition and that the Assistant Section Foreman was closer in geographic proximity than the Claimant. However, the record contains only an assertion that there was an emergency condition and Carrier did not provide any documentation as to the time and frequency of train traffic over the rail section in

question that would support its claim. Although it may not require much of a stretch of one's imagination to conclude that an expansion to rails could cause a serious accident, that fact alone does not mean that time was of the essence. Rather, the time and frequency with which the portion of rail in question was to be used would also be relevant and we have no such evidence on the record. Accordingly, we find that the Claimant had an enforceable claim to the work that was not nullified by any emergency condition.

The Carrier's final argument is that although there was a contract violation, the remedy must be payment at straight time, asserting that payment at any premium rate is punitive. In support of its argument it cites Board precedent, including cases decided on its own property. On the other hand, there is a line of authority, including cases decided on the property, that the appropriate remedy in these cases is that payment should be made at the appropriate premium overtime rate. Thus, there are clearly two schools of thought on this issue.

The Board squarely chooses to follow the school of thought that the appropriate penalty in this type of case is to pay the Claimant at the premium overtime rate of pay. Our reason for doing so is quite simple. When a contract is violated either the Carrier has done something it may not do, or failed to do something it was obligated to do. In either instance, and in this case, the Claimant should have and would have been assigned to perform the work in question and therefore should have and would have worked the time in question. Accordingly, a remedy to the contract breach is to restore the conditions that would have been extant had the breach not taken place. In this case those conditions would have been the time lost, which was overtime work. Thus, he must be compensated at the premium overtime rate.

AWARD

Claim sustained.

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 21st day of December 1999.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 33854; DOCKET MS-32279
AND
THIRD DIVISION AWARD 33855; DOCKET MS-32280

(Referee Robert Perkovich)

The Referee's decisions are simply incredible to say the least.

Some of his basic misconceptions demand that we set the record straight.

The penultimate paragraph of each Award reveals that the Referee totally misconstrued the Carrier's fundamental MITIGATION OF DAMAGES ARGUMENT, as evidenced by the fact that he somehow concluded:

> "The Carrier's final argument is that although there was a contract violation, the remedy must be payment at straight time, asserting that payment at any premium rate is punitive. In support of its argument it cites Board precedent, including cases decided on its own property." (Emphasis added)

Just because the Carrier deemed it appropriate to say something about the excessive remedy, so as to mitigate the damages, IF ANY, does not mean that it conceded that the Agreement was violated!

Second, and more important, the Board has, until now, consistently held that where two classes of the SAME CRAFT claim the exclusive right to perform certain functions the burden of proof standard is raised to a higher plateau. On July 8, 1993, the disputed work was performed by Assistant Section Foreman R. A. Hicks who, just like Section Laborer-Truck Driver J. J. Bainter, i.e., the Claimant, is a BMWE represented employee assigned to the Track Department. On August 6, 1993, the disputed work was performed by Section Foreman J. D. May who, just like Section Truck Driver-Laborer J. J. Bainter, i.e., the Claimant, is also a BMWE represented employee assigned to the Track Department.

Can it be that the Referee thought the Assistant Section Foreman and the Section Foreman were management supervisory employees, as opposed to BMWE represented employees? It certainly appears that such was the case, as evidenced by the fact that in Award 33854 and again in Award 33855 he rejected the Carrier's argument that:

". . . the work in question was not within the scope of the Claimant's position. This argument must be rejected however for Rule 52(c) states that '(all) work of... maintaining, ... and other work incidental thereto shall be performed by employes in the Track Department. . . .'"

Thirdly, as the Referee noted at Page 2 of Award 33854:

"On July 8, 1993 at Seven Mile, Ohio (Milepost 37.2) located in that territory, there was a sun kink, or expansion of a section of rail due to excessive heat. Assistant Section Foreman Hicks, who resided at Eaton, Ohio, (Milepost 59.8) was called to inspect and repair the defect. Claimant, who resided at Muncie, Indiana, (Milepost 122) was not called to do so."

Even assuming Hicks and the Claimant had an equal right to perform the disputed work, absent an Agreement restriction requiring, for example, the use of the senior employee, simple logic dictates that the one who resides closest to the work site and who, therefore, could presumably respond quicker, should be called to minimize traffic disruption.

Fourth, in Award 33855 the Referee's vision apparently blurred once again during his analysis of the point, counterpoint arguments of the respective parties as to whether an emergency condition existed, requiring a prompt response, and he, consequently, MISSED THE FOREST FOR THE TREES.

For the foregoing reasons we can only conclude that Awards 33854 and 33855 are PALPABLY ERRONEOUS.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

December 24, 1999

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENTING OPINION
TO
AWARD 33854, DOCKET MS-32279
AND
AWARD 33855, DOCKET MS-32280
(Referee Perkovich)

The Majority was correct in its ruling in Dockets MS-32279 and MS-32280, and nothing present in the Carrier's dissent distracts from the correctness and precedential value of these awards.

The dissent attempts to portray the referee as ignoring evidence that was submitted during the on-property handling of this case. Moreover, the dissent declares that the payment of the claim at the time and one-half rate was improper. First, as to the remedy, one only needs to review the Carrier's submission to the Board to conclude that it conceded that it had violated the Agreement when it improperly assigned the foreman and assistant foreman to perform the overtime work at issue here. The normal course of events when the Carrier presents a submission to the Board is for it to lay out how the Carrier did not violate the Agreement. A simple review of the Carrier's submission reveals that its first position was that the remedy requested was improper because it considered pay at the punitive rate excessive for time not worked. The Carrier did not lay out its submission in such a way as to show that the Agreement was not violated as its first position to the Board, but it began its position that the claim was excessive. Thereafter, it went on for more than eight (8) pages in its submission in an attempt to have the Board mitigate its damages by pleading for a remedy to be made at the straight time rate, rather than the time and one-half rate of pay. One does not need to be a rocket scientist to conclude that the Carrier simply conceded the violation of the Agreement. Thereafter, the Board held that the proper rate of pay for an Agreement violation is the rate of pay the claimant would have earned absent the violation. Such is in accordance with a myriad of awards of the Third Division and other tribunals, and citation of those awards here would be superfluous.

As a secondary issue, the Carrier alleged that it did not violate the Agreement. However, as was appropriately pointed out by the Majority, the Carrier failed to prove its affirmative defense that an emergency situation existed in these cases. The award is correct and stands as precedent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member