Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33855
Docket No. MS-32280
99-3-95-3-108

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 August 6 and 7, 1993 between the hours of 7:30 p.m. and 1:30 a.m. Carrier violated the provisions of our effective working agreement (Nickel Plate Road) dated February 1, 1951 when it used assigned Section Foreman J.D. May assigned as such to Campbellstown, Ohio did remove tools (spike mauls, track wrench and claw bars) and materials (tie plugs, track bolts and washers) from the Carrier's Section Truck located at Campbellstown, Ohio and place same into his personal vehicle then transported the above mentioned tools and material to the west end of Crescentville Siding where he used same to repair a switch. Carrier failed and refused to use Section Laborer-Truck Driver J. J. Bainter who was qualified, available and entitled to perform the above mentioned work in accordance with his 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 respective seniority districts.' Rules 1-(A) and 1-(B). Hence the agreement was violated when the Carrier chose to utilize assigned section Foreman J.D. May to perform the above mentioned work of Section Laborer-Truck Driver J. J. Bainter to perform the above mentioned work in accordance with my established seniority. I therefore request to be paid six (6) 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. At Crescentville, located in that territory, there is a switch consisting of switch points which must fit snugly against rails so that trains may move over the switch without impairment. On August 6, 1993 the switch points did not fit in that fashion and the condition was known by the Carrier while the Claimant was on duty. Despite that fact, Carrier permitted the Claimant to conclude his tour of duty for the day and later assigned a Section Foreman to inspect and remedy the defect.

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 Crescentville switch created an emergency condition and that the Section Foreman was closer in geographic proximity than the Claimant. Assuming for the purposes of argument that there was indeed an emergency condition, the claim that the Section

Foreman was closer and therefore able to complete the task sooner ignores the fact that the condition was known while the Claimant was on duty. Thus, he was farther away from the work than the Section Foreman only because the Carrier permitted him to return home after his tour of duty ended. 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