

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles 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 it assigned Repairman Foreman D. Meryl to perform overtime flagging work on December 13 and 18, 1984, instead of using Trackman R. Lanning, who was available and qualified and who had ordinarily and customarily performed such work with Gang Y-192 (System File NEC-BMWE-SD-1248).

(2) Trackman R. Lanning shall be allowed thirteen (13) hours of pay at his time and one-half rate."

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 employees 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.

On December 13 and 18, 1984, Claimant was flagging for Gang Y-192 while it did repair and maintenance work near a main-line track. At the end of the regular tour of duty, Claimant was sent home while the Repairmen continued to perform maintenance duties on overtime.

Claimant alleges that the Repairman Foreman took over flagging for the gang in violation of Rule 55 of the Agreement, and maintains that he should have been assigned to continue flagging on the overtime assignment. He seeks 13 hours of pay at the overtime rate for the two days in question.

Carrier states that no flagging was done (or required) on the overtime assignment, since the gang had moved to another location away from any main-line track for the overtime work.

The work the Repairman Foreman performed on overtime was work within his own classification, and work which Claimant was not qualified to perform, according to the Carrier. In addition, the Carrier argues, if this Board should find a violation, payment to the Claimant must be at straight-time rates since the Claimant did not actually work the overtime.

This Board is presented with two conflicting descriptions of what actually occurred during the overtime assignments on December 13 and 18, 1984. According to the Organization, the gang continued to work near a main-line track, and under the operating rules, a flagman was required to protect the gang.

The Carrier contends that at the end of the regular tour of duty on the two days, the gang moved to an access road, away from any main-line track. No flagman was required by the rules under these circumstances, and, according to the Carrier, no flagging was done by any member of the gang.

On May 2, 1986, during the course of the handling of the dispute on the property, the Claimant wrote to the Assistant to the President of the Organization:

"Concerning Doug Merrel and 13 hrs in question, I was assigned to him as a flagman for the TLM machine, this machine was tied up on the Magnolias siding, Edgewood, Maryland. The siding is adjacent to high speed track 6 ft away, I flagged for Doug for 10 hrs. Come quitting time, Doug told me he couldn't keep me flagging no more on overtime because his Supt Mike McAdams told him there would be no overtime. I then went back to Perryville MW Base, spoke to Engenier Mike Albanese. He said if they are still working on the machine next to live track, Doug Merrel is required to have a flag man. I went back out the the TLM with a note from Mike Albanese stating to keep me flagging, Doug Merrel tore the letter, stopped my time and sent me back in. I feel I should get paid for 13 hrs, because Doug was flagging for the Mechanics, where as a foremans job specifically states that he will observe the men working under him and not flagging." (sic)

In response, on May 19, 1986, the Repairman Foreman submitted the following:

"The following voluntary statement is made without union representation being required on my part.

On Tuesday, December 13th, 1985 (sic) during our normal tour of duty which was 6:00 a.m. to 4:30 p.m. maintenance work was performed in and around the T.L.M. Machine. During that specific time frame flag protection was required and this protection was performed by Messrs. H. Wolf and R. Lanning.

After the normal tour of duty, overtime work was relocated to the access road clear of all main-line tracks. Therefore, flagging protection was not required and these two (2) employees (i.e., Messrs. Wolf and Lanning) were taken back to the camp facility at Perryville, Maryland.

Discussions by Messrs. Wolf and Lanning to the Equipment Engineer, Mr. M. J. Albanese returned these two (2) employees to the area at which we were working.

It should be noted that I do recall a handwritten note being given and received by myself with respect to their alleged contention from Mr. Albanese. However, it is further noted that at no time did Mr. Albanese confer with me as to the specific work being done. At this time, I cannot properly recall with what I did with Mr. Albanese's handwritten note.

As for December 18th, 1985 (sic), the work being performed after normal work hours was also outside the immediate area of main-line track and on the access road.

Furthermore, at no time during the overtime period on either December 13th, 1985 (sic) or December 18th, 1985 (sic) was my Repairmen personnel or myself used to serve for 'flag protection.'"

We note that both statements were given a year and a half after the events in dispute, and we recognize that memories can fade over that length of time. However, there are deficiencies which cannot be ignored.

Claimant does not identify when the events he described occurred (and the Repairman Foreman mistakenly identifies the year). From the Repairman Foreman's statement, we assume Claimant is referring to the events of December 13, 1984. There is no indication at all from the Claimant concerning the December 18, 1984, events.

As of the date the Claimant wrote his letter, the Organization was already aware of the Carrier's position that the gang had relocated to an access road, where a flagman was not required. While Claimant states that he returned to the TLM with a note from the Engineer (suggesting that the gang was still alongside the main line at that point) the Repairman Foreman implies that the Claimant found them on the access road. In either case, there is no evidence in the Claimant's statement that the gang remained by the TLM machine for the seven overtime hours claimed.

As already mentioned, the Claimant offers no evidence at all that the gang worked alongside a main-line track for the six hours of overtime on December 18, 1984.


The burden of proof rests with the Organization in this dispute. Absent persuasive contradictory evidence, we must accept the Carrier's assertion that no flagging was performed on the two overtime assignments.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.