

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 required Messrs. M. Puzio, R. De Carlo, T. Miller, G. Montour, R. Aylor, C. Perch, F. Picciotti, K. McDaid, and D. Pollard assigned to Gang C-242 to suspend work for four (4) hours on January 22, 1985 (System File NEC-BMWE-SD-1242).

(2) Because of the aforesaid violation, the claimants shall each be allowed four (4) hours of pay at their respective straight time rates."

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 January 22, 1985, Gang C-242 reported for its assignment at Bridge No. 60.07 over the Susquehanna River. It was determined that the weather was too severe that day to permit work on the bridge, and the gang was sent home with four hours' pay.

Rule 52 states, in pertinent part:

"When the foreman and supervisor in charge determine that weather conditions prevent work being performed, employees in gangs of ten (10) or more reporting at their regular starting time and place for the day's work will be allowed a minimum of four (4) hours . . .; if held on duty beyond four (4) hours . . . they will be paid on a minute basis."

The Organization alleges that the Carrier violated Rule 52 when it paid Gang C-242 for only four hours on the Claim date, since the gang consisted of fewer than ten employees. Gangs of fewer than ten are guaranteed eight hours of work under Rule 32 (Forty Hour Work Week), the Organization maintains.

The Carrier contends that Gang C-242 was authorized for eleven men; therefore, Rule 52 provides that only four hours of pay was required in this case.

Other issues raised by the parties already have been addressed in Third Division Award 27810. It has been established that the weather was sufficiently severe to prevent the assigned work on the bridge, and the Carrier was not obligated to find other work for the employees. The crucial issue in this case is the size of the gang involved as it relates to Rule 52.

The Carrier provided with its Submission a list of assigned employees on the Baltimore Division as of January 15. (The year was not indicated; we presume it was 1985.) This list shows that Gang C-242 consisted of Foreman Puzio, eight named employees (the Claimants), and three vacant positions. The Organization cites another Carrier document, dated September 15, 1984, which lists the size of force for Gang C-242 as "08." Since this is an older document, it is not as persuasive as the Carrier's January 1985 list.

The record indicates that Foreman Puzio and all eight gang members identified by name in the Carrier's list reported for work on January 22, 1985.

The Carrier argues that Gang C-242 was authorized for eleven men, and the authorized size is controlling. (Presumably, the Carrier does not include the Foreman in the size of the gang, since its own document shows eleven positions plus a Foreman.) Otherwise, the Carrier states, the application of Rule 52 could be manipulated by those employees in excess of nine simply failing to report. The Carrier contends that it "has used the authorized gang strength to determine the applicability of Rule 52 since it was negotiated in 1982."

The Organization explains that prior to the 1982 modification to Rule 52, the Carrier was obligated to pay all employees for eight hours if they reported to work as assigned. In recognition of the fact that some work assignments were unsafe in severe weather and that it was difficult for the Carrier to find alternative work for large gangs, the Organization agreed to a compromise, permitting the Carrier to send large gangs home with only four hours' pay. It was understood, the Organization maintains, that alternative routine maintenance work always could be found for smaller gangs. Therefore, the key issue under Rule 52, according to the Organization, is the number of employees for whom the Carrier would have to find alternative work. In this case, the number was fewer than ten.

The Carrier has not disputed the Organization's description of the genesis of the 1982 modification to Rule 52. Therefore, we accept that explanation, and find that it adds considerable weight to the Organization's argument that Rule 52 should not have applied in this situation.

A careful reading of Rule 52 also clarifies the meaning of the provision. Rule 52 applies to "gangs of ten (10) or more reporting at their regular starting time and place." Hence, it is the number of employees who report to work that determines whether employees sent home due to severe weather will be paid for a minimum of four hours or paid for a full day.

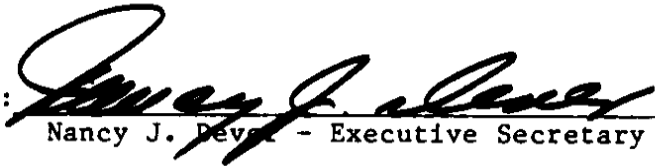
It should be noted, too, that Gang C-242 only had a Foreman plus eight employees assigned on January 22, 1985. Three "authorized" positions were unassigned. This particular case did not involve any employees failing to report.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 27901, DOCKET MW-27270
(Referee Sickles)

In Third Division Award 27810 (Sickles) involving Rule 52, the Board held:

"It is an accepted principle that once an issue between the same parties has been decided, a subsequent arbitration on that same issue will follow the original holding unless it can be shown that the original decision was palpably erroneous. This principle applies regardless of how the subsequent arbitrator might have ruled had he heard the case in the original instance."

One of the Awards furnished the Majority was Third Division Award 26778, wherein the Board held:

"Thus, Rule 52 permits payment of less than eight hours for shortened work days due to weather related conditions for gangs of ten or more. Under the circumstances of this case, we do not agree with the Organization that Rule 52 is inapplicable because the actual number of employees reporting for work on the days in issue was less than ten per gang. It is undisputed that the gangs were authorized at levels in excess of ten employees per gang. A fair reading of Rule 52 is consistent with the Carrier's position that the overall makeup of the gang dictates application of the Rule."

Awards 26778 and 27901 involve the same issue. The only Award cited by the Majority was Award 27810. Notwithstanding what the Board held therein, the Majority here made no effort to distinguish Award 26778. In our view, since Award 27901 did not find Award 26778 palpably erroneous, Award 27901 is itself palpably erroneous.

See Award 27773 involving the very same issue wherein the Board adhered to the "accepted principle" and followed the precedent established by Award 26778.

Dissent to Award 27901
Page 2

We Dissent.

Michael C. Lesnik

M. C. LESNIK

Mr Fingerhut

M. W. FINGERHUT

R. L. Hicks

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P. V. Varga

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