Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32518
Docket No. MW-31603
98-3-93-3-611

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Maintenance of Way equipment operators assigned to all Rule 89, 90A and 90B Gangs and who were transported via Maintenance of Way vehicles to and from the work site were not properly compensated for the time spent traveling to and from the designated work site beginning July 28, 1992 and on a continuing daily basis thereafter (System File NEC-BMWE-SD-3176 AMT).

(2) As a consequence of the violation referred to in Part (1) above:

'. . . all such MW Equipment Operators on the above referenced gangs who are driven in MW vehicles to and from the job site to and from their camp cars or motels be compensated as follows:

1. half time at the MW Equipment Operators rate for their particular class all hours since July 28, 1992 in which such Equipment Operators received straight time pay when traveling to and from the job site to and from the camp cars or motels when such traveling occurred in excess of the normal ten hour day; and

2. time and one half at the MW Equipment Operator rate for their particular class for 1/2 hour per day for each day since July 28, 1992 in which such MW Equipment Operator rode to and from the worksite to and from the camp cars and motels as passengers in which such Equipment Operators were not paid one half hour per day of travel time.'"

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.

In this claim, the Organization asserts that Carrier violated Rule 63(c) when it failed to treat as time worked time the Claimants spent riding between their headquarters and their work site. The Organization insists that Rule 63(c) considers this time as time worked because Claimants were required to handle tools to and from highway vehicles each time they were transported between their headquarters and their work sites.

The Organization maintains that the Work Site Reporting Rule, Article VI of the June 27, 1992 Agreement, does not modify this result. In the Organization's view, all Article VI did was exclude certain specified travel time between the time the employees reported at their headquarters and the time they arrived at their work site. However, according to the Organization, Rule 63(c) deals with time worked and not travel time and, therefore, provides no basis for the Carrier to decline the payment the Organization claims has always been provided pursuant to Rule 63(c). Thus, the

Organization insists that Article VI did not change the historic practice of paying employees, pursuant to Rule 63(c), for time worked in handling tools to and from highway vehicles each time employees were transported between their headquarters and their work site.

Carrier, on the other hand, disputes the Organization's claim that M/W Equipment Operators (EWEs) have traditionally been paid for time traveling as time worked. Carrier insists that these individuals have never been so paid under Rule 63(c) of the Agreement. Carrier maintains that it has consistently applied Rule 63(c) as not addressing payment for an employee carrying personally owned tools. Instead, Carrier insists that the tools referred to in Rule 63(c) are company owned tools used by the work unit in general. In Carrier's view, Claimants' election to remove their personal property at the end of each day does not warrant the payment specified in Rule 63(c). Carrier insists that the Organization has been unable to demonstrate that this payment was paid under Rule 63(c) in the past. Without such evidence, argues Carrier, it is unnecessary to reconcile the relationship between Rule 63(c) and Article VI of the June 27, 1992 Agreement.

Moreover, Carrier insists that the new Work Site Reporting Rule takes precedence over the general travel time provisions set forth in Rule 63(c). It cites a series of Awards in support of this proposition. For all of the foregoing reasons, Carrier insists that the Organization's claim is without merit.

Rule 63 reads as follows:

"RULE 63

WAITING OR TRAVELING BY DIRECTION OF MANAGEMENT

An employe waiting, or traveling by direction of AMTRAK by passenger train, motor car, or any other method of transportation, will be allowed straight time for actual time waiting and/or traveling during or outside of the regularly assigned hours, except:

* * *

(c) Employees traveling on a motor car, trailer or highway vehicle, who are required to operate, flag or move the car or trailer to or from the track, or handle tools to and from such vehicles, shall be paid for time riding as time worked."

Article VI states:

"ARTICLE VI - WORK SITE REPORTING

Employees in Rule 89, 90 A, B, C, Corporate Agreement Rule 29 gangs and employees in protection, and/or flagging positions and Bridge & Building Inspectors shall not be paid for traveling an aggregate total of 30-minutes per day. Travel time in excess of the aggregate 30-minutes per day shall be compensated in accordance with the rules of the Agreement. Employees will not be paid less than the bulletined time of the job due to uncompensated travel time.

Specifically excepted from this rule are foremen, fuel truck, boom truck, dump truck drivers, and truck drivers transporting people to and from a work site. Foremen and such drivers shall not be subject to uncompensated travel time.

NOTE: Thirty (30) minutes aggregate total means no more than a total of 30 minutes unpaid travel time in a 24-hour period."

This case should present the question of the proper relationship between the new Work Site Reporting Rule (Article VI) and the old Waiting and Traveling Rule (Rule 63). The parties legitimately differ as to their view of the relationship or lack of the relationship regarding these two Rules.

However, we are unable to resolve this underlying issue. This is so because there is an irreconcilable dispute of fact in the record. The parties have steadfastly insisted upon different interpretations and applications of Rule 63(c) in the past. According to the Carrier, travel time with personal tools has never been treated as working time on the property. In contrast, the Organization insists that such travel has always been treated as working time by the Carrier.

Because the cornerstone for determining the relationship between Article VI and Rule 63(c) is an agreed upon understanding and interpretation of how Rule 63(c) has been applied from 1945 to 1992, this irreconcilable dispute in fact makes it impossible for the Board to address the fundamental question presented by the claim.

Stated otherwise, without being able to reconcile this factual dispute, we are required to dismiss the claim without resort to the underlying dispute of the relationship between Rule 63(c) and Article VI. That is, we are dismissing the claim due to an irreconcilable factual dispute without determining the meaning of Rule 63(c) nor of its relationship, if any, to Article VI.

The Board regrets that no other conclusion is possible regarding this important and interesting question.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 1998.

LABOR MEMBER'S DISSENT
TO
AWARDS 32518, 32519, 32520 AND 32521
DOCKETS MW-31603, MW-31604, MW-31605 AND MW-31606
(Referee Scheinman)

In these awards, the Majority failed to reach a decision concerning the merits of the cases because of an alleged conflict in facts. These cases were the subject of an intense referee hearing wherein the Carrier brought in its own representative to argue its position. Early on during the referee hearing, the Carrier's representative admitted that up until June 27, 1992, the date that Article VI went into effect, the employes who were required to carry tools were paid as time worked for the time spent traveling from the headquarters point to the work site. Hence, any question as to the application of Rule 63(c) prior to the effective date of Article VI was clearly defined by the Carrier. The thrust of the Carrier's argument was that Article VI was meant to negate Rule 63(c); however, this view was in the Carrier's eyes only. The Organization pointed out that if it was the parties' intention to have Article VI negate or amend Rule 63(c), which the Organization vehemently argued that it did not, it would have been a simple matter for the parties to make such an adjustment in Rule 63(c). Because it is crystal clear that the parties did not make any such adjustment to Rule 63(c) in relation to Article VI speaks for itself.

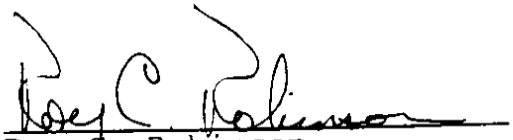
As was argued by the Organization, Rule 63(c) is crystal clear and the Board should not have hesitated to sustain the claims. But as fate would have it, the Majority searched for a reason to dismiss the claims and latched on an obscure allegation found within the Carrier's final denial of the cases on the property to justify its actions. The problem with the Majority's search for a reason to dismiss the cases was the Carrier representative's earlier admission that the employes who were required to carry tools had always been compensated therefor as time worked and its allegation that Article VI amended Rule 63(c). Hence, the Majority's opinion that:

AWARD 32518:

> "Because the cornerstone for determining the relationship between Article VI and Rule 63(c) is an agreed upon understanding and interpretation of how Rule 63(c) has been applied from 1945 to 1992, this irreconcilable dispute in fact makes it impossible for the Board to address the fundamental question presented by the claim."

is erroneous because the Carrier had already admitted that such employes had been compensated for carrying tools as time worked prior to the adoption of Article VI. This Board has held that in rules cases such as these, the burden is on the Organization to prove through a clear rule or past practice that its case should prevail. In these cases, the Organization had proven both criteria and the Majority ignored its responsibility to make a findings on the merits.

Respectfully submitted,



Roy C. Robinson
Labor Member