

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32556
Docket No. MW-31406
98-3-93-3-386

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Chesapeake and
(Ohio Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier required B&B Foreman G. Hayes to remain at his work site performing the work of obtaining OTE work authorities, monitoring his radio and permitting train traffic through his work area during his designated (1/2 hour) meal period near St. Albans, West Virginia beginning on September 23, 1991 and continuing [System File C-TC-8437/ 12(92-167) COS].**
- (2) As a consequence of the aforesaid violation, B&B Foreman G. Hayes shall be allowed one-half (1/2) hour per day at his straight time rate of pay beginning September 23, 1991 and continuing until this matter is resolved."**

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.

The original claim herein referred to the Claimant being required "to remain in the area and monitor his radio to allow any train traffic to move through his work area." The Carrier properly notes that the Statement of Claim, as provided by the Organization, amends the original claim in its reference to "obtaining OTE work authorities" during the Claimant's meal period. The Board agrees that this amendment is improper; it will not be considered in the following discussion.

What gave rise to the claim is the fact that the Claimant was required to obtain or alternately was given "work authority" throughout the Claimant's workday. During the claim-handling procedure, the Organization asserted this was a change from procedure, stating that previously "Foremen were not required to hold the track all day long" but, rather, were given authority to hold a track until a specified meal period and then were given renewed authority following the meal period. As a result, the Foreman previously was without track responsibility during the meal period.

The Board finds nothing in the record to contradict this assertion.

Third Division Award 31529, a former Baltimore and Ohio Railroad Company case, concerned the virtually identical situation. Award 31529 involved a Foreman under a 707 Conditional Stop Order, commencing May 10, 1991, four months prior to the claim here under review. As here, Award 31529 stated:

"The Carrier raised a historical practice defense contending no other employee had sought compensation for working through the lunch hour because of an existing 707 Conditional Stop Order. The Organization responded, without rebuttal, that up to about one year prior to the claim dates, before the dispatching offices were consolidated, the 707 Conditional Stop Order protection excluded the lunch hour. As an example, the Orders protected workers from 8:00 AM to 12:00 Noon, and then from 12:30 PM to 4:30 PM. Since the consolidation, however, they protected workers from 8:00 AM through to 4:30 PM." (Emphasis added)

Relying on Third Division Award 18153, Award 31529 in effect found that stand-by time should be treated as time worked and sustained the claim. To reach a different conclusion, the Board now must be given a basis to determine that Award 31529 is erroneous. The Carrier Members' Dissent to Award 31529 simply states that the Organization's contention of a "change" following dispatch centralization is simply a "tall tale," yet the Carrier here leaves this contention entirely without rebuttal in its on-property handling of the dispute. Further, Award 31529's reference to a 12:00 Noon to 12:30 P.M. lunch period was merely an "example," with no indication that this was the period selected in each instance.

There is no dispute that a Foreman called upon to "work," that is, arrange for passage of a train, etc., during a meal period (and given no other meal period) is entitled to the additional pay cited in Rule 42. Yet the full-day "work authority" (which, again for emphasis, the Organization states is a procedural change) certainly calls for uninterrupted Foreman responsibility.

The Carrier raises a number of defenses, none of which is convincing to the Board. First, the Carrier refers to the requirement that "regular meal periods shall be observed at the work site." This does not imply, however, that a "meal period" has been eliminated.

Next, the Carrier discusses the "higher rate for Foremen to compensate them for the additional supervisory duties." Again, this does not imply that Foremen have lost a "meal period."

The Carrier also refers to Operating Rule 707, Paragraph 6, which the Carrier contends gives the Claimant "an option to delegate to another employee the authority to allow trains to pass." Further, the Carrier states that, because the Claimant is "in constant contact with the train dispatcher," he should therefore "have had advance knowledge of any train activity in his area" and thus can readily schedule a meal period. The Organization states these points were not raised during the claim-handling procedure and thus are "new argument" which may not be considered. The Board agrees. Even if considered, is the Carrier suggesting the Foreman can abandon his responsibility at any time just by delegating his authority and/or having knowledge of the absence of train traffic?

The Board returns to the initial point: There was a procedural change as to the length of the work authority, an assertion uncontested by the Carrier. Remedial action by the Carrier is readily available, simply by direction as to how and when the Foreman is relieved of responsibility for the purpose of the designated meal period. Without such provision, the Board finds no basis not to support the conclusion of Awards 31529 and 18153.

Having reached this conclusion, however, the Board finds insufficient justification for the remedy sought by the Organization. Absent is hard evidence that the Claimant, in fact, actually went without a break for a meal period during the prescribed hours in Rule 42. However, continuation of the uncontradicted circumstances as outlined by the Organization leaves wide open the question of remedial payment in future identical instances.

The Award therefore will sustain Paragraph 1 of the claim and deny Paragraph 2 of the claim.

AWARD

Claim sustained in accordance with the Findings.

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 29th day of April 1998.