

PUBLIC LAW BOARD NO. 4259

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
)
TO) AND
)
DISPUTE) NATIONAL RAILROAD PASSENGER CORPORATION
) (AMTRAK) - NORTHEAST CORRIDOR

QUESTION AT ISSUE:

What is the proper application of the incentive pay provisions of Rule 42?

BACKGROUND:

This case involves the interpretation and application of Rule 42 as it was revised in an agreement dated January 22, 1987. Rule 42 as it existed prior to January 22, 1987 read as follows:

Starting Time Hours - Change In

(a) When three (3) shifts are employed, the starting time of the first shift shall not be earlier than 6 a.m. nor later than 8 a.m. The second shift will start immediately following the first shift and the third shift will start immediately following the second shift.

(b) Except as provided in paragraphs (c), (f) and (g) of this Rule 42, when less than three (3) shifts are employed, the starting time of employees shall be between the hours of 6 a.m. and 8 a.m. (Track production Gangs may be required to start between 5 a.m. and 8 a.m. from May 1 through September 30).

(c) Starting times other than those set forth in paragraphs (a) and (b) of this Rule 42 may be established for the following assignments:

1. Surfacing Gangs, when paid the district rate of pay.
2. Welding/Joint Elimination Gangs, when paid the district rate of pay.
3. Switch and Rail Renewal Gangs, when paid the district rate of pay. The term "Switch and Rail Renewal Gangs" refers to gangs engaged in the renewal of frogs, switch

(2) points, stock rails and leads or the transposition of rail."

4. Electric Traction Wire Train Gangs.

5. Inspectors, Watchmen and ET "Class A" men when assigned for protection purposes.

Employees filling assignments in any of the gangs established pursuant to this paragraph (c) shall be paid an incentive allowance of 25 cents per hour for all straight time hours worked. The incentive allowance shall be considered separate and apart from the basic rate of pay and shall not be subject to cost-of-living or general wage increases.

(d) The starting time and ending time of tour of duty will be shown on advertisements.

(e) Starting times will not be changed without first giving employees affected thirty-six (36) hours posted notice and then not more often than every seven (7) days. Changes in starting times made under the provisions of this Rule 42 shall not require readvertisement; however, employees whose starting times are changed more than one (1) hour may elect to exercise their seniority to other positions in accordance with Rule 18.

(f) The provisions of this rule 42 do not apply to:

1. Special Construction Gangs established in accordance with the provisions of the Agreement dated November 3, 1976.

2. Track Gangs whose tour of duty is changed temporarily for two (2) or more consecutive days to conform to the working hours of Corridor Gangs in conjunction with which they are working.

3. Track Gangs when assigned temporarily to perform work in tunnels at night which on account of the density of traffic cannot be performed during normal working hours.

4. Drawbridge Operators, Drawbridge Tenders, Camp Overseers, Camp Car Attendants and Cooks, except that the provisions of paragraph (a) shall apply where three (3) shifts are employed.

5. New Haven Rail Welding Plant.

(g) Except as provided in paragraphs (c) and (f) of this Rule 42, starting times outside the hours specified in paragraphs (a) and (b) of this Rule 42 may not be established except by agreement, in writing, between the Director of Labor Relations and the General Chairman.

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There is no dispute, generally speaking, over the meaning and application of this language. Basically, the Carrier could have non-standard starting times (those outside the brackets of rule 42 (a) and (b) for certain gangs as set forth in 42 (c). If the Carrier did establish non-standard times for such gangs the employees were entitled to 25 cents per hour "incentive pay" for all straight time hours worked. Additionally, there was no dispute that second or third shift employees who had standard starting times under 42 (a) did not qualify for incentive pay.

The Organization pursuant to its Section 6 notice dated August 21, 1984, sought to modify Rule 42. The notice was handled locally. Their proposal read as follows:

"Starting Time Hours - Change In:

"(a), (b) same

"(c) add: The provisions of this paragraph shall apply to Surfacing Gangs and Switch and Rail Renewal Gangs when such gangs are engaged in work exclusively related to surfacing and switch and rail renewal work. Should such gangs be used for work other than surfacing and switch and rail renewal, their assigned hours will be subject to paragraphs (a) and (b) of this Rule.

"Change incentive allowance to the following: Five (5) percent increase over the base hourly rate for employees working second shift.

"Ten (10) percent increase over the base hourly rate for employees working third shift.

"These incentive allowances shall apply to all employees working the shifts listed supra, including employees working in gangs established pursuant to Rules 89, 90-A, 90-B and 90-C.

"(d), same

"(e), (f) delete

"(g) same

"(h) Eight hour shifts will be concurrent with the calendar day. i.e., shifts will be midnight to 8:00 a.m., 8:00 a.m. to 4:00 p.m. and 4:00 p.m. to midnight."

It is also necessary to note that the Organization on April 30, 1984 served a Section 6 notice--to be handled nationally. The portion of that notice relevant to this dispute is the proposal for a shift differential. The proposal read as follows:

"Shift Differentials"

"In addition to all other wage payments required, effective July 1, 1984, all employees shall be paid shift differentials of five per cent (5%) of the current applicable hourly wage rate each hour for all work on any shift beginning after 2 p.m. and before 8 p.m. and ten per cent (10%) of the applicable hourly wage rate each hour for all work on any shift beginning after 8 p.m. and before 6 a.m. This proposal contemplates increases in tandem with all subsequent wage adjustments."

It is clear that if accepted the national proposal would have extended a shift differential to all second and third shift employees including those that had standard starting times under Rule 42 (a). However, it is undisputed that the Union's national proposal for a shift differential was resisted by the Carriers and was ultimately withdrawn and did not become part of the National Agreement.

Pursuant to the local Section 6 notice the Parties engaged in protracted bargaining with respect to Rule 42 and other issues. The Carrier made a written proposal in an effort to resolve the Union's demand to modify Rule 42. Their proposal was accepted by the Union and became effective January 22, 1987. The new Rule 42 reads as follows:

Starting Time Hours - Change In

(a) When three (3) shifts are employed, the starting time of the first shift shall not be earlier than 6 a.m. nor later than 8 a.m. The second shift will start immediately following the first shift and the third shift will start immediately following the second shift.

(b) Except as provided in paragraphs (c), (g) and (h) of this Rule 42, when less than three (3) shifts are employed, the starting time of employees shall be between the hours of 6 a.m. and 8 a.m. (Track production Gangs may be required to start between 5 a.m. and 8 a.m. from May 1 through September 30).

(c) Starting times other than those set forth in paragraphs (a) and (b) of this Rule 42 may be established for the following assignments:

1. Surfacing Gangs, when paid the district rate of pay.
2. Welding/Joint Elimination Gangs, when paid the district rate of pay.
3. Switch and Rail Renewal Gangs, when paid the district rate of pay. The term "Switch and Rail Renewal Gangs" refers to gangs engaged in the renewal of frogs, switch

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points, stock rails and leads or the transposition of rail."

4. Electric Traction Wire Train Gangs, Electric Traction Hi-Rail Platform Truck Gangs.

5. Inspectors, Watchmen and ET "Class A" men when assigned for protection purposes.

6. One Maintenance Gang per former operating Division (three (3) gangs total) on the Southern District and one Maintenance Gang on the Northern District, when paid the district rate of pay, between March 15 and November 15, each gang with a consist no greater than ten (10) which will include a Foreman and Truck Driver. The March 15 to November 15 period may be extended by written agreement between the Assistant Chief Engineer Maintenance of Way and Structures and the appropriate General Chairman.

(d) Employees filling assignments in any of the gangs established with starting times other than between 6 a.m. and 8 a.m. (5 a.m. and 8 a.m. from May 1 through September 30 for Track Production Gangs) shall be paid an incentive allowance of 55 cents per hour for all hours, or portion of an hour, worked. The incentive allowance shall be considered separate and apart from the basic rate of pay and shall not be subject to cost-of-living or general wage increases.

(e) The starting time and ending time of tour of duty will be shown on advertisements.

(f) Starting times will not be changed without first giving employees affected thirty-six (36) hours posted notice and then not more often than every thirty (30) days. Changes in starting times made under the provisions of this Rule 42 shall not require readvertisement; however, employees whose starting times are changed more than one (1) hour may elect to exercise their seniority to other positions in accordance with Rule 18.

(g) The provisions of this rule 42 do not apply to:

1. Special Construction Gangs established in accordance with the provisions of the Agreement dated November 3, 1976.

2. Track Gangs whose tour of duty is changed temporarily for two (2) or more consecutive days to conform to the working hours of Corridor Gangs in conjunction with which they are working.

3. Track Gangs when assigned temporarily to perform work in tunnels at night which on account of the density of traffic cannot be performed during normal working hours.

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4. Drawbridge Operators, Drawbridge Tenders, Camp Overseers, Camp Car Attendants and Cooks, except that the provisions of paragraph (a) shall apply where three (3) shifts are employed.

5. New Haven Rail Welding Plant.

(h) Except as provided in paragraphs (c) and (g) of this Rule 42, starting times outside the hours specified in paragraphs (a) and (b) of this Rule 42 may not be established except by agreement, in writing, between the Director of Labor Relations and the General Chairman.

The question at issue relates to the new Rule 42. Specifically, subsequent to ratification the Union took the position that Rule 42 (d) dictates that incentive pay is due to any employee on a gang with starting times outside 6:00 a.m. and 8:00 a.m. The Carrier took the position that there was no intent to establish in effect what becomes a shift differential for all employees outside first shift employees starting between 6:00 a.m. and 8:00 a.m. The intent was only to increase the 25 cents per hour incentive pay to 55 cents per hour for--with one addition--those gangs to whom it previously applied.

The Parties agreed to submit the question to a public law board without the necessity of filing claims. They also agreed in writing that each party could " . . . present whatever materials they deem relevant to the support of their respective positions . . ." A hearing was held in Philadelphia on April 23, 1987 at which the Parties presented evidence, submissions and rebuttal submissions.

FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

OPINION OF THE BOARD:

The critical issue here is the meaning and effect of the change in the construction of Rule 42 as it relates to who is entitled to incentive pay. As noted, it is agreed that previously incentive pay only applied to employees who had a non-standard starting time, which could occur by virtue of being on a gang set forth in paragraph c.

While the change in the language arguably supports the Organization's view, the new language is not clear and

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unambiguous. The Organization essentially reads paragraph (d) out of the context of the entire rule. When the rule is read as a whole and paragraph (d) is read contextually the Carrier's interpretation is at least as plausible.

It is plausible as the Carrier argues to say--even without reference to the previous rule or negotiations--that the reference to "any of the gangs" in paragraph d is a reference to the gangs established under "c" in view of the title of the Article and sequence of the language. It is plausible to argue (1) since paragraphs (a) and (b) remained unchanged and set forth the required starting time for multiple shifts and one shift operations and (2) since paragraph (c) sets forth the exceptions to (a) and (b), therefore (c) and its exceptions are the subject of the pecuniary considerations in (d). Ancillary to this it is plausible to argue that a general shift differential applicable to all gangs with starting times outside 6:00 a.m. and 8:00 a.m. would not be set forth within the context of Rule 42 which applies to standard starting times and the exceptions. Instead, it would be set forth separately. The fact the incentive allowance is set forth within Rule 42 and its purpose suggest a more limited scope to the effect of the change.

Thus, given there is more than one plausible interpretation, it must be recognized that there is some ambiguity in the new language. Accordingly, the new language is subject to construction and the Arbitrator must consider whether, among other things, there is any evidence of mutual intent that the change in the language should have the meaning and effect urged by the Organization. Additionally, it is the Arbitrator's opinion that there would have to be very strong and convincing evidence of this since the mere change in the language by itself is not sufficient to support the petitioner's burden. Changing the meaning of Rule 42 from a limited arbitrary for non-standard starting times to an unqualified shift differential for all second and third shift employees is a major change in an agreement which should not be casually read into the contract.

It is the Arbitrator's opinion that there is no and cannot be any evidence that the change was meant to be anything but an increase in the amount of the old incentive allowance since the Union's original proposal was limited to such an effect.

Close scrutiny of the August 21, 1984 Section 6 notice shows that the Organization sought an increase in the incentive allowance under the umbrella of old paragraph (c). Therefore, they did not seek an allowance apart from the conditions set forth in old paragraph "c." Thus, it is difficult to say that the end result of negotiations on such a proposal should be more than the proposal itself.

The plain fact is--based on their August 21, 1984 proposal--the Organization never sought a shift differential under the guise of modifying Rule 42. While the proposal to

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modify Rule 42 may be subject to creative interpretations, the fact it was not a shift differential is made crystal clear by the Organization's efforts to secure a shift differential under a separate and distinct notice. Significantly, that effort failed.

The Organization did argue that if the language of the new Rule 42 (d) was ambiguous--and indeed it is considering its internal and historical context--any ambiguity in line with a well established principal of contract interpretation should be resolved against the Carrier since it proposed the language ultimately adopted by the Parties. This, under these circumstances, is a superficial argument. As a threshold to this argument the Organization would have to show that it had communicated to the Carrier their initial proposal was in fact intended to be a payment applicable to all but employees starting between 6:00 a.m. and 8:00 a.m. The language of the proposal did not communicate this nor did they communicate this in bargaining. It is undisputed that there was simply no evidence of bilateral discussions, especially at the time the Carrier presented their counter proposal, that the change sought by the Organization was to, in effect, expand and elevate the coverage of the incentive pay to a broad across-the-board shift differential.

In absence of such evidence and in view of the nature of the proposals and the construction of the new language, the change must be viewed--in spite of the sloppiness in the Carrier's construction--as a change in form and not substance. The change instead was limited to increasing the incentive pay and adding one more category of gangs to the list in (c).

GILBERT H. VERNON
Gilbert H. Vernon, Chairman
and Neutral Member

Jed Dodd 7/9/87 see dissent
Jed Dodd, Employee Member

L. C. Hriczak
L. C. Hriczak, Carrier Member

Dated June 12th, 1987 at Eau Claire, Wisconsin.

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ORGANIZATION'S DISSENT TO CASE NO. 1, AWARD NO. 1 PLB # 4259

Ordinarily decisions of Arbitrators (neutrals) regarding contract interpretation are based on several principles: (a) the clear, unambiguous language of the Agreement; (b) principles established in other Awards of the National Railroad Adjustment Board, Public Law Boards and Special Boards of Adjustment relating to contract interpretation; (c) legal precedents relating to contract interpretation; and (d) logic. In the opinion of the Organization, Arbitrator (Neutral) Gil Vernon's decision in this important case is in direct, intentional, biased, hostile conflict with: (a) the clear, unambiguous language of the agreement; (b) principles established by the National Railroad Adjustment Board, Public Law Boards and Special Boards of Adjustment relating to contract interpretation; (c) legal precedents relating to contract interpretation; and (d) logic. In short Vernon's decision is so outrageously erroneous that the Organization strongly questions his qualifications to decide any cases regarding a significant dispute between Rail Labor and Rail Management.

I. THE DISPUTE.

This dispute arose when a clear, unambiguous Rule that existed in the old AMTRAK-BMWE Agreement (Rule 42 c) was changed as a result of Section 6 Contract Negotiations. The old Rule 42 c required AMTRAK to pay members of certain gangs, clearly defined in the old Rule 42 c, an "incentive" allowance of \$.25 per hour. The equally clear and unambiguous language in the new Rule (42 d of the new Agreement) required "(d) Employees filling assignments in any of the gangs established with starting times other than between 6:00 a.m. and 8:00 a.m. (5:00 a.m. and 8:00 a.m. from May 1 through September 30 for Track Production Gangs) shall be paid an incentive allowance of \$.55 per hour for all hours, or portion of an hour, worked." Before the ink was dry on the new Agreement, AMTRAK refused to pay employees assigned to gangs which started on the 3:00 p. m. shift and the 11:00 p. m. shift the \$.55 per hour, even though those employees were filling assignments in gangs established with starting times other than between 6:00 a. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. from May 1 through September 30 for Track Production Gangs). The parties submitted this dispute to this Public Law Board for resolution.

A. THE CLEAR, UNAMBIGUOUS LANGUAGE OF THE AGREEMENT.

In what the Organization considers to be an implausible gyration of sophistic rambling completely at odds with any reasonable understanding of the English language Neutral Vernon found that "(d) Employees filling assignments in any of the gangs established with starting times other than between 6:00 a. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. from May 1 through September 30 for Track Production Gangs) shall be paid an incentive allowance of \$.55 per hour for all hours, or portion of an hour, worked." could plausibly be read as not to apply to

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employees assigned to gangs which commenced work on the 3:00 p. m. shift and the 11:00 p. m. shift. Despite reading this opinion numerous times, the Organization is befuddled as to how Neutral Vernon could find a plausible reading of this Section to exclude employees assigned to gangs which commenced on the 3:00 p. m. and 11:00 p. m. shifts, when these employees have "starting times other than between 6:00 a. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. from May 1 through September 30 for Track Production Gangs)." Nevertheless Neutral Vernon found that the Carrier could plausibly read the above language in (d) as not to apply to the 3:00 p. m. and 11:00 p. m. employees. In what the Organization considers to be intentionally distorted linguistic analysis, Neutral Vernon finds one phrase of the new Rule 42 d, "any of the gangs", could plausibly be read to refer only to Gangs listed in the new Rule 42 c, even though: (a) the full language of the new Rule 42 d has no such limiting language; and (b) the new Rule 42 d includes language which directly tracks Paragraph b of the Rule. The relevant language of the new Rule 42 d states "any of the gangs established with starting times other than between 6:00. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. from May 1 through September 30 for Track Production Gangs) shall be paid an incentive allowance of \$.55 per hour ---". This clearly and unambiguously means that employees assigned to gangs with starting times of 3:00 p. m. and 11:00 p. m. (starting times other than between 6:00 a. m. and 8:00 a. m., 5:00 a. m. and 8:00 a. m. from May 1 to September 30 for Track Production Gangs) are entitled to the incentive allowance.

B. PRINCIPLES ESTABLISHED IN OTHER AWARDS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, PUBLIC LAW BOARDS AND SPECIAL BOARDS OF ADJUSTMENT AND LEGAL PRECEDENTS RELATING TO CONTRACT INTERPRETATION.

After concluding that the new Rule 42 (d) which clearly and unambiguously requires a \$.55 per hour "incentive" allowance to all employees assigned to Gangs with starting times other than between 6:00 a. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. for Production Gangs between May 1 and September 30) can plausibly be interpreted not to require AMTRAK to pay a \$.55 cent per hour "incentive" allowance to employees assigned to Gangs with starting times other than between 6:00 a. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. for Production Gangs between May 1 and September 30), Neutral Vernon devoted the rest of his opinion to unilaterally overturning well established Board (and legal) principles of contract interpretation. One such principle requires that any ambiguity in Agreement language shall be read against the interpretation of the party who drafted the ambiguous Agreement language. AMTRAK drafted the ambiguous Agreement language. Did that bother Neutral Vernon??? Why, of course not.

By weaving a patchwork of what the Organization considers to be incredibly biased reasoning sprinkled with fabrications and added manifestations of an inability to read and understand the English language, Neutral Vernon found that the Organization did not ask for what the language of the new Rule 42 d clearly and

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unambiguously gave its Members. Ignoring the facts: 1. that the old Rule 42 c was the only part of the old Rule 42 which dealt with "incentive" allowance; and 2. that the "incentive" allowance sections were removed from the new Rule 42 c and put in a separate paragraph (42 d) with all references to specific gangs entitled to the "incentive" allowance that existed in the old Rule 42 c dropped; Neutral Vernon found that the Organization DID NOT ASK for the "incentive" allowance to be expanded to all employees with starting times other than between 6:00 a. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. for Production Gangs between May 1 and September 30). Conveniently omitted from Neutral Vernon's opinion are the facts that the only place where the "incentive" allowance existed in the old Rule was in the old 42 c and that the Section 6 clearly asked that the incentive allowance be expanded to cover "employees working the **SHIFTS** supra, including employees working in gangs established pursuant to Rules 89, 90-A, 90-B, and 90-C." Needless to say, the only place where the word "SHIFTS" is used is in the old (and new) Rule 42 a. Therefore Neutral Vernon's statement "--the Organization never sought a shift differential under the guise of modifying Rule 42." is, in the opinion of the Organization, a fabrication made to justify an opinion that cannot be supported by language nor even by his distorted, sophistic reasoning. In short the Section 6 demand for an increase and expansion in the "incentive" allowance was placed in the only part of the old Rule 42 that dealt with the incentive allowance -- 42 c. In recognition of this, the new Rule 42 d, expanding and increasing the incentive allowance to cover all employees with starting times other than between 6:00 a. m. and 8:00 a. m., 5:00 a. m. and 8:00 a. m. for Track Production Gangs between May 1 and September 30), was exsected from the old Rule 42 c and placed into a separate, equal paragraph, with no language limiting it to the previous paragraph (the new Rule 42 c) and with language tracking Rule 42 b.

C. LOGIC.

The Organization views the logic employed by Neutral Vernon to be analogous to the following:

1. All Employees with starting times other than between 6:00 a.m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. for Production Gangs between May 1 and September 30) are entitled to \$.55 per hour incentive allowance.
2. Employees with starting times of 3:00 p. m. and 11:00 p. m. are employees with starting times other than between 6:00 a. m. and 8:00 a. m. (5:00 a. m. and 8:00 a. m. for Production Gangs between May 1 and September 30).

THEREFORE: Employees with starting times of 3:00 p. m. and 11:00 p. m. are not entitled to \$.55 per hour incentive allowance.

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II. CONCLUSION.

In our opinion the decision of the Neutral in this case can only be described as one devoid of an understanding of the English language, Board and legal principles and logic. It cannot be explained as a decision resolving a dispute among the parties. It is a decision that we believe demonstrates a hostile and biased attitude toward Rail Labor in general and the Pennsylvania Federation and the Northeast Federation of the BMWWE in particular. This decision will have a revolutionary impact on negotiations with the Carrier, because it means that the Union can trust neither the Carrier nor certain "neutrals" to keep their biases out of contract interpretation. It means that regardless of how clear contract language is written, and regardless of what Board and legal principles are involved, a neutral with a bias will ignore the language in favor of his/her bias. As a result of Neutral Vernon's opinion, all a Carrier need do to get out of its responsibilities under an Agreement is to declare that it did not intend to agree to what the language of the Agreement requires. The Carrier merely needs to claim lack of mutuality in order to evade the clear, unambiguous language of the Agreement. Without faith that the English language will ultimately be interpreted as it is written, there is no way to come to Agreements with the Carrier.

Arbitrators have a great deal of power under the Railway Labor Act. Their decisions, even when clearly and intentionally erroneous, are not generally subject to judicial review on the merits. This means that when biased, hostile, intentional decisions are made by Arbitrators, the Organization has no recourse to have it corrected. The Organization considers this opinion to be such a biased, hostile intentionally erroneous decision made by an Arbitrator whose opinion reflects his biases.

DATED: 7/9/87



Jed Dodd, BMWWE