NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20065
THIRD DIVISION Docket Number MW-20059

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Norfolk and Western Railway Company (Lake Region)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement beginning on May 10, 1971 and continuing through June 11, 1971 (excluding June 7 and 8) when it changed the hours of service of Sections 17, 18 and 19, Old Cleveland Seniority District, to avoid the payment of overtime (System File MW-BVE-71-11).

(2) The Carrier further violated the agreement on the dates mentioned in (1) above when it compelled the operators of one Tie Machine, one Tie Saw, one Scarifier-Inserter, one Tamper, two tie handlers and two Truck Driver-Laborers to change their regular hours of service to avoid the payment of overtime.

(3) Claimants to be all employes assigned to Section #17 at Lorain, Ohio, Section #18 at Vermillion, Ohio, Section #19 at Avery, Ohio and operator of tie machines working on the dates of claim inserting ties between Lorain and Avery, Ohio.

(4) Claimants as identified be further made whole at their respective rates of pay for one hour at pro rata rate each day of claim for the hour they were deprived of their regular bulletined starting time for the violation.

(5) Claimants as identified above now be made whole at their respective rates of pay for the differnential between straight time for which they were compensated and punitive time to which they were entitled for one hour each, each date of claim for the violation.

OPINION OF BOARD: The basic facts in this case are not in dispute. From May 10 through June 11, 1971, the Carrier changed the regularly assigned hours of employees assigned to Sections 17, 18, and 19, (Claimants herein) Old Cleveland Seniority District, from 7:00 A.M. to 4:00 P.M. to 8:00 A.M. to 5:00 P.M. The Carrier gave thirty-six (36) hours notice of a change in hours prior to May 10 and also prior to June 11. The May 10 and June 11 dates coincide with the beginning and completion of the Claimants' work on tie-renewal project on the Cleveland District between M.P.-200 and M.P.-245.79. After the project was completed, the Carrier returned the Sections to the regular hours of 7:00 A.M. to 4:00 P.M.

The issue raised by these facts, and the record as a whole, is whether the Carrier was justified, after giving thirty-six hours notice to affected employees, in changing the regular assigned hours of employees holding regularly assigned positions. To determine this issue we must examine the parties contentions in regard to the following rules:

"Rule 26. - Starting Time.

. . . . .
. . . . .
(c) Employes' regular assigned hours will not be changed for short periods of time to avoid the application of overtime rules."

"Rule 27. - Variation. Work Periods.

For regular operations necessitating working periods varying from those fixed for the general force as per Rule 26, the hours of work will be assigned in accordance with the requirements."

"Rule 33. - Overtime.

Time worked in excess of eight hours per day and 40 hours per week shall be paid for as follows:

(a) Time worked preceding or following and continuous with a regularly assigned eight hour work period shall be computed on actual minute basis and paid for at time and one-half rates, and at double time rates after 16 continuous hours of work in any 24-hour period computed from starting time of the employe's regular assignment."

"Rule 26. - Starting Time.

. . . . .
. . . . .
. . . . .
(d) The starting time of the work period for regularly assigned service will be designated by the supervisory officer and will not be changed without first giving employes affected 36 hours' notice."

The Employees contend that the change in hours violated Rule 26(c) in that the change was for a short period of time to avoid overtime, that the change required the positions to be bulletined if the change was for other than a short period of time, and that the Carrier gave no valid reason for the change. The Carrier makes a general defense on the ground that the change in hours was simply an exercise of the prerogative granted it by Rules 27 and 26(d). Under Rule 26(d), the argument goes, starting times may be changed by giving the affected employees thirty-six (36) hours notice; this was done and, thus, Carrier's prerogative was properly exercised. Carrier says further that it did not violate Rule 26(c) in that train schedules delayed movement of machinery and the work force from the lay-up point to the work point, resulting in considerable idle time between 7:00 A.M. and 8:00 A.M.; hence, the change was made to avoid idle time, not overtime. As further evidence that its intent was not to avoid overtime, Carrier states that inconsequential overtime was worked by the affected employees during the month preceding the change.

We have carefully studied the parties arguments and prior Awards of this Board, which involve essentially the same rules as those presented here, and we are convinced that the change in hours in the instant dispute cannot be justified by the reasons advanced by the Carrier. In Award 3039 which dealt with a rule substantially identical to the herein Rule 27, along with a rule requiring a regularly assigned steel gangs starting time to be between 6:00 A.M. and 8:00 A.M., we did not disturb Carrier's determination that a change in hours was necessary because the "work to be done was on a coal trestle which could not be handled during the regular morning hours because of the density of traffic". However, in that Award we made it clear that Carrier's right to determine that "such necessity exists" must be reasonably and not arbitrarily exercised, and must be subject to review by this Board. Carrier's objective in the instant case, i.e., to avoid idle time, does not make the requisite showing of necessity within the meaning of Award 3039 and we therefore conclude that the herein change of hours was not permitted by Rule 27. In Award 3784, due to the impracticality of painting an office building during its daytime use, the Carrier changed the hours of a regularly assigned B&B Painting Crew under a rule which reads as follows:

> "RULE 32. CHANGING STARTING TIME
>
> Regular assignments will have a fixed starting time and the regular starting time will not be changed without at least thirty-six (36) hours notice to the employes affected, except as otherwise arranged between the employes and their immediate superior."

In sustaining the Employees' contention that the above quoted rule did not authorize the change in the regular assigned hours, this Board stated:

"The Carrier insists that since the members of the crew were given 36 hours notice there was no violation of Rule 32. With this contention we cannot agree.

This rule only permits a change in regular starting time on the giving of 36 hours notice. It clearly does not anticipate that the crew can be required to do emergency work or night work for the convenience of the Carrier for two or three days under the claim that the regular starting time has been changed by giving 36 hours notice.

Here it is very evident that there was no intention to change the starting time permanently or to make the regular starting time of these men 5:00 P.M. The starting time was changed only for this one job for three days for the convenience of the Carrier. We see no reason why the Carrier should be permitted to so work these men at night for its convenience and to prevent interference with its day-time office workers and not pay the members of this crew overtime."

For like rulings of this Board on similar facts, see Award Nos. 4109 and 13834. See also Award 15873, another sustaining Award which dealt with a Signalmen's rule that combined the herein Rule 26(c) and (d) into a single rule.

Applying the foregoing as authorities to the instant facts requires the conclusion, as we have indicated, that the change in the regular assigned hours of regularly assigned employees, extending only for the duration of the tie-renewal project, was for a short period of time and the Carrier did not have the right under Rules 27 and 26(d) to make the change. This brings us to the final facet of the case, namely, did Carrier make the change with the purpose or intent of avoiding overtime in violation of Rule 26(c). The Carrier's explanation of the change being made to avoid idle time, resulting from train movements, was controverted by the Employees, but, more importantly, this explanation is in the nature of evidence of Carrier's subjective intent or state of mind. This is not the kind of intent which must be determined in the interpretations of agreements. If a party intends to do the act in question, then the intent of the act must be determined by overt actions of the party and the natural consequences of the act. As this Board stated in Award No. 139, "In the interpretation of agreement we are interested in what a person seems to intend; not in what he actually intends." The natural consequence of Carrier's action in this instance was that Claimants worked between 4:00 and 5:00 P.M. on each claim date, resulting in the performance of one hour of work following and continuous with their regular assigned hours of 7:00 A.M. to 4:00 P.M. Had the schedule not been changed this hour of work obviously would have required pay at the overtime rate; however,

the hour was worked instead at the straight time rate, which clearly compels the conclusion that the change was made to avoid the application of overtime.

In view of the foregoing we shall sustain the claim. The compensation for each claim date shall be (a) one hour straight time for the period of time the Claimants were not permitted to work their regular assignment between 7:00 A.M. and 4:00 P.M.; and (b) the difference between the straight time rate and the overtime rate for work actually performed between 4:00 P.M. and 5:00 P.M.)

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G W Paulus
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1973.