Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41565
Docket No. MW-41525
13-3-NRAB-00003-110096

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned a starting time of 8:00 P.M. to the employes assigned to Gang 5505, beginning September 3, 2009 and continuing (System File R-0931U-301/1526091).

(2) As a consequence of the violation referred to in Part (1) above, beginning September 3, 2009 and continuing Claimants R. Burton, M. Anaya and/or any other employe assigned to Gang 5505 shall now '*** each be compensated for an additional four (4) hours at their respective straight time rates for each work day that they were not allowed to work from 4:00 P.M. and 8:00 P.M. and the difference of pay between their applicable straight time and overtime rates for each hour that they worked after midnight on each work day, until the violation is corrected.'"

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 record evidence establishes that the Carrier issued a bulletin for a gang assignment that would begin at 8:00 P.M. The bulletin was issued on August 27, 2009. The Carrier sent the Organization a letter dated August 28, 2009. That letter cited Rule 31(h) and provided in relevant part:

> "The Carrier will be conducting undercutting operations on the Powder River Subdivision effectively halting rail traffic during the day. This will result in heavy traffic at night. To ensure safe and smooth flow of traffic, the need of a night gang is required. Therefore it is agreed that the Carrier may bulletin a night gang consisting of an Extra Gang Foreman, Assistant Foreman and Sectionman/Truck Driver with a work week to conform to that of the Undercutter Gang. It will have a starting time between 5:00 P.M. and 8:00 P.M., be headquartered at South Morill and then subsequently Lusk, WY. It would last for the duration of the project on the Subdivision."

The General Chairman did not sign the letter to indicate his agreement and contacted the Carrier to state that he did not agree. The Carrier worked the night gang during the undercutting operation.

The Organization contended that the Carrier unilaterally decided to impose a starting time outside of the hours specified in the Agreement. The Organization has previously agreed to similar starting times, but when it did not agree in the instant matter, the Carrier did not have the right under the Agreement to unilaterally impose the late start time. Instead, the Carrier should have followed the procedures of Rule (h) and Appendix A. The Carrier bulletined the assignment prior to sending the request for agreement to the General Chairman thereby indicating that it would not follow the applicable Rule.

The Carrier countered that Rule 31(h) allows for changing starting times "for work that must be coordinated with other operations in order to avoid substantial loss of right of way access time."

When the Organization refused to agree to the change in starting times in order to coordinate the assignment with the change in traffic due to the undercutting operation, the Carrier implemented the start time. The Carrier contends that it complied with the Rule and had a valid necessity for changing the start time.

Rule 31 provides in pertinent part:

"(c) Where two (2) shifts are employed, the starting time for the first shift will be between the hours of 5:00 am and 8:00 am, and the starting time of the second shift will be between the hours of 1:00 pm and 4:00 pm.

* * *

(h) Other starting times may be agreed upon between the parties for production crews or for regular assignments involving service which is affected by environmental conditions or government requirements or work that must be coordinated with other operations in order to avoid substantial loss of right of way access time; however, no production crews or regular assignment will have a starting time between midnight and 4:00 am. If the parties fail to agree on such other starting times, the matter may be referred to arbitration in the manner described in Appendix "A." Similar notice requirements regarding starting times as described in (g) above will apply."

Appendix "A" provides:

"Arbitration Procedures for Starting Times and Combining or Realigning Seniority Districts

Section 1 – Selection of Neutral Arbitrator
Should the parties fail to agree on selection of a neutral arbitrator within five (5) calendar days from the submission to arbitration . . .

Section 2 – Fees and Expenses
The fees and expenses of the neutral arbitrator should be borne equally by the parties, and all other expenses shall be paid for by the party incurring them.

Section 3 – Hearings
The arbitrator shall conduct a hearing within thirty (30) calendar days from the date on which the dispute is assigned. . . .

Section 4 – Written Decision
The arbitrator shall render a written decision, which shall be final and binding, within thirty (30) calendar days from the date of the hearing."

The Board reviewed the evidence, as well as the Submissions of the parties. The burden is on the Organization to establish a violation of the Agreement. We find that the Organization met its burden in the instant matter.

Rule 31 is clear in its requirement that an agreement with the Organization is required for a start time outside of the hours specified in Rule 31(c) as in the instant matter. In the absence of an agreement for a start time outside of the hours of Rule 31 (c) there is an arbitration provision for determining the starting time. The Carrier did not follow the procedure prescribed in Appendix "A." Those requirements are clear. Accordingly, the instant claim must be sustained.

AWARD

Claim sustained.

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 18th day of March 2013.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 41565; DOCKET MW-41525

(Referee Brian Clauss)

The Majority fashioned an Award that has no basis in fact, arbitral authority or Collective Bargaining Agreement provisions. This is a simple case where the Collective Bargaining Agreement (Appendix "A") sets forth a procedure for resolving starting time disputes that arise pursuant to Rule 31(h). The procedure does not include arbitration before the NRAB. Clearly the NRAB had no authority or jurisdiction to hear the case and the Organization's claim should have been dismissed.

The Carrier notified the General Chairman of the operational necessity to change the Claimants' starting time pursuant to Rule 31(h). The parties did not agree and the Carrier used its defined Agreement right to implement the change. The Rule provides for the matter to be referred to arbitration as defined in Appendix "A."

The Majority erred when they based their decision on the basis: "The Carrier did not follow the procedure prescribed in Appendix "A." Appendix "A" does not require the Carrier to invoke arbitration as inferred in the Award.

Significantly, the Organization did not allege that it was the Carrier's responsibility to trigger arbitration and there is no foundation in the parties' Agreement on which to base that decision. The Carrier correctly argued that if the Organization desired to dispute the starting time change, the proper avenue was through the Appendix "A" process, not through filing a claim pursuant to Rule 49 of the parties' Collective Bargaining Agreement.

The language of Rule 31(h) comes from Article IX of the July 29, 1991 Imposed Agreement. The language of Appendix "A" comes from Article XVI of the same Imposed Agreement. This Agreement provides that if the parties fail to agree on alternative starting times, the Carrier may implement the starting time and the Organization can challenge the decision through the Appendix "A" process. In this case, the Carrier notified the Organization of the need for a required change in starting time and when the Organization did not concur, the Carrier implemented the starting time change. Thereafter, the Organization should have followed the Appendix "A" process.

Article XVI of the Imposed Agreement (now Appendix "A" of the Collective Bargaining Agreement) was defined by Contract Interpretation Committee Issue No. 23. The Committee determined:

> "Found that if the parties fail to agree on alternative starting times, a Carrier may implement the starting time prior to arbitration under Article XVI of the Imposed Agreement."

The parties clearly agreed to an exclusive dispute resolution mechanism to resolve such disagreements and the Organization failed to follow the agreed upon procedures. Article XVI (Appendix "A") reads, in relevant part, as follows:

> "ARBITRATION PROCEDURES FOR STARTING TIMES AND COMBINING OR REALIGNING SENIORITY DISTRICTS
>
> Section 1 – Selection of Neutral Arbitrator
>
> Should the parties fail to agree on selection of a neutral arbitrator within five (5) calendar days from the submission to arbitration, either party may request the National Mediation Board to supply a list of at least five (5) potential arbitrators, from which the parties shall choose the arbitrator by alternately striking names from the list. Neither party shall Oppose [sic] or make any objection to the NMB concerning a request for such a panel.
>
> Section 2 – Fees and Expenses
>
> The fees and expenses of the neutral arbitrator should be borne equally by the parties, and all other expenses shall be paid for by the party incurring them.
>
> Section 3 – Hearings
>
> The arbitrator shall conduct a hearing within thirty (30) calendar days from the date on which the dispute is assigned to him or her. Each party shall deliver all statements of fact, supporting evidence and other relevant information in writing to the arbitrator and to the other party, no later than five (5) working days prior to the date of the hearing. The arbitrator shall not accept oral testimony at the hearing, and no transcript of the hearing shall be made. Each party, however, may

present oral arguments at the hearing through its counsel or other designated representative.

Section 4 – Written Decision

The arbitrator shall render a written decision, which shall be final and binding, within thirty (30) calendar days from the date of the hearing."

Appendix "A" provides an exclusive dispute resolution mechanism, which is commonly known as a parties' pay board. Section 2 states that the "fees and expenses of the neutral arbitrator should be borne equally by the parties . . . ." Section 1 also affords "either party" the right to request a strike list from the National Mediation Board.

Contrary to the Majority's finding, the Carrier is not required to be the moving party to request that the issue be heard by a "parties pay" board. As noted above, the Third Division of the NRAB does not have authority or jurisdiction to hear or resolve Rule 31(h) disputes under the specific Agreement language and subsequent interpretation.

As countless Awards have held, the Board is not empowered to rewrite Collective Bargaining Agreement language. That is a function of the parties. The July 29, 1991 Imposed Agreement and the Contract Interpretation Committee determined the intent of the skilled framers who authored Article IX – Start Times. The Board should have dismissed the instant claim due to its lack of jurisdiction and the Organization's failure to follow the negotiated Rules.

For all these reasons, Award 41565 is palpably erroneous and lacks precedential value. The undersigned Carrier Members vigorously dissent.

Brant Hanquist
Brant Hanquist

Michael C. Lesnik
Michael C. Lesnik

March 18, 2013

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 41565, DOCKET MW-41525
(Referee Clauss)

At the outset, it must be noted that the Carrier Members' Dissent contains various factual inaccuracies, including a purported quotation that does not actually appear in the cited source document. However, those inaccuracies are of little relevance to the overall understanding of the error in the Carrier Members' position, as set forth within their Dissent. Consequently, this response will focus on setting the record straight on the Board's findings and on the spurious jurisdictional issue raised by the Carrier Members as well.

In order to appreciate the extent of the Carrier Members' error within their Dissent, we first start by reminding the reader that Section 3 of the Railway Labor Act bestows jurisdiction to the appropriate Division of the NRAB over disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of Agreements concerning rates of pay, rules, or working conditions. A review of the facts and arguments raised by the parties to this dispute during the handling on the property and by the Carrier Members during the handling before this Board reveals that the dispute is one between a group of employes (the Organization) and a carrier growing out of the interpretation or application of Rule 31 of the Agreement, which concerns rates of pay, rules, or working conditions. Consequently, there can be no question but that the Board has jurisdiction over this dispute.

The Carrier Members asserted within their Dissent that "*** Clearly the NRAB had no authority or jurisdiction to hear the case and the Organization's claim should have been dismissed." However, examination of the Carrier's Submission to the Board in this case reveals nary a trace of such an argument. Similarly, during the Referee Hearing afforded by the Division in this case, the Carrier's advocate made no mention of any alleged jurisdictional impediment due to some mandatory alternative arbitration provision. In addition, during the Division's panel discussion of this case, the designated Carrier Member had no objection to the jurisdiction of the Division to make an award in this matter. Had the Carrier and/or the Carrier Members actually believed that a controversy existed over the Board's jurisdiction in this matter, it would have been incumbent upon them to raise the issue before the Board.

In view of the foregoing, it is clear that the Carrier and the Carrier Members were under no illusion that there existed any jurisdictional impediment to the Board's deciding the dispute herein and, in fact, recognized the jurisdiction of the Board to decide the issues presented here concerning the interpretation and application of Rule 31 of the Agreement. In view of the foregoing, even if there had been a question of the Board's jurisdiction to decide the claim (which there is not), the Carrier and the Carrier Members clearly waived any jurisdictional issues and

acknowledged the jurisdiction of the Board when they failed to raise any objection whatsoever prior to the issuance of the award. Clearly, the Carrier Members simply raise their specious jurisdictional argument as a result of the Division having sustained the case in this instance.

The facts of this case are uncomplicated. On August 27, 2009, having not made any attempt to contact the General Chairman to reach an agreement, the Carrier advertised positions on a gang to work a second shift with a starting time listed that is outside of the starting times it is allowed to establish unilaterally under Rule 31(c). There was never any dispute over that fact. However, the Carrier contended throughout the handling of this case that Rule 31(h) allowed certain alternative starting times to be established and it desired to establish the starting time at issue here under that rule. Rule 31(h) reads:

> "(h) Other starting times may be agreed upon by the parties for production crews or for regular assignments involving service which is affected by environmental conditions or governmental requirements or for work that must be coordinated with other operations in order to avoid substantial loss of right of way access time; however, no production crews or regular assignment will have a starting time between midnight and 4:00 a.m. If the parties fail to agree on such other starting times, the matter may be referred to arbitration in the manner described in Appendix 'A'. Similar notice requirements regarding starting times, as described in (g) above, will apply."

As can clearly be seen by reading its plain language, Rule 31(h) does not grant the Carrier a unilateral right to establish a starting time at variance with the range specified elsewhere in the rule. Rather, the clear language of Rule 31(h) prohibits the establishment of alternative starting times, unless and until an agreement is reached with the General Chairman or an arbitration award finds the starting time proposed by the Carrier to be allowable.

In an attempt to give the illusion of compliance with the Agreement and to attempt to cure its failure to negotiate with the General Chairman prior to establishment of the starting time in question here, the Carrier contacted the General Chairman after August 27 and proposed a letter of agreement, alleging that Rule 31(h) would somehow justify the starting time it had already established in violation of the Agreement. The General Chairman observed that the alternative starting time proposed by the Carrier had no rational basis in the criteria spelled out in Rule 31(h) and, therefore, declined to agree to the starting time, observing that Rule 31(c) of the Agreement requires that when the Carrier employs two (2) shifts, the starting time of the first shift **will be** between the hours of 5:00 A.M. and 8:00 A.M. and the starting time of the second shift **will be** between the hours of 1:00 P.M. and 4:00 P.M.

A plain reading of Rule 31(h) also reveals that even if the Carrier had established that the criteria listed within Rule 31(h) had been applicable, the rule clearly provides that if the parties fail to agree on alternative starting times for any positions which are covered therein, the matter may be referred to arbitration in the manner described in Appendix "A". Inasmuch as the Carrier was the moving party regarding the variance from the allowable starting times as provided in the Agreement, and inasmuch as referral to arbitration as provided in Appendix "A" is not mandatory, and inasmuch as Rule 31(h) does not bestow upon the Carrier a right to unilaterally implement an alternative starting time, it was the Carrier's burden to institute referral of the matter to the arbitration forum suggested within Appendix "A". In this connection, we have reference to the final paragraph of the Board's findings concerning the interpretation and application of Rule 31(h):

> "Rule 31 is clear in its requirement that an agreement with the Organization is required for a start time outside of the hours specified in Rule 31(c) as in the instant matter. In the absence of an agreement for a start time outside of the hours of Rule 31 (c) there is an arbitration provision for determining the starting time. The Carrier did not follow the procedure prescribed in Appendix 'A.' Those requirements are clear. Accordingly, the instant claim must be sustained."

What is clear from the language of the award is that the Board ruled on the interpretation and application of Rule 31(h). The Board found the correct interpretation and application of Rule 31(h) to be that as the moving party in the establishment on non-standard starting times, the Carrier had the burden of invoking the Appendix "A" arbitration procedure and that absent an agreement with the General Chairman or an Appendix "A" arbitration, the Carrier had no right under Rule 31(h) to implement the alternative starting time. Deciding disputes over the interpretation and application of agreements concerning rates of pay, rules, or working conditions is exactly the jurisdiction bestowed upon this Board by the Railway Labor Act and that is exactly what the Board did in this case. Consequently, there can be no question but that the Board had jurisdiction to decide this case.

Conclusion

The NRAB has jurisdiction over disputes arising between the Organization and the Carrier growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, such as the dispute in this case. Moreover, the Carrier and the Carrier Members clearly acknowledged that jurisdiction when they failed to raise any jurisdictional issues whatsoever prior to the issuance of the award. As to the merits, nothing within the parties' Agreement can be reasonably construed to provide the Carrier a unilateral right to establish a starting time at variance with the range specified within Rule 31(c). Rather, the clear language

of the Agreement prohibits the establishment of alternative starting times, unless and until an agreement is reached with the General Chairman or after referral of the question to arbitration. Consequently, the Board did not reach the merits (if any) of the Carrier's purported justification pursuant to Rule 31(c) for establishing a starting time other than that allowed under Rule 31(c).

For all the foregoing reasons, the Carrier Members' Dissent is in serious error. Third Division Award 41565 is correct and its well-reasoned findings will stand as precedent in future cases.

Respectfully submitted,

Gary L. Hart
Labor Member