PUBLIC LAW BOARD NO. 2960

AWARD NO. 54

CASE NO. 44

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed and refused to compensate Foreman Leroy Sprinkle and Machine Operator Dave Broehm at the overtime rate for time worked preceding and following their regular assigned work periods on July 13, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31 and August 1, 1981.

(2) Foreman Leroy Sprinkle and Machine Operator Dave Broehm shall each be allowed the difference between the straight time and overtime rate for 13.5 hours. (Organization's File 7 T - 2394; Carrier's File 81-19-257)

OPINION OF THE BOARD:

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

The basic facts are not in dispute. The Claimants are members

of Smoothing Gang No. 2 headquartered at Altoona, Wisconsin. They were regularly assigned to work from 7:30 a.m. to 4:00 p.m., Monday through Friday each week with Saturdays and Sundays designated as rest days. On each date of claim, Claimants were directed to report to Altoona one-half hour prior to their regular starting time, and then travel to Menomonie, where they then performed service. At the end of their day, Claimants returned to Altoona. On some dates of claim, they were back at Altoona by 4:00 p.m., but on other dates did not return until 4:30 p.m. On each date, Claimants claimed pay at the overtime rate for all time outside their regular bulletined hours. These claims were denied and Claimants were compensated at the straight time rate.

The Organization contends that the employees were not properly compensated at the overtime rate of pay for the overtime spent preceeding and following the regular period. They claim a violation of Rules 25, 30, and 34, which state:

Rule 25

"Employes' time will start and end at a regular designated assembly point for each class of employes, such as tool house, outfit car or shop."

Rule 30

"Time worked continuous with and following a regular eight-hour period shall be computed on the actual minute basis and paid for at time and one-half rate, with double time on actual minute basis after sixteen hours of work in any twenty-four hour period computed from starting time of employes' regular shift."

Rule 34

"Employes required to report in advance of regular starting time for work continuous with regular assignment will be

compensated at rate and one-half for such advance time, with minimum of one hour."

The Carrier argues that the Claimants were properly compensated at the straight time rate for the time consumed outside their regular bulletined hours because such time was only used for travel between their headquarters and their work location. Claimants performed no service other than travel during this time. The basis for this manner of compensation is clearly found in Rule 43 of the Agreement which the Carrier argues as controlling. Rule 43 states:

"Rule 43-Travel. Except as provided in Rules 42 and 47, employees who are required by direction of the Company to leave their home station will be allowed actual time for traveling or waiting during regular working hours. All hours worked will be paid for in accordance with practice at home station. Travel or waiting time during the recognized overtime hours at home stations will be paid for at the pro rata rate. If, during the time on the road, a man is relieved from duty and is permitted to go to bed for five hours or more such relief time will not be paid for, provided that in no case shall he be paid for a total of less than eight hours each calendar day, when such irregular service prevents the employee from making his regular daily hours at home station."

The Board observes similar factual situations and questions of interpretation relating to the apparent conflicts between Rules 43 and 34, 35, and 30, have been considered before by Public Law Board 1844. The parties had made similar arguments in this record concerning these rules. The analysis of Referee Eischen in Award 18 recognizes that the conflict and the rules had to be resolved in line with the intent of the parties. He also gave a detailed analysis to the myriad of other arbitration decisions involving similar questions regarding the "intent" of the other parties in the face of similar language conflicts.

One line of thought relied on "past practice" and the other school of thought relied on the rule of contract construction which holds that a special rule prevails over a general rule. For reasons he explained, Referee Eischen found past practice to be the controlling principle of construction. He then went on to apply the principle to the facts he stated:

> "Unfortunately, however, the apparently easy answer of reliance upon practice to resolve the conflict in the rules is foreclosed to us in this case. This is so because the record is inadequately developed to permit a clear determination relative to practice in similar fact situations on this property in the past. The Organization asserts and the Carrier denies such practice but neither offers any proof. The onus of this state of equilibrium falls upon the Organization as the party with the burden of proof on the point.
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> Given the state of the record and in consideration of the established precedents governing such cases, we are left no alternative but to dismiss this claim for lack of proof. In so doing we emphasize that our holding is dictated by evidentiary inadequacies relative to past practice. We make no affirmative determination herein relative to the proper reconciliation of Rules 30, 34, and 43. Such a determination is not possible on this record."

This Board has no basis to quarrel with Public Law Board 1844's analysis of the controlling principles of contract construction. Thus, we will approach the case in the same interpretive context.

With respect to the critical question of past practice, the Organization claims that it is significant that this same crew was compensated at the overtime rate under the same circumstances beginning August 13 through August 20, 1981. They submitted copies of the Employees work report to substantiate this (Employee Exhibit 7).

The Board has carefully considered the evidence of past practice put forth by the Organization. First, it is noted the dates in Employee

Exhibit "C" are subsequent to the claim dates, and second, and more importantly, there is no evidence that the documents comprising Employee Exhibit "C" were ever handled on the property. Under the well-established rules of evidence, applicable to these and similar proceedings under the Railway Labor Act, the Board is without jurisdiction to give any consideration to this evidence.

This leaves the Board exactly at the same point as Public Law Board 1844 in their Award No. 18. There is no evidence of past practice which would support the Organization's contention that the intent of the parties in writing the applicable rules was to grant overtime to employees in such circumstances. In view thereof, the Claim must be dismissed for lack of proof.

AWARD: The Claim is dismissed.

Gil Vernon, Chairman

H. G. Harper, Employe Member

J. D. Crawford, Carrier Member

Dated: 5-8-84