

Award No.: 110 & 111

Case No.: 110 & 111

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPI

And

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

1. The Carrier violated the Agreement beginning on October 10, 1988 and continuing through October 28, 1988 when it changed the starting time of Gang TS-23 and Crossing Gang 11 from 7:00 A.M. to 9:30 A.M. to avoid the payment of overtime (Carrier's File MW-SG-BLVE-88-175).

2. The Carrier violated the Agreement beginning on October 10, 1988 when it changed the starting time of Floating Gang #1 on the Sandusky District from 7:30 A.M. to 9:30 A.M. to avoid the payment of overtime (Carrier's File MW-LM-PORT-88-191).

3. As a consequence of the violation referenced in Part (1) hereof, Claimants C. K. Swathwood, G. E. Dalton, V. L. Barrett, R. D. Meyers, C. A. Kegley, P. D. Miller, T. R. Dadosky, H. B. Anderson, J. D. Davis, D. W. Stephens, E. Horton, S. J. Horton, C. D. Peach, W. A. Thompson, M. A. Lilly, W. E. Hurt, III, D. G. Perry, J. R. Graham, P. D. Weems, L. J. Marcum, D. S. Osborne, C. J. Kitchen, W. F. Bradley, D. L. Slark, S. D. Meyers, J. A. Pigg, W. A. Blizzard, G. Maynard, F. R. Lamblin, L. E. Copley, P. G. Coburn, P. L. Miller, T. A. Liles, B. E. James, D. S. Mills, J. Harris, C. L. Bowen, M. K. Lane, W. C. Whitlock and A. R. Harris shall now be made whole at their respective rates of pay for two and one-half (2 1/2) hours at pro rata rate for each day of claim for the two and one-half (2 1/2) hours they were deprived of their regular bulletined starting time for the violation. Claimants shall now be made whole at their respective rates of pay for the differential between straight time for which they were compensated and the time and one-half rate of pay to which they were entitled for the hours each worked between 4:00 P.M. and 6:30 P.M. each date of the claim for the violation.

4. As a consequence of the violation referenced in Part (2) hereof, Claimants R. M. Sprouse, S. Waller, Jr., G. L. Braddy, F. Robertson, J. D. Barker, J. J. Furay, D. B. Neville, P. L. Lucas and A. L. Blizzard shall each be made whole at their respective rates of pay for two (2) hours at pro rata rate for each day of claim for the two (2) hours they were deprived of their regular bulletined starting time for the violation and two (2) hours overtime for the hours each worked between 4:00 P.M. and 6:00 P.M. each date of claim for the violation until the violation ceases.

### FINDINGS

Claimants are the members of T&S Gang 23, Crossing Gang 11 and Floating Force #1 operating on the Sandusky District. T&S Gang 23 was engaged in replacing defective ties and surfacing the track. Crossing Gang 11 and Floating Force #1 worked together performed similar functions at crossings. The three forces were working together during the period October 10 to 28, 1988.

While a detailed description of the work performed by these forces is set forth in the record, Claimants generally were engaged in the process of "conforming the track to its prescribed geometrical parameters...and providing the necessary compaction of ballast at each tie." In the course of their work, Claimants and their co-workers installed more than 10,000 new ties over 20 miles of track and surfaced the track. The operation is conducted in an assembly line fashion with different groups of employees performing their particular task as they move along the line. The beginning of the repair/replacement operation at the head of the line is referred to as "opening" the track, while the conclusion of the repair/replacement operation at the tail of the line is referred to as "closing" the track. Regular rail traffic could not use the portions of track on which Claimants

were conducting this repair/replacement operation; the Maintenance of Way employees had to clear the track in order for regular traffic to pass.

During the period October 10 to 28, 1988, the Carrier switched the hours for T&S Gang 23 and Crossing Gang 11 from 7:00 a.m. - 4:00 p.m. to 9:30 a.m. - 6:00 p.m.; and the start time for Floating Force #1 from 7:30 a.m. to 9:30 a.m. These changes were made following at least 36 hours advanced notice.

Rules 36 and 41 of the Agreement provide:

RULE 36 - HOURS OF SERVICE

(a) The starting time of the regular work period of regularly assigned service will be designated by the supervisory officer and will not be changed without first giving employees affected thirty-six hours' notice.

(b) Employees working single shifts, regularly assigned exclusively to day service, will start work period between 6:00 A.M. and 8:00 A.M.

(c) Employees working single shifts, regularly assigned exclusively to part day and part night service, will start work period between 3:00 P.M. and 6:00 P.M.

(d) Employees working single shifts, regularly assigned exclusively to night service, will start work period between 6:00 P.M. and 9:00 P.M.

(e) For regular operation necessitating working periods varying from those fixed for the general force, the hours of work will be assigned in accordance with the requirements.

#### RULE 41 - ABSORBING OVERTIME

Employees will not be required to lose time during any regularly assigned work period for the purpose of absorbing overtime.

The traffic density for the segment of track on which the work was performed is as follows:

Date	# of Trains from 7:00 - 9:30 A.M.	# of Trains 9:30 A.M. - 6:00 P.M.	# of Trains Rest of Day	Total Trains
10-10-88	4	0	9	13
10-11-88	4	2	5	11
10-12-88	5	1	10	16
10-13-88	4	1	5	10
10-14-88	4	1	9	14
10-17-88	4	0	5	9
10-18-88	3	2	10	15
10-19-88	1	0	15	16
10-20-88	2	0	8	10
10-21-88	2	1	8	11
10-24-88	2	1	7	10
10-25-88	3	1	6	10
10-26-88	4	0	9	13
10-27-88	3	1	11	15
10-28-88	<u>4</u>	<u>2</u>	<u>11</u>	<u>17</u>
Daily Average:	3.27	0.87	8.53	12.67

The question to be resolved in this dispute is whether the Carrier violated the Agreement by changing Claimants' hours as described; and if so, what should the remedy be.

The position of the Organization is that the Carrier violated the Agreement by altering Claimants' hours so as to begin work outside of the 6:00 a.m. to 8:00 a.m. period provided in Rule 36(b). The Organization maintains that the Carrier's intent and purpose for making the change in starting time can be determined by the "consequences and results" of its actions. The Organization contends that the Carrier altered the starting times for sole purpose of avoiding the payment of overtime for the period after 4:00 p.m.

The Organization rejects the Carrier's argument based on Rule 36(e) that the regular operation of the railroad necessitated a starting time for Claimants outside the range specified in Rule 36(b). The Organization maintains that the Carrier's assertion of this defense does not make the defense valid. The Organization contends that the Carrier presented no evidence of the circumstances requiring the change and that the Carrier did not deny the Organization's assertion that the Carrier had run trains "for years" without changing employes' starting times and had adjusted traffic densities to allow the work schedule of single shift production gangs to be in accordance with Rule 36(b) "irrespective of traffic patterns."

The Organization further asserts that there was no evidence that the traffic density which the Carrier alleged necessitated the change in

starting times was required for the maintenance of the Carrier's regular operations. In essence, the Organization maintains that the Carrier did not show that it could not rearrange its traffic so as to allow the work to be performed within the starting times provided in Rule 36(b). The Organization rejects as proof of the Carrier's regular operation, or that such a traffic pattern was necessary to its regular operations, the Carrier's list of trains scheduled to use the portion of track on which Claimants were working.

The Organization appears to also contend that the temporary nature of the change in starting times proves that it was made for the sole purpose of avoiding the payment of overtime.

In rejecting the Carrier's Rule 36(e) defense, the Organization argues that traffic density, which is under the Carrier's direct control, is not one of the criteria historically contemplated for the application of Rule 36(e). The Organization contends that there are no "requirements necessitating" a change as contemplated by Rule 36(e). The Organization asserts that the Carrier has historically been able to reschedule trains to allow for maintenance work without rescheduling starting times. The Organization contends that the Carrier must show that its present circumstances are somehow different from past circumstances where no starting time changes were made in order to avail itself of a Rule 36(e) defense and that it has failed to sustain that burden of proof.

The position of the Carrier is that it has not violated the Agreement by changing Claimants' starting times. It maintains that it did so in accordance with the rules and with the required period of notice.

Specifically, the Carrier contends that Rule 36 allows for it to set working periods to meet the demands of service. Rule 36(a), it contends, provides for starting times outside those mandated by Rule 36 (b), (c) and (d) "in the event of operational necessity." The Carrier cites awards where the working of off hours to accomodate traffic density justified the change of starting times.

The Carrier further contends that it was justified in changing the hours of service pursuant to Rule 36 based on the nature of Claimants' work and the traffic density on the track in question. The Carrier maintains that Claimants' work necessitated substantial time to start and stop and that the work, by definition, closed the track to ordinary use. Because of the location, no traffic-free time existed, so the Carrier sought to perform the work at the time when the traffic was the least. The Carrier's analysis of the least trafficked time led to the conclusion that the period 9:30 a.m. to 6:00 p.m. was best. This was the time, the Carrier asserted, during which it would have to clear the track the fewest number of times. The Carrier maintains that this was reasonable in light of the considerable amount of time involved in clearing the track of employees in order to let traffic pass. In the record, the Carrier describes in careful detail the process in which the employees engaged in repairing/replacing the track and in clearing the track.

The Carrier maintains that its change of Claimants' hours was within its managerial prerogative. The Carrier rejects the Organization's contention that it should have modified its schedule. The Carrier maintains that, historically, carriers have not been required to do so under Rule 36. The Carrier points out that it is in the transportation business and must move freight in a manner convenient to its customers.

The Carrier rejects the Organization's contention that it modified Claimants' schedules in order to deny them overtime. In support of that contention, it points out that Claimants worked 40 hours per week and that no work was suspended in order to make up for overtime already worked to avoid paying for overtime.

After review of the entire record, the Board finds that the Carrier did not violate the Agreement.

It is well settled that the Carrier has a certain capacity to exercise its managerial prerogative to conduct its business in a profitable fashion. To that end, it may structure its traffic patterns in such a way so as to run a successful operation. This must be done, however, in accordance with its obligations under its Agreement with its employees.

Rule 36 sets forth the starting times for employees under this Agreement. It establishes a method for changing that starting time. And the Rule makes provisions for certain circumstances wherein work hours different from the ordinary can be fixed to suit the particular requirements of the situation. This is precisely the circumstances present in this case.



The work Claimants performed was set forth in the record in extraordinary detail. It is clear from the specific description of the operation that it is one which necessitates a track free of traffic for substantial periods of time to operate efficiently. Otherwise, constant clearing of the track brings the repair/replacement operation to a virtual standstill.

Recognizing that the Carrier must move freight in order to stay in business and must move that freight in a fashion convenient to its customers, the Carrier behaved reasonably in finding a time to conduct its track repair/replacement operations that would create the minimum disruption to its normal transportation operations. The Carrier did this by analyzing its traffic density.

Having analyzed its traffic density for the portion of track in question, the Carrier determined that the requirements of its operations necessitated the modification in Claimants' hours of work so to generate the least disruption of its operations. Rule 36(e) permits the analysis of traffic density in determining operational necessity, if not on its face, then in its reasonable interpretation. An examination of the traffic density makes it clear that the modified hours of work would create much less disruption to the Carrier's operation than maintaining the normal work hours. Therefore, the Carrier acted in accordance with the Agreement when it notified the Organization of the change in Claimants' hours of work and then changed the hours of work.

AWARD

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Claim denied.

Nicholas Rymas

Neutral Member

J. M. M. J.

Carrier Member

Richard A. Law

Organization Member

Date: JAN. 25, 1991