BEFORE PUBLIC LAW BOARD NO. 4715

BROTHERHOOD OF RAILROAD SIGNALMEN
and
NORFOLK & WESTERN RAILWAY COMPANY

Case No. 2

Dispute - Claim of the Brotherhood that:

A. Carrier violated the rules of the Signalmen's Agreement, in particular the Forty Hour Work Week Agreement, effective September 1, 1949, and Rule 305 C(1) of the Current Agreement, when, on August 21, 1987, Carrier notified Mr. Goebel that "Effective with the work week beginning September 1, 1987, your rest days will be changed to Friday and Saturday."

B. Carrier should now pay Mr. Goebel eight (8) hours at the straight-time rate of pay for each Friday he is required to be off from work on his regularly assigned workday, and eight (8) hours at the time-and-one-half rate of pay for each Saturday he is required to work on his regularly assigned rest day, for the violation cited in part A.

C. This claim is filed as a continuing violation in accordance with Rule 700 (d) for as long as the above violation continues. Carrier file SG-BVE-87-57. Organization file case no. 7596-N&W

Findings:

The Organization contends that this dispute began on September 1, 1987, when Carrier, in a letter of August 21, 1987, advised Claimant M.A. Goebel that his rest days would be changed. The Organization took exception to the Carrier's action and filed a grievance on September 18, 1987.

The claim was denied and has resulted in the dispute being placed before this Board.

This Board has reviewed the record in this case and we find that Rule 305 (c)(1) requires that the Carrier seek the agreement of the employees before requiring some of the employees to change rest days.

The language states:

> (c)(1) Five-day Positions - On positions the duties of which can be reasonably met in five days, the days off will be Saturday and Sunday, except if an operational problem arises which the Company contends cannot be met under this paragraph (c)(1) and requires that some of such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend the contrary, and if the parties fail to agree thereon, then if the Company nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under this agreement.

It is clear that the Carrier has the right to change the rest days since it has a right to direct its work force and operate the railroad. However, that right can be limited by language of the agreement. In this case, the agreement clearly contemplates that the parties will enter into a discussion of the change in rest days before they will be put into effect. As Referee Dana A. Eischen held in Second Division Award No. 7041:

> "...but it is likewise obvious to us that a condition precedent to Carrier putting such assignments unilaterally into effect is an attempt first to reach Agreement with the employees. Failure or neglect to confer and attempt to agree thereon obviates any question concerning the merits of Carrier's contentions of operational necessity. Further, such failure or neglect to seek such agreement is the basis for an independent grievance irrespective of the validity or existence of the operational problem. Thus, Carrier disregards the requirements of Rule 1 (f) at its peril. See Awards 2722 and 5397.
>
> We are persuaded on the record before us that Carrier did not seek agreement to the change from Monday to Friday to a Tuesday through Friday week before putting such assignments, into effect. For this reason, we find that Carrier violated Rule 1(f) of the Agreement. In so holding we do not reach the merits of Carrier's contention that operational problems and requirements necessitated such a change and indicate no view thereon. By failing to comply with the express requirements of Rule 1(f) Carrier effectively has placed that issue beyond our reach on this record. We have no alternative but to sustain the claim.

In the case at hand, it is evident that the Carrier merely exercised its unilateral power to change the rest days. However,

there was no effort to meet with the Organization to discuss it. The change may have had a great deal of merit, but the requirement to meet with the Organization was not met. Therefore, this claim must be sustained.

Once this Board determines that the claim should be sustained, we next look at the type of relief being sought by the Organization. In this case the Organization is seeking eight (8) hours of straight time pay for each Friday the Claimant was required to be off from work and eight (8) hours at the time-and-one-half rate for each Saturday that he was required to work on his regularly assigned rest day. This Board finds that the Claimant did work and receive pay for 40 hours each week. However, he was working on Sundays instead of Fridays, therefore should have received overtime pay for his Sunday work. Therefore, this Board finds that the Claimant shall be paid the overtime rate for any Saturdays or Sundays on which he was required to work since the change was put into effect on September 1, 1987.

Award

Claim sustained in part. Claimant shall receive overtime pay for any Saturday or Sunday on which he was required to work commencing September 1, 1987.

Neutral Member

Dissent attached
Carrier Member

C. A. McGraw
Organization Member

Date: February 6, 1991

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AWARD 2

CARRIER MEMBER'S DISSENT

The Majority have incorrectly awarded penalty payments to the claimant on a day not listed in the claim.

The Organization filed a claim reading in pertinent part as follows:

> Carrier now pay Mr. Goebel eight (8) hours at the straight-time rate of pay for each Friday he is required to be off from work on his regularly assigned workday, and eight (8) hours at the time-and-one-half rate of pay for each Saturday he is required to work on his regularly assigned rest day, for the violation cited in part (A).

Despite the fact that the claim defined the relief sought as quoted above, the Board sustained payment of overtime pay for the claimant's Sunday work (although claimant sought no such relief) on the stated ground that the change in rest days had been made in violation of the agreement. The Board's non sequitur cannot overcome the inadequacy of the statement of claim. There simply is no justification for this Board to "perfect" the Organization's

claim to provide payment at the overtime rate for Sunday in the guise of contract interpretation. This is not a court of equity. The Board cannot decide a claim against the Carrier on the reasoning that because there has been a technical violation of the agreement, that violation automatically will be penalized, and then turn around and ignore the technical failure of the Organization properly to state the relief sought in the claim so as to correspond with the claimant's actual rest days. The Board has literally awarded a different penalty or remedy from that asked by the Organization. This the Board cannot properly do, because such an action is beyond its jurisdiction; this is not an interpretation of anything within the four corners of the governing agreements. Rather, the Board is rewriting the agreements between the Organization and the Carrier.

This award hence is patently erroneous and without precedential value.

D E Steele

Carrier Member, PLB 4715